



**Kenya Medical Practitioners, Pharmacists & Dentists Union
[KMPDU] v County Government of Mombasa & another (Petition
E014 of 2021) [2023] KEELRC 1122 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1122 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION E014 OF 2021
AK NZEI, J
APRIL 27, 2023**

BETWEEN

**KENYA MEDICAL PRACTITIONERS, PHARMACISTS & DENTISTS UNION
[KMPDU] PETITIONER**

AND

COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

MOMBASA CUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

JUDGMENT

1. In its amended petition dated March 10, 2022, the Petitioner petitioned this court regarding what it referred to as infringement of its members’ rights and pleaded, inter-alia:-
 - a. that in July 2017, the Respondent and the Petitioner signed a Collective Bargaining Agreement (hereinafter referred to as “the CBA”) to regulate relations between the two parties herein, and that the CBA took effect on 1/7/2017.
 - b. that the CBA was registered by the court as RCA No. 2016 of 2017 and a certificate was duly issued.
 - c. that in 2020, a dispute arose on the interpretation application and execution of the CBA, and that conciliation efforts by the responsible ministry having failed, a strike by the Doctors commenced on 2nd December 2020.
 - d. that a Return to Work Formular (RTWF) dated 15/1/2021 and incorporating aspects of a RTWF dated 2/10/2020 was duly executed between the Petitioner and the Respondent, creating legally binding obligations between the parties herein.



- e. that the Respondent has today dishonoured the terms and conditions of the CBA, Scheme of Service 2016 and RTWF, hence filing of the petition herein.
 - f. that there is a perennial salary delays and many doctors have worked for several months without salary in sheer act of breach of the law by the Respondent.
 - g. that in breach of Clause 2 of the RTWF, Doctors with Masters Degree have not been designated to job Group Q in conformity with the Schemes of Service 2016 and as per reconciled list agreed upon in reference to an earlier RTWF dated 2/10/2020.
 - h. that in breach of the RTWF and the CBA, doctors in Job Group Q and R have not been promoted and /or there has been failure by the Respondent to effect promotions generally.
 - i. that in breach of Article VI(A) of the CBA and in breach of the doctor's fundamental right of equality and freedom from discrimination under the Constitution, the Respondent has not procured a comprehensive medical cover for doctors employed after the year 2015 while those employed before the year 2015 have the same.
 - j. that the Respondent has failed, neglected and/or refused to remit statutory and other third party deductions deducted from doctors' salaries to the relevant entities, hence breaching the CBA, RTWF and the law.
 - k. that some members of the Petitioner, namely Dr. Nawal Aliyan, DR. Hafsa Mohammed Zuber and Dr. Nayirat Mohammed Dormohamed received promotion letters on 13/1/2021 but are still stuck on the same job Group.
2. The petition alleges violation of the Petitioner's members' rights and fundamental rights under articles 20(1), 22(1),22(2), 27,28,41(1), 41(4), 43,47,258 and 259 of the Constitution, and is supported by a supporting affidavit and a further affidavit by Dr. Davji Bhimji Atallah sworn on 12/10/2021 and 14th June 2022 respectively.
3. The Petitioner seeks the following prayers:
- a. An order of specific performance directing the respondents to implement, within 21 days from the date of judgment, the CBA between the Respondent and the Petitioner that became effective on 1/07/2017, registered under RCA No. 206 of 2017, Return to Work Formula entered into by the parties on 15/01/2021.
 - b. A declaration issued that the delay by the Respondents in implementing the CBA between the Respondent and the Petitioner that became effective on 1/7/2017, registered under RCA No. 206 of 2017, Scheme of Service 2016, the Return to Work Formula entered into by the Petitioner and the Respondent's on 15/1/2021 violates the petitioner's members rights to an administrative action that is expeditious, effective, lawful, reasonable under Article 47 of the Constitution.
 - c. An order of specific performance compelling the Respondents to strictly comply with the terms of the CBA and RTWF dated 21/10/2020 and 15/01/2017.
 - i. to re-designate all doctors with duly recognized Masters Degree to job Group Q in strict conformity to the Scheme of Service 2016, and as per the reconciled list agreed upon in reference to the RTWF dated 2nd October 2020 incorporated into RTWF dated 15/01/2017.



- ii. to promote all the doctors in Mombasa County in terms of Clause 1 of the RTWF dated 15/01/2021 and Article III(B)(1) of the CBA that took effect from 1st July, 2017, and upon promotion salary arrears backdated to 1/7/2017 be paid by the Respondents within 21 days from the date of the judgment.
 - iii. to immediately pay the members of the petitioner all the outstanding salary arrears upon receipt of an updated list from the Respondents as at the time of judgment, which settlement be made within 21 days from the date of judgment.
 - iv. to effect promotions of Dr. Nawal Aliyan, Dr. Hafsa Mohammed Zuber and Dr. Nayirat Mohammed Dormohamed and place them to the requisite job group with requisite salary as conveyed in the promotion letters dated 13th January 2021.
- d. An order that salaries for the members of the Petitioner shall be paid timely every month in accordance with section 18 of the Employment Act and CBA as well as timely remittances of statutory and any other deductions in line with the law.
 - e. A declaration be and is hereby issued that failure by the Respondents to implement the CBA and RTWF violates the doctors' rights, who are members of the Petitioner, under Article 27,28,41,43 & 47 of the Constitution and the Respondents are hereby ordered to comply with the terms of the CBA and RTWF dated 2/10/2020 and 15/01/2017 within 30 days from the date of the judgment.
 - f. Costs of the petition.
4. On 11/5/2022, the Respondents filed a Replying Affidavit sworn by one Joab Tumbo, the 1st Respondent's County Secretary, on 9/5/2022. It was deponed, on behalf of the 1st Respondent, as follows:-
- a. that the Respondent (County Government of Mombasa) has constantly taken steps to meet its obligations under the CBA, but had constantly hit roadblocks as its efforts go to waste due to lack of enough funding by the National Government.
 - b. that the Respondent has been operating on deficits since the amounts remitted to it are used to offset, in accordance with directions given by the National Government, pending bills owed to suppliers and other statutory dues which effectively inhibits the extend to which the 1st Respondent can deliver on certain services timeously.
 - c. that the Petitioner has been exacerbating and escalating the situation by constantly and hastily pushing for strikes in the middle of negotiations hence, making it impossible for the Respondent to meet any or all the demands raised by the Petitioner.
 - d. that the 1st Respondent remains desirous of implementing the CBA and has shown enough good faith by availing itself on numerous consultative meetings with the Petitioner with a view to resolving the outstanding issues with regard to implementation of the CBA.
 - e. that the Respondent is willing to meet its end of the bargain if given enough room.
 - f. that the Petitioner and the Respondent entered into a Return to Work Formula dated 15/1/2021 wherein the Respondent was to put into effect some of the Petitioner's demands which included promotions of doctors who had been vetted, interviewed and approved for promotion.



- g. that the Respondent experienced financial constraints due to budget allocations, but still maintained the wheels of negotiations running to assure doctors that their concerns had been noted for future implementation upon receipt of sufficient funds.
 - h. that the Respondent settled some of the arrears raised by the Petitioner such as salary arrears, the medical cover and part- promotions.
 - i. that the Respondent is willing and ready to implement the CBA.
 - j. that the Petitioner is always looking to frustrate the process by invoking premature strikes, putting in jeopardy the lives and health of the residents of Mombasa.
5. I have noted that the 1st Respondent, the County Government of Mombasa, has not denied the Petitioner’s pleadings and depositions that it has not complied with the legally binding obligations imposed upon it by the CBA signed by the Petitioner and the 1st Respondent in July 2017 and the Return to Work Formula (RTWF) dated January 15, 2021 (incorporating aspects of an earlier RTWF dated October 2, 2020). All that the 1st Respondent deponed/pleaded is that it is, and has always been, willing to perform its part of the bargain, but has so far been constrained by insufficient funding by the National Government. The 1st Respondent has also accused the Petitioner of calling for pre-mature strikes and therefore frustrating the process. The 1st Respondent appeared to be pleading, and indeed pleaded, for time to perform its obligations under the CBA in issue and the legally binding Return to Work Formula.
6. The 2nd Respondent, Mombasa County Public Service Board, did not file any response to the petition. All the parties filed written submissions on the petition pursuant to the court’s directions in that regard, which I have considered.
7. The foregoing being the position, and particularly in view of the foregoing clear admissions on the part of the 1st Respondent regarding the Petitioner’s members’ entitlements under the July 2017 CBA and 2020-2021 Return to Work Formula (RTWF), the only issues that fall for determination, in my view, are as follows:-
- a. whether the Respondents have infringed or threatened to infringe on the Petitioner’s members fundamental rights and freedoms under the Constitution.
 - b. whether the Petitioner is entitled to the reliefs sought.
8. On the first issue, it is clear, from the petition filed herein, that the Petitioner’s complain and claim is founded on a Collective Bargaining Agreement (CBA) signed between the Petitioner and the 1st Respondent in July 2017 and subsequent Return to Work Formula signed between the same parties after the Petitioner called for strikes while pushing the 1st Respondent to implement terms of the CBA for the benefit of the Petitioner’s members who are employees of the 1st Respondent.
9. Failure by an employer, for whatever reason, to implement terms of a Collective Bargaining Agreement is purely an employment and labour relations issue, but not a constitutional one. The issue as to whether rights in employment and labour relations matters covered and/or addressed in a contract should be addressed through a constitutional petition was addressed by the Court of Appeal in the case of *Summaya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR as follows:-

“It is evident that the petition was hybrid combining violations of various rights, employment rights under the *employment Act* and breach of Public Officers Ethics Act. However, the underlying complaint was the alleged unlawful interdiction and subsequent dismissal of the



1st Respondent by the Corporation Appellant. The specific remedies sought were general damages, terminal benefits and issuance of certificate of service. In determining the Petition, the ELRC relied wholly on the provisions of the *Employment Act*.

The article 41 rights are enacted in the *employment Act* and Labour Relations Act. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1st Respondent filed a petition directly relying on the provisions of the constitution for enforcement of contractual rights governed by the *Employment Act* without seeking a declaration of invalidity of the provisions of the *Employment Act* or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of the Constitution. We adopt and uphold the general principle in the persuasive authority in *Barbara De Klerk (supra)* that where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in the *Communication's Commission Case (supra)*.”

10. Still on the fact that parties enforcing rights under the *Employment Act* and the Labour Relations Act should file a claim and not a constitutional petition, the court in *Francis Atonya Ayeka v Keny Police Service & another* [2017] eKLR stated as follows:-

“...the cause of action arose in employment where the Petitioner is seeking a benefit out of his employment and or service with the Respondent. Whether a Memorandum of Claim was filed or a Petition, the Cause of action does not change due to the name assigned to the pleadings.

A litigant should not avoid the provisions of the *Employment Act* regarding unfair termination or wrongful dismissal by going behind the statute and seeking to rely directly on Article 41 of the Constitution on the right to fair labour practices. The purpose of the Constitution is that the right to fair labour practices is given effect in various statutes of which the *Employment Act* and the Labour Relations Act are primary.

The primary legislation should not be circumvented by seeking to rely directly on a Constitutional provision. Both the *Employment Act* and the Labour Relations Act give effect to Constitutional rights.”

11. The pleadings filed herein and affidavit evidence presented do not disclose violation of the Petitioner's members' (doctors') constitutional rights or threat of such violation. Further, the petition did not raise any question of interpretation or application of the constitution. The dispute presented by the Petitioner falls within the purview of the *Employment Act* and the Labour Relations Act. I will proceed to address the case before me as an ordinary employment and labour relations suit.
12. As already stated this judgment, the 1st Respondent has admitted the Petitioner's claim arising from the July 2017 CBA and 15th January 2021- Return to Work Formula as pleaded by the petitioner.
13. The Petitioner did not rebut the 1st Respondent's plea that failure on its part to fully implement the July 2017 CBA and the 2020 and 2021 Return To Work Formular was caused by lack of adequate funding of the 1st Respondent by the National Government. Lack of adequate funding, if at all this has been the position, cannot, however, absolve the Respondents from binding contractual or statutory obligations.



14. Having said that, I enter judgment for the Petitioner against the 1st and 2nd Respondents in the following terms:-
- a. an order of specific performance is hereby issued directing the Respondents to, within three (3) months from the date of this judgment, fully implement the Collective Bargaining Agreement between the Respondents and the Petitioner that became effective on 1/7/2017 and was registered under RCA No. 2016 of 2017, and the Return to Work Formula entered into by the parties on 15/1/2021.
 - b. the Respondents shall pay the Petitioner's members' salaries timely every month in accordance with Section 18 of the Employment Act and the CBA, and shall make timely remittances of statutory and other deductions in line with the law.
 - c. the Petitioner is awarded costs of this petition.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH APRIL 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....for Petitioner

.....for Respondent

