



**Kenya Medical Practitioner’s Pharmacists & Dentists’ Union v Kiambu
County Government & 2 others; Mua Insurance [K] Limited (Interested Party)
(Cause E122 of 2023) [2023] KEELRC 1123 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1123 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E122 OF 2023**

**K OCHARO, J
APRIL 27, 2023**

BETWEEN

**KENYA MEDICAL PRACTITIONER’S PHARMACISTS & DENTISTS’
UNION CLAIMANT**

AND

KIAMBU COUNTY GOVERNMENT 1ST RESPONDENT

**COUNTY SECRETARY AND HEAD OF PUBLIC SERVICE, KIAMBU
COUNTY 2ND RESPONDENT**

KIAMBU COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

AND

MUA INSURANCE [K] LIMITED INTERESTED PARTY

RULING

1. By a Notice of Motion Application expressed to be under the provisions of Article 35, 41, 43 and 47 of the Constitution; Section 10 [5] 16, 26 [2], 34 and 87 of the Employment Act 2007; section 5, 62, 74 of the labour Relations Act, 2007, Section 3, 12 of the Employment and labour Relations Court Act, 2011, dated July 14, 2023, the Claimant/Applicant Union sought: -
 - a. Spent;
 - b. Spent
 - c. That pending hearing and determination of the claim, the Honourable Court be pleased to issue an order restraining the Respondents and the Interested party whether by themselves or their representatives, servants, agents and or assigns from effecting and/or implementing



the memo/letter dated February 10, 2023 [CGK/GEN/CORR/CS/VOL.1/15] issued by 2nd Respondent changing terms and conditions of employment of the Claimant's Union members.

- d. That pending hearing and determination of this application, the Honourable Court be pleased to issue an order restraining the Respondents and Interested Party whether by themselves or their representatives, servants, agents and or assigns from changing medical insurance cover from the current NHIF Cover to the Interested Party and or any other medical provider with inferior terms without communication with the Claimant;
 - e. That pending the hearing and determination of this claim the Honourable Court be pleased to issue an order restraining the Respondents and Interested Party whether by themselves or their representatives, servants, agents and or assigns changing medical insurance cover from the current NHIF cover to the Interested Party and or any other medical insurance provider with inferior terms and without communication with the Claimant.
 - f. That pending the hearing and determination of this application and claim, the Honourable court be pleased to issue an order compelling the Respondents and Interested Party to produce/provide the Claimant Union with all documents related to Tendering process for the medical insurance cover and containing specifics of bidders, their scores, and the resolutions of tendering committee to settle on the Interested Party MUA Insurance [K] Limited as per the Notice to produce.
 - g. That the Honourable Court be pleased to grant such other orders as it may deem fit.
2. The application is premised on those grounds obtaining on the face of the application and the affidavit of DR Davji Bhimji Atallah, the Secretary General of the Union.
 3. The application is opposed upon premise of the;
 - a. Affidavit sworn by Sarah Deru the Company Secretary of the Interested Party sworn on the February 28, 2023.
 - b. A replying affidavit sworn on February 24, 2023 by Waithera Waiyaki, the county Attorney of the 1st Respondent.
 - c. Grounds of opposition dated February 22, 2023, by the 1st, 2nd and 3rd Respondents.
 4. Imperative to state that Dr Davji Bhimji Atallah in response to the above stated documents, filed a further affidavit sworn on the March 3, 2023.
 5. The Applicant contends that it is a trade Union whose constitution rules and regulations allow it to represent the interests of the Respondent's Unionsable Doctors. The Respondents recognize it as the sole trade Union to represent the doctors. This upon premise of the Collective Bargaining Agreement executed on the July 6, 2017.
 6. It asserts further that the terms and conditions of service of the Unionsable Doctors are guided by the existing registered Collective Bargaining Agreement between it and the 1st Respondent.
 7. All the negotiable terms like medical insurance are subject to negotiations before changes.
 8. The Claimant/Applicant states that on the February 10, 2023, the Respondents issued a memo [CGK/GEN/CORR/CS/VOL.I/15, informing its members of a new medical insurance cover with the Interested Party requiring them to register with the Interested Party by February 16, 2023.



9. The Claimant/Applicant argues that the conditions of the medical cover issued by the Interested Party have been altered and or changed the Claimant Union members' terms and conditions of service in relation to medical insurance. The Claimant/Applicant cites notable changes on the terms and conditions as;

	Current terms	Proposed terms as per MUA Insurance Policy
Inpatient	Admission on referral basis.	Admission on pre-authorization basis of 48-hours before admission. [Section 2[a] of the policy document.
Maternity Cover	Fully covered – no payment.	Insured to pay for the service and claim reimbursement. [Section 2[c] of the policy document.
Optical Cover	No prepayment [Limits at 40,000/=]	Insured to pay and seek reimbursement with low limits. [Section 2[d] of the policy document.
Dental	Fully covered [Limit at 50,000/=].	Inured to pay and seek reimbursement with a low limit 10,000. [Section 2[e] of the policy document.
Out-patient Job Group R,S,T Job Group Q Job Group P	Current Limit is 350,000/= Current is 250,000/= Current Limit is 225,000/=	Proposed Limit is 250,000/= Proposed Limit is 200,000/= Proposed Limit is 200,000/=
Last expense	Between 150,000/= to 300,000/=	Limited to 100,000/= per family.
Group Life Cover	Covered upto 1,700,000/=	Not covered.

10. The process of changing, altering the terms and conditions are without prior consultations with it and or public participation.
11. The Applicant argues further that the Respondents have contracted the Interested Party to issue medical cover with conditions and terms that are not in line with the terms and conditions embodied in the Collective Bargaining Agreement.
12. It was asserted further that the terms and conditions of the cover being provided by the Interested Party are inferior to the existing cover between the National Health Insurance Fund and the Respondents.



13. The Applicant states further that Article VI[A] of the Collective Bargaining Agreement between the parties provides for comprehensive medical insurance cover for its members, whereas the Respondent's current actions aim at changing and abolishing and or converting such existing terms to a lesser medical cover, offered by a private insurer.
14. The Claimant's/Applicant's petition to the Respondents to have the matter mutually negotiated, was contemptuously handled by the Respondents.
15. Further, that the medical insurance cover between the Respondents and the Interested Party lacks transparency and violates *ILO Convention 87* and *98 Labour Relations Act, Employment Act*, the collective Bargaining Agreement and the *Constitution* of Kenya, 2010.

The Respondent's Response.

16. The Respondent contends that the Claimant's/Applicant's application is frivolous, vexatious, bad in law and wanting in merit. The application is anchored on a Collective Bargaining Agreement which already expired by effluxion of time.
17. The Respondent argues that the Applicant's interpretation of the CBA is incorrect. The CBA only obligates the Respondents to provide a comprehensive medical cover for the employees but does not direct the Respondents to only use, the NHIF as the medical insurance provider.
18. The Respondent's state further, that the Applicant's members are subject to Human Resource Policies and Procedures Manual for Public Service 2016 which does not in any manner direct it to use NHIF.
19. It is the Respondent's case that the Public Service Manual explicitly require an annual review of the medical cover of public servants to ensure that the Government and the servants get value for their money.
20. That contrary to the Claimant's assertion, the Respondents are not in any manner doing away with the employee's medical cover, that could amount to change of terms of employment, but are instead bringing on board a new medical insurer.
21. The Respondent further asserts that the Applicant's application herein has been overtaken by events for the reasons that; before initiation of the procurement process for the new insurer, and the commencement of this matter, the contract between the 1st Respondent and the NHIF had lapsed; and the contract between the new insurer and the Respondent had already taken effect on February 9, 2023.
22. The Respondents contend that the memo sought to be quashed by the Applicant was merely administrative, seeking to do a follow up of the execution of the contract between the 1st Respondent and the interested party to ensure that effect of the same was given by all employees by providing their identification details to the insurer. The memo being, such in character is not justiciable and consequently the orders sought by the Claimant are incapable of being availed.
23. The Respondent further asserts that the impugned memo expressed that the principal employees of the Respondents were already registered and were therefore enjoying the benefits of the medical cover by the Interested Party. According to the memo non-principal employees had not been registered and thus were being called upon to register in order to enjoy the benefits of undercover.
24. By reason of the premises foregoing, granting the orders sought will create an unconstitutional situation. A discriminatory one contrary to Article 27 of the *Constitution*.



25. Contrary to the Applicant's contention that there was no open tendering, the 1st Respondent did invite Interested persons to bid.
26. The Respondents state that the procurement process is extrinsic to the current application and that this court lacks jurisdiction to make a determination on the procurement process at this point.
27. The contention by the Claimant to the effect that there was no public participation in the procurement process, stands on quick sand. There is no law which obligates the Respondents to undertake public consultation and or participation before procuring every good or service.
28. The complaints by the Applicant are thus a belated attempt at frustrating a lawfully undertaken process because the invitation to submit bids for the provision of medical insurance to the Respondent's employees was done publicly in the National papers and County portal as required by law and at no point did the Applicant apply to stop the process.
29. The Respondents argue that the Claimant having failed to demonstrate any violation of law or breach of a valid agreement between the parties cannot be said to have established a *prima facie* case. Further that it has not demonstrated that irreparable loss shall be suffered if the orders sought are not granted.
30. To grant the orders sought shall be against public policy in the sense that:
 - a. Currently, there exists a valid medical cover with the Interested Party for all staff and staying implementation of the said cover will leave them uninsured.
 - b. The 1st Respondent has already remitted its first instalment to the Interested Party and made arrangements to settle the balance.

The Interested Party's Response

31. The Interested Party states that through an advertisement in the Daily Nation Newspaper on the October 12, 2022, the 1st Respondent invited expression of interest for supply of a number of services, inclusive provision of medical insurance.
32. It did thereafter invite bids for Tender for Group medical cover for County Government staff Tender No CGIL/FCP/RFP/01/2022 – 23. The Interested Party submitted its bid followed the procurement process and was successful and parties thereafter entered into a contract on February 1, 2023 with a commencement date of February 9, 2023. The coming into effect ushered in attendant contractual obligations and rights.
33. Among the responsibilities that got placed on the 1st Respondent, was to facilitate registration of its staff to be on boarded to the cover. It is pursuant to this obligation that the 1st Respondent issued the memo.
34. Considering the notice to produce issued by the Claimant, the Claimant wants the court to enter into the realm of procurement. The substratum of this matter is procurement and if the Claimant wanted to challenge the procurement process, it ought to have invoked the dispute resolution mechanism provided for under the [Public Procurement Asset and Disposal Act](#), 2015.

Rejoinder by the Claimant

35. Through a further affidavit sworn on the March 3, 2023 by Dr Davji Bhamji Atellah, the Claimant/Applicant contended that contrary to the assertion by the Respondents that the Collective Bargaining Agreement lapsed and that at the time of filing this suit or execution of the contract by the parties



therein, it did not have any effect therefore, by dint of Article 7 [A] the terms of the contract remained in force.

36. The Claimant/Applicant contended that the CBA in force obligates the Respondents to provide comprehensive medical cover which NHIF satisfactorily provided.
37. The subject contract between the Respondents and the Interested Party signed on February 1, 2023 and operationalized on the February 9, 2023 has not been placed before the court to justify value for tax payers' money as required by the Public service manual, 2016. No evidence of payment deposits or premium has been tendered.
38. It was further argued that assuming that the Respondents have already remitted instalments to the Interested Party, the same would be a clear violation of the stipulations of the tender document and specifically that the policy will be issued upon full payment of the premium as consideration.
39. Further, that the Respondents and Interested Party have not exhibited any documents to demonstrate procurement processes and procedures post the newspaper advertisement leading to the acquisition of the tender.
40. Changing medical insurance of employees from comprehensive cover to a less favourable inferior cover with numerous exclusions is not only an unfair labour practice but a violation of the rights enjoyed by such employees and terms of the CBA.

Determination

41. Considering that the court is asked to render itself on an interlocutory application at this point, there is need to so render itself in a manner that will not subject it to the risk of appearing to be of a predetermined mind. I shall therefore be very measured in the determination hereunder. This state of caution is heightened by the fact that the parties herein did place forth very detailed affidavits, and submissions as though they were in respect of a matter that has proceeded for full trial.
42. No doubt the order[s] sought by the Claimant/Applicant is conservatory in nature. There is firm jurisprudence that such an order[s] is granted only where an Applicant seeking for the same has established specific preconditions. Foremost, he or she has to demonstrate a *prima facie* case with a likelihood of success, and that if the conservatory order is not granted, he or she is likely to suffer prejudice. On this, the court in [*Centre for Rights Education and Awareness and 7 Others V The Attorney General*](#) [HCCC No 16 of 2011], held:

“ [Arguments] in this Ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner’s application and not the petition. I will therefore not delve into a detailed analysis of facts and law. At this stage a party seeking a conservatory order only requires to demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of violation or threatened violation of the [*Constitution*](#).”
43. It is not enough for the Applicant to declare “I have a *prima facie* case, arguable case.” There must be evident a likelihood of success. Justice Onguto [as he then was], aptly captured it in [*Board of Management of School Uhuru Secondary v City Director of Education & 2 others*](#) [2015] 1KLR, thus:

“ 26. It is in my view not enough to merely establish a *prima facie* case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success.



The prima facie case ought to be beyond a speculative basis. In these respects, I would quickly make reference to M Ibrahim J. [as he then was] in the case of *Muslims for Human Rights [MUHURI] & others V Attorney General & others* CP No 7 of 2011, who whilst agreeing with Musinga J’s statement in *Centre for Rights Education and Awareness [CREAW] and 7 others V Attorney General* [supra] stated as follows:

“I would agree with my brother that an Applicant seeking conservatory orders in constitutional case must demonstrate that he has a prima facie case with a likelihood of success.”

44. Second, the Applicant must demonstrate that if the conservatory order is not granted, the case or its substratum will be rendered nugatory. See *Martin Nyaga Wambora V Speaker of the County Assembly of Embu & 3 others* CP No 7 of 2014.
45. Further it has to be demonstrated that public interest shall not be prejudiced by the grant of the conservatory order. In this I draw support from the Supreme Court decision in the case of *Gatirau Peter Munya V Dickson Mwenda Githinji & 2 others* [2014] eKLR, where the court stated that the court must consider conservatory orders in the face of public interest.
46. Having put forth the conditions as I have hereinabove, the question then is whether the Claimant/Applicant herein has satisfied the conditions.

The Memo Assailed

47. The Applicant seeks inter alia a restraining order against the implementation of the Respondent’s memorandum of February 10, 2023. In my view the memo flows from the medical insurance provision contract between the 1st Respondent and the Interested Party. The Respondents and the Interested Party contended that the contract took effect on the February 9, 2023. The Claimant’s pleadings and affidavits filed herein in a sense, do not challenge this fact but are in accord with the same.
48. The court notes that in the statement of claim, the Applicant has not sought for nullification of the contract. The contract is in force. The benefits thereunder are being enjoyed by other employees of the 1st Respondent. One wonders what the Claimant/Applicant Union and its members stand to gain, even if the memo’s implementation were to be stopped, yet the contract is subsisting and continues to.
49. Courts of law are indifferent to issue orders in a vacuum.

Forum

50. The Respondents contend that the matter herein is a procurement matter disguised as an employment matter. That there is a well laid out mechanism, outside court litigation for settlement of such disputes. A mechanism established under the public procurement and Assets Disposal Act, 2015. The Claimant/Applicant ought to have first engaged the mechanism. The Interested Party urges the court to strike out the matter for want of jurisdiction.
51. The court notes that the Claimant/Applicant has dedicated a huge part of its energy assailing the process leading to the procurement of the services rendered by the Interested Party, the subject matter of the contract between the 1st Respondent and the Interested Party. The point raised by the Respondents and the Interested Party is not an idle point.



The NHIF Contract

52. From the material placed before this court, it is discernible that the contract for provision of medical insurance that was between the 1st Respondent and NHIF, lapsed. As the combatants are engaged in the proceedings herein, the contract is not in force. Granting the orders sought by the Claimant/Applicant, shall have the undoubtable implication of the court forcing the 1st Respondent into a contractual relationship with another entity. The court won't make the order[s] as it shall lead to an absurdity.
53. By reason of the foregoing premises, I come to a conclusion that the Claimant/Applicant has not demonstrated that it has a prima facie case with a likelihood of success.
54. Having found as I have hereinabove, that a *prima facie* case with a likelihood has not been established, I need not consider the other factors for a grant of conservatory order[s]. In regard to this, I quickly make reference to the holding by the Court of Appeal in the case of *Nguruman Limited V Jan Bonde Nielsen & 2 others* [2014] eKLR, that;
- “If damages recoverable in law is an adequate remedy, and the Respondent is incapable of paying, no interlocutory order of injunction should normally be granted. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the Applicant to an injunction directly without crossing the other hurdles in between.”
55. The Claimant/Applicant has sought for an order compelling the 1st Respondent to provide some specific documents. The court notes that the Claimant did issue the 1st Respondents with a notice to produce. In my view a failure to act on a notice to produce has consequences, all that the Claimant needs to do is to appropriately prove service of the notice to produce and seek to enforce the consequences. In the ordinary run of things, the notice to produce, in my view acts as an application for production of the documents. To file an application as the Claimant/Applicant has done herein, shall amount to running two processes, unnecessarily to get to one result.
56. By reason of the foregoing premises, I find no merit in the Applicant's application herein dated February 14, 2022. It is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF APRIL, 2023.

OCHARO KEBIRA

JUDGE

Delivered in presence of:

Mr. Washika for Union/Claimant.

Mr. Kigata for Interested Party.

Mr. Ometto for the Respondents.

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions



of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

