Egerton University v Universities' Academic Staff Union & another (Employment and Labour Relations Cause E008 of 2023) [2023] KEELRC 1298 (KLR) (23 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1298 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

EMPLOYMENT AND LABOUR RELATIONS CAUSE E008 OF 2023

HS WASILWA, J

MAY 23, 2023

BETWEEN

EGERTON UNIVERSITY ..... CLAIMANT

AND

UNIVERSITIES' ACADEMIC STAFF UNION ..... 1ST RESPONDENT

EGERTON UNIVERSITY CHAPTER ..... 2ND RESPONDENT

RULING

1. This Ruling is in respect Claimant/ Applicant Notice of Motion dated 25th January, 2023 brought pursuant to articles 50 & 159 of the *Constitution of Kenya* 2010, sections 3 of the *Employment and Labour Relations Court Act*, 2011 and rules 17 of the *Employment and Labour Relations Court (Procedure) Rules, 2016*, the inherent jurisdiction of the Court and all other enabling provisions of the law, seeking for the following Orders; -

    1. Spent.

    2. That the Honourable Court be pleased to issue a temporary restraining order to the Respondents, either by themselves, their officials, agents and or servants, representatives or otherwise howsoever from causing, effecting, or calling for industrial action by the members of the 2nd Respondent on the ground of failure by the claimant to obey the court order issued on May 30, 2022 in Nakuru Employment and Labour Relations Court Cause No E016 of 2022:- Universities Academic Staff Union Egerton University Chapter versus Egerton University, The council, Egerton University and The Vice Chancellor Egerton University pending the hearing and determination of this application.

    3. That the Honourable Court be pleased to issue a temporary injunction restraining the Respondents, either by themselves, their officials, agents and or servants, representatives or otherwise howsoever from causing, effecting, or calling for industrial action by the members of

the 2nd Respondent on the ground of failure by the claimant to obey the court order issued on May 30, 2022 in Nakuru Employment and Labour Relations Court Cause No E016 of 2022:- Universities Academic Staff Union Egerton University Chapter versus Egerton University, The council, Egerton University and the Vice Chancellor Egerton University pending the hearing and determination of this cause.

4. That the Honourable Court be pleased to issue a temporary injunction restraining Members of the 2nd Respondent, from participating in the illegal and unprotected strike called by the 2nd Respondent *vide* the letter dated January 13, 2023 set to commence on February 6, 2023 and from interfering with the smooth running of the Applicant's provision of education/teaching services in the Country pending the determination of this application.

5. That the honourable Court be pleased to issue a temporary injunction restraining Members of the 2nd Respondent, from participating in the illegal and unprotected strike called by the 2nd Respondent vide a letter dated 13th January 2023 set to commence on 6th February 2023 and from from interfering with the smooth running of the Applicant's provision of education/ teaching services in the Country pending the determination of this cause.

6. That the honourable Court be pleased to issue an injunction restraining the Respondents and/or their agents or servants or otherwise howsoever from inciting the members of the 2nd Respondent and students against the Applicant through the media including social media on account of this cause pending the hearing and determination of this cause.

7. That the Honourable Court be pleased to issue an order declaring the strike called by the 2nd Respondent in its notice dated 13th January 2023 as unlawful, illegal, unprotected, null and void.

8. That the cost of this Application be provided for.

2. The Application is supported by the grounds on the face of the application and the supporting affidavit of Prof. Richard Mulwa, the the acting Vice Chancellor in Charge of Administration, Planning and Development, deposed upon on the January 23, 2023.

3. In the affidavit, the affiant stated that on 13th January 2023, the Secretary of the 2nd Respondent wrote a letter to the Chairman of Council of the Claimant and issued a strike notice pursuant to a special General meeting of the 2nd Respondent held on 12th January 2023 at Nakuru Athletic Club. The strike is to take effect on 6th February 2023 for the reason that the Claimant had failed to comply with the court order of 30th May 2022 directing the Claimant to pay 100% salary as at November 2021.

4. He contends that the the intended strike is illegal and unprotected having been called before the trade dispute was referred to conciliation contrary to section 67 and 73 of the *Labour Relations Act*, 2007. Also that the intended strike is illegal in so far as it has been called by the 2nd Respondent's Secretary General and not the National Secretary General of the 1st Respondent contrary to article 10 and 15 of the 1st Respondent's Constitution.

5. The deponent emphasized that the Chapter Secretary General does not have powers to call for strike as its powers is limited to those provide for under Article 20(c) of the 1st Respondent's Constitution. He then stated that these default and procedural impropriety renders the strike unprotected and prohibited as contemplated under section 78 of the *Labour Relations Act*.

6. The deponent stated that the issue of payment of salaries at 100% as at November 2021 is the subject of Nakuru Employment and Labour Relations Court Cause No E016 of 2022 Universities Academic

Staff Union Egerton University Chapter versus Egerton University, the council, Egerton University and the Vice Chancellor Egerton University which is still ongoing.

7. He stated that the said interim orders were issued ex parte on 30th May 2022 in Nakuru ELRC Cause No E016 of 2022. Subsequently, the 1st Respondent made an application dated 13th June 2022 for contempt of court and by a ruling delivered on 7th December, 2023, the court found the respondents guilty of contempt of court and on 8th December fined the members of the 2nd Respondent and the 3rd Respondent Kshs. 100,000/- each in default to serve one-month imprisonment.

8. The 3rd Respondent has since appealed the Ruling of the Court in the Court of Appeal serialized as Nakuru Court of Appeal Civil Appeal No E155 of 2022, seeking stay of further proceedings.

9. He stated that the parties have by consented on 11th March, 2023 and agreed to adopt the Return to Work Formula(RTWF) Dated 4th March, 2023 and to mark Cause 2 of 2022 and Cause 5 of 2022 as settled as it touched on similar issues agreed by the parties.

10. The deponent avers that there have been several strikes called vide the letters dated 28th October 2020, 8th November 2021 and 11th October 2022. Following the later strike notice, the Ministry of Labour appointed Mr. George Abuto of the Nakuru Labour Office to deal with the matter by a letter dated 18th October 2022 and requested the 1st Respondent to call off the strike and await the outcome of the envisaged consultations.

11. That it is due to this persistent strikes that the claimant filed Petition No E012 of 2022 challenging the strike called by the 1st Respondent. The court stayed the strike and referred the trade dispute for conciliation under the leadership of the Nakuru County Labour Officer, a process which is still ongoing.

12. He maintained that the letter of 13th January, 2023 addressed to the labour office was a Strike Notice and not referring the matter to the ministry of labour for the purposes of conciliation.

13. He contends that if the strike is permitted to take place, it will disrupt the operations of the Claimant and specifically the graduation ceremony scheduled to take place on 10th February 2023.

14. The Application is opposed by the 2nd Respondent who file a replying affidavit deposed upon on the 1st February, 2023 by Dr. Grace Wanjiru Kibue, the Secretary of the 2nd Respondent.

15. Dr. Grace states that the application is fatally defective, grossly incompetent and should not be entertained by this Court. She stated that the 2nd Respondent held a special general meeting on 12th January, 2023 at Nakuru Athletic Club and made a resolution to withdraw labour with effect from 6th February, 2023. Subsequently a Strike notice was issued to the claimant on the 13th February, 2023.

16. The grounds upon which the strike notice was issued was because the claimant had not complied with the orders of this Court issued on 30th May, 2022 in Nakuru ELRC Cause 16 of 2022, where the Court ordered the claimant to pay 100% salaries owing to members of the 2nd Respondent that was due in November, 2021.

17. She opposed to the prayer for conciliation with regard to the strike Notice stating that the same was issued to compel the Claimant to comply with Court Orders which orders cannot be issued in vain.

18. The affiant states that when the claimant failed to comply with Court orders, they filed a contempt application dated 13th June, 2022, which the Court founds the claimant's council members and Vice Chancellor in contempt vide the ruling of Justice David Nderitu issued on the 7th December, 2022. Despite being held in contempt, the contemnors have failed to purge the said contempt and still seeks

audience of this Court. In fact, that the Court by its orders of 7th December, 2022 barred the claimant from getting audience of this Court until they purge the contempt and comply with the Orders of the Court issued on 30th May, 2022.

19. The Affiant stated thus that the proceedings before this Court have been used by the claimant to circumvent compliance of Court Orders and added that the same are in abuse of Court process. She urged this Court to consolidate this file with ELRC cause 16 of 2022 because both stem from the issues raised in ELRC Cause number 16 of 2022.

20. It is her contention that the failure by the claimant to pay the 2nd Respondent's members' salaries has rendered them destitute in violation of article 41(2) of the *Constitution* .

21. The deponent stated that the actions by the claimant is meant to punish the 2nd Respondent's members for participating in a peaceful strike held on 15th November, 2021, when they are entitled under article 37 of the *Constitution* to peaceful assembly, demonstration and picketing. Furthermore, that that strike was a protected strike in line with section 76 of the *Labour Relations Act*.

22. On powers by the chapter leadership to call for strike, the affiant stated that the 2nd Respondent has powers to call for strike within the branch and only barred under Article 15 of UASU Constitution to call for national Strike. She added that since the 2nd Respondent chapter is registered, it has been donated powers to do all that pertaining the Branch and perform the functions of the Union at Branch Level.

23. The affiant reiterated that the claimant has exposed them to financial embarrassment as they are unable to meet their daily financial obligation owing to the non-payment of salaries. She adds that the claimant, just like all other universities, are paid by the exchequer but it's only the Claimant who has failed to pay their salaries.

24. She urged this Court to disallow the Application herein and compel the claimant to first comply with the Orders of the Court and pay its employees before they are given audience, to avoid any further injustice being visited on the claimants' Employees.

25. In the rejoinder filed by the claimant/ Applicant, Prof. Richard Mulwa Stated that the denial of audience order in ELRC Cause number 16 of 2022 is not a universal Bar by the Court from hearing and determining any other matter that is filed by the claimant.

26. He maintained that the prerogative of calling for strike is preserved for the 1st Respondent under Article 15 of the UASU Constitution. Further that the strike of 28th October, 2020 and the one of 11th October, 2022 was called by the Secretary General of the 1st Respondent in line with Article 9(c)(xiii) and Article 15 of UASU Constitution.

27. He stated that financial challenge is faced by several universities such as; Kenyatta University with debt of more than 6 Million, University of Nairobi with debt of 10 Million , Jomo Kenyatta University with a debt of more than 7 million and Moi University with a debt of More than 5 Million with all these universities defaulting in payment of statutory deductions , remittance of pensions contributions , Unpaid PAYE among others, which issues arise from non-remittance of money from the Government exchequer. He added that these financial issues facing the universities was discussed in parliament on the 23rd November, 2022 which reported that the combined debt by the public universities is at 56.1 Billion, which debt keep growing, as such the failure to pay is a National issue that the claimant should not be condemned when its hands are tied.

28. The affiant reiterated that the challenges its facing as a university are not unique to the claimant but cuts across all other universities and infact that Rongo University has given its employees notice of

redundancy because it cannot meet its financial obligation. In that basis, the claimant urged this Court to consider the issues surrounding it and allow the Application herein.

29. The Application was canvassed by written submission with the Applicant filling on the 13th February, 2023 and the 2nd Respondent on the 27th February, 2023.

***Applicant's Submissions.**

30. The Applicant submitted on three issues;Whether the strike called by the 2nd Respondent on 6th February 2023 vide the notice dated 13th January 2023 is unlawful and unprotected, Whether the claimant has made out a proper case for the grant of the orders sought and Who should bear the costs of this application.

31. On the first issue, it was submitted that the strike notice issued by the 2nd Respondent was not copied to the Cabinet Secretary as required by sections 76 and 78 of the *Labour Relations Act*. Also that the notice was signed by the Secretary of the 2nd Respondent who has no powers to call a strike as such powers is reserved for the Secretary General of the 1st Respondent. He argued that even if the notice was signed by the Secretary General of the 1st Respondent, it still did not comply with the provisions of sections 76 and 78 of the *Labour Relations Act* and the failure to copy the notice to the Cabinet Secretary renders the intended strike unprotected. To support this argument, they relied on the case of *Inter-Public Universities' Councils Consultative Forum of Federation of Kenya Employers v Universities' Academic Staff Union & 5 others* [2018] eKLR, where the Court held that: -

> " No Judicial precedents were referred by either side of the divide but the answer to the main question herein lies in the provisions of part X of the *Labour Relations Act* which must be read as whole. The said provisions are in harmony with the *Constitution* and it is through them that the rights to go on strike under Article 41 of the *Constitution* is exercised. The relevant provisions in this case are section 76 and 78(1) (e) of the Act...he procedure laid down by the said 76 and 78 (1) (e) of the Act is mandatory and if not complied with the strike is rendered unprotected and participants exposed to the consequences provided by section 80(1) of the Act."

32. To reinforce its argument further, they relied on the case of *University of Nairobi v Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers & 4 others* [2018] eKLR, where the Court held that;-

> " The Claimant and the Interested Parties are however unanimous that the strike is unprotected and illegal because it does not comply with section 76 and 78 of the Act. The said provisions prescribe a mandatory procedure to be followed before calling for a protected strike or lock- out...The procedure laid down by the said section 76 and 78 (1) (e) of the Act is mandatory and if not complied with the strike is rendered unprotected and participants exposed to the consequences provided by section 80(1) of the Act. ..In view of the said statutory provision, it is clear that the strike notice dated February 27, 2018 was served before the dispute cited therein was taken through conciliation as required by section 76 and 78 of the Act and that default has rendered the on-going strike to be unprotected."

33. The Applicant submitted that the reasons given for calling out the strike, being non-compliance of Court Orders, is not one of the reasons that constitute a trade dispute. He argued that the law on contempt is clear and the 2nd Respondent had filed an application on that regard that was determined and the claimant's official fined 100,000 each and the subsequent application is pending for hearing

as such, the strike notice and the intended strike are Subjudice. In this they relied on the case of *West Kenya Sugar Company Limited v Kenya Union of Sugarcane Plantation and Allied Workers* [2021] eKLR where the court expressed itself as follows: -

> " The claimant and the respondent filed written submissions which the Court has carefully considered and has come to the following finding of law and fact:-
>
> i. The respondent did not follow the statutory procedure provided under sections 76 and 78 of the *labour Relations Act*, 2007 before issuing the strike notice dated 8/7/2020.
>
> ii. The respondent did not adhere to the provisions of the Recognition Agreement between the parties under Clause 59(ii) (a) and (b) by issuing 21 days' notice upon a deadlock being reached by the "Committee" of the parties seized with the dispute. In any event the dispute had not been referred to any committee in the first place.
>
> iii. The dispute the subject of the intended strike is subjudice being the subject of ELRC at Kisumu Cause No. 47 of 2020 filed by the respondent union itself against the claimant employer.

For the above reasons, the Claimant/Applicant has established a prima facie case with a probability of success and has also demonstrated that it would suffer irreparable harm not remediable by damages if the Order for stay is not confirmed by the Court pending the hearing of the main suit."

34. On that basis, the Applicant submitted that the strike notice called by the 2nd Respondent on 6th February, 2023 *vide* Notice of 13th January, 2023 is unlawful and unprotected for failure to comply with part X of the *Labour Relations Act*.

35. On whether the Applicant has made a proper case to warrant issuance of the Orders sought, it was submitted that the law on interlocutory application is now settled as was held in *Nyanza Fish Processors Limited v Barclays Bank of Kenya Limited & 3 others* [2016] eKLR, the court evaluated those principles and opined as follows.

> " This appeal questions the decision of the learned Judge in rejecting an application for an interlocutory injunction. In this regard this Court has previously given guidance in *Vivo Energy Kenya Limited Maloba Petrol Station & 3 others* f20151 eKLR (Civil Appeal No 21 of 2014) where the Court had this to say: The granting of an interim injunction is an exercise of judicial discretion and as an appellate court, we shall not readily interfere with the exercise of discretion by the High Court, unless we are satisfied that the discretion has not been exercised judicially. ... The principles for granting an interlocutory injunction are well known having been reiterated in the *locus classicus* case of *Giella v Cassman Brown & Co. Limited* [1973] EA 358 where the court (Spry VP) held at page 360 as follows:- The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (*E.A. Industries v Trufoods* (1972) EA 420.) The principles provide a three-stage test involving a sequential enquiry that the learned Judge was expected to test the facts before him against. (See *Export Processing Zones Authority v Kapa Oil*

Refineries Limited & 6 others [2014] eKLR). The three stages are applied as separate, distinct and logical hurdles, which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co Ltd v Afraha Education Society & others*, Civil Application No 142 of 1999 [2001] 1 EA 86.1 In *Habib Bank Ag Zurich v Eugene Marion Yakub*, CA No 43 of 1982 (unreported) the Court of Appeal considered the role of the court when determining whether or not a prima facie case has been made out. The Court expressed itself thus: Probability of success means the court is only to gauge the strength of the Plaintiff's case and not to adjudge the main suit at that stage since proof is only required at the hearing stage. In *National Bank of Kenya v Duncan OwourShakali& another*, CA No 9 of 1997 Omolo JA stated: The question of finally deciding whether or not there is a contract between the parties and if there is what terms ought to be implied in the contract is not to be determined on affidavits. All a Judge has to decide at the stage of an interlocutory injunction is whether there is a prima facie case with a probability of success. A prima facie case with a probability of success does not, in my view, mean a case, which must eventually succeed. And in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR was described as follows: A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter....a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case. "

36. Based on that, it was submitted thatthe strike notice offends the provisions of Section 76 and 78 of the *Labour Relations Act* and therefore that they have established a *prima facie* case with high probability of success.

37. On irreparable loss, it was submitted that the Claimant is likely to suffer irreparable loss if the strike was allowed to go on as it would interalia affect the graduation that take place on February 10, 2023.

38. On balance of convenience, it was argued that it tilts in favour of the Claimant because if the illegal strike is allowed to go on, it will affect the operations of the Claimant. The students who are currently attending classes will also be affected.

39. On costs it was submitted that while the award of costs is at the discretion of the court the general rule is that costs follow the event as was held in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR.

Respondent's Submissions.

40. The Respondent submitted on two issues; whether the claimant/ Applicant is entitled to the orders sought and whether the costs should issue.

41. The Respondent, like the Applicant submitted that the principles on grant of interlocutory injunctions are settled as held in the locus classicus case of *Giella v Cassman Brown and Co Limited* [1973] EA 358 and reinforced in *Nguruman Ltd v Jan Bonde Nielsen and 2 others* [2014] eKLR which listed the three requirements follows; establish a *prima facie* case, demonstrate irreparable injury and consider in who favour the balance of convenience tilts in favour of.

42. On prima facie case, the Respondent herein relied on the case of *Mrao Limited v First American Bank of Kenya & 2 others* [2003] eKLR where the Court held that ;

> " a prima facie case is one which on the material presented in Court, a tribunal property directing itself will include that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the Respondent."

43. Accordingly, submitted that Justice Nderitu, issued Orders for the Claimant Applicant to fully pay the 2nd Respondent's members' salaries, which they failed leading to the filling of the contempt application which Court found them in contempt and denied the Applicant audience until the said contempt is purged. He argued that the Applicant is yet to purge the contempt and instead circumvented it by filling this case in this Court instead of pursuing the said issue through ELRC Cause 16 of 2022, when issues raised herein emanated from Cause 16 of 2022. On that basis, it was submitted that the Applicant is in abuse of Court process in filling this Suit and relied on the case of *Fred Matiang'i,Cabinet Secretary Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others* [2018] eKLR where the Court held that;-

> " When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities... In deserving cases, this Court has itself set its face firmly against granting contemnors audience until and unless they first purge their contempt and it shall continue to do so in such cases as evince a headstrong contumaciousness proceeding from a bold impunity, open defiance or cynical disregard for the authority of the Court and the integrity of the judicial system. Such pernicious conduct cannot be countenanced and those hell-bent on it will find neither help, nor refuge under a convenient and self-serving appeal to natural justice when their impudent conduct threatens the very foundation of the rule of law. While the right to fair hearing is sacrosanct and is one of the non-derogable rights in article 25 of the *Constitution* , we affirm with this Court in *A. B. & another v R.B*. 2016 eKLR that there may be instances where due to the risk of the rule of law being deliberately undermined, such right may be denied and the hearing of an application for stay denied until there is full compliance with the orders of the High Court. "

44. It was submitted that the strike notice was as a result of the claimant habitual conduct of not paying the 2nd Respondent's members. The said strike, according to the Respondent was conducted in strict adherence with the law under section 76 of the *Labour Relations Act* and Article 36 of the *Constitution* .

45. On the requirement for conciliation, the Respondent submitted that the same is spent. That conciliation meetings were carried out on 16th February, 2023 where the Conciliator recommended that the claimant set out timeline to pay the employees. In any event that the need to be subjected to conciliation is not a bar to industrial action. In addition, the Respondent submitted that the 2nd Respondent is clothed with powers to call for strike within the chapter and the power of the national Secretary Granted under Article 15 of UASU Constitution and the procedures therein, contemplates a situation where the industrial dispute cuts across all branches.

46. The Respondent further cited the decision of this Court in Nakuru ELRC Judicial Review number 004 of 2021- *Republic v Registrar of Trade Union; Universities Academic Staff Union Egerton University Chapter. ex-parte Applicant & Dr. Joseph Juma Mafura & 6 others Interested Parties* (Unreported), where this Court held that;

> " ...the operative word herein is registration of the branch and it is registration that give the branch the capacity and indeed locus to perform its function."

47. It was submitted also that the ILO has established it as a fair labour practice and principle that the powers of the Branch of Union to call for a strike when the trade Dispute is limited to the branch.

48. Bases on the foregoing, the Respondent submitted that the Applicant herein has not established any prima facie case with probability of success. Further that the the issue herein was dealt with by Justice Nderitu in his Ruling on 7th December, 2022 when the Claimant was denied audience until they purge the contempt and to allow them orders in this Application will be monstrous travesty of justice. In this they relied on the case of *EAM v PAA* [2017] eKLR where Onyiego J held that ;-

> " A court order is a sacrosanct tool through which courts communicate and exert its authority and therefore non compliance thereof will erode the authority, dignity, confidence and integrity bestowed upon our judicial system hence undermine the rule of law. To encourage defiance will be a kin to perpetuating impunity, anarchy and the law of the jangle in which people will be at liberty to conveniently choose which court orders to obey or not to."

49. On irreparable damage, the Respondent relied on the case of *Nguruman Ltd v Jan Bonde Nielsen and 2 others* [2014] eKLR, where the Court held that; -

> " On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

50. Accordingly, it submitted that the claimant will not suffer any damage in the circumstance. Instead that the 2nd Respondent's members are the ones that are prejudiced by the lack of salary when they are still in the claimants' employment.

51. On the balance of convenience, the Respondent submitted that the claimant has not satisfied the ingredients for the grant of injunction and the balance of convenience does not lie in their favour. In this they relied on the case of *Bryan Chebii Kipkoech v Barnabas Tuitoek Bargoria & another* [2019] eKLR where the Court held that; -

> " The court should issue an injunction where the balance of convenience is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would

be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."

52. On costs, the Respondent submitted that costs follow event and urged this Court to dismiss the Application and grant them costs.

53. I have examined all the averments and submissions of the parties herein. I set the following as the issues for this court's determination;-

1. Whether the strike notice by the 2nd respondent issued on February 6, 2023 by notice dated January 13, 2023 was lawful and protected.

2. Whether the 2nd respondent have *locus* to issue a strike notice.

3. What orders this court can grant in this application.

Issue No. 1: Strike Notice

54. The applicants have submitted that the 2nd respondent issued a strike notice without powers to call for such a strike as the powers for calling such a strike is reserved for the Secretary General of the 1st respondent.

55. I have been referred to section 76 of the *Labour Relations Act* which states as follows;

"76. Protected strikes and lock-outs

A person may participate in a strike or lock-out if-

a. the trade dispute that forms the subject of the strike or lock-out concerns terms and conditions of employment or the recognition of a trade union;

b. the trade dispute is unresolved after conciliation

i. under this Act; or

ii. as specified in a registered collective agreement that provides for the private conciliation of disputes; and

c) Seven days written notice of the strike or lock-out has been given to the other parties and to the Minister by the authorized representative of –

i. The trade union, in the case of a strike;

ii. The employer, group of employers or employers' organization, in the case of a lock-out.

77.....

78. Prohibited strikes or lock-outs

(1) No person shall take part in a strike or lock or in any conduct in contemplation of a strike or lock-out if—

(a) any law, court award or a collective agreement or recognition agreement binding on that person prohibits a strike or lock-out in respect of the issue in dispute;

(b) the subject matter of the strike or lock-out is regulated by a collective agreement or recognition agreement binding on the parties to the dispute;

(c) the parties have agreed to refer the trade dispute to the Industrial Court or to arbitration;

(d) in the case of a dispute concerning the recognition of a trade union, the trade union has referred the matter to the Industrial Court;

(e) the trade dispute was not referred for conciliation in terms of—

(i) this Act; or

(ii) a collective agreement providing for conciliation;

(f) the employer and employees are engaged in an essential service;

(g) the strike or lock-out is not in furtherance of a trade dispute; or

(h) the strike or lock-out constitutes a sympathetic strike or lock-out.

(2) For the purposes of this section—

(a) an employee engages in a sympathetic strike if the employee participates in a strike in support of a trade dispute in respect of which the employee's employer—

(i) is not a party to the dispute; or

(ii) is not represented by an employer's organisation that is a party to that dispute; or

(b) an employer engages in a sympathetic lock-out if the employer locksout an employee in support of a trade dispute—

(i) to which the employer is not a party; or

(ii) in respect of which the employer is not represented by an employer's organisation that is a party to dispute".

56. Indeed Section 76 sets out parameters for calling for a strike.

57. Section 78 (1) sets out instances when a strike should not proceed and one of the instances as submitted by the applicants is when the trade dispute has not been referred to conciliation.

58. The 2nd respondent content that they were not ready to go for conciliation as the applicants had failed to adhere to the orders of the court in ELRC Cause 16 of 2022 and that conciliation meetings had been carried out on 16th February, 2023 where the conciliation recommended that the claimant sets out timelines within which to pay employees.

59. It is indeed true that the law envisages that a strike should not be carried out without the parties considering a conciliation process.

60. In this case however, the conciliation process had proceeded in Cause No. 16 of 2022.

61. The strike called by the 2nd respondent was not part of Cause 16 of 2022. Infact execution in Cause 16 of 2022 proceeded with the respondents the claimants herein being found culpable and also being fined. In that case, cause 16/22 remained res-judicata.

62. This cause No. E008 of 2023 is a new cause and a strike can only be issued as per section 78 (1) (e) of the *LRA* after the trade dispute has been referred for conciliation in terms of the Act or the parties CBA.

63. The 2nd respondent therefore issued the strike notice without considering a conciliation process and therefore failed to follow the provisions of the law and the notice was therefore irregular and unprotected.

2nd Issue – Locus

64. The claimant also submitted that the 2nd Respondent issued the strike notice without locus as the 1st respondent is the one with the mandate to do this.

65. The claimant relied on Article 8 of the 1st respondent's constitution which provides that the NEC the governing body of the union shall be responsible for the management of the affairs of the union and exercise control over individual officers of the union.

66. They also submitted that article 15 of the 1st respondent's constitution sets out the manner in which a strike on industrial action may be initiated and that Supreme Authority of the 1st respondent lies with the National Delegates Council Article 15 of the 1st respondent's constitution states as follows;

> "Article 15: Industrial Action
>
> The national Executive Committee shall by a resolution have the authority to call upon all members or any group of members to withdraw their labour in case of a trade dispute arising, provided that such resolutions voted upon by secret ballot of a meeting of the National Executive Committee called for the purpose and provided further that such resolution has received the support and approval of two thirds of the members of the National Delegates Council at a Delegates Conference.
>
> Such industrial action can only be called off by resolution of the National Executive Committee and approval by two thirds (2/3) of National Delegates Council at a National Special Delegates Conference and communicated by the Secretary General".

67. This section is indeed couched in mandatory terms that it is the NEC that has the mandate to call for a strike action.

68. The 2nd respondent argued that they as a branch have also their mandate to run the affairs of the branch which this court has agreed with in NKR JR E004 of 2021. It is true that a branch of a union retains some capacity to run the affairs of the branch.

69. This capacity can only be utilized within its constitution which constitution has expressly provided that the mandate of calling for industrial action is nested in the NEC.

70. That being the position, I make a finding that the 2nd respondent didn't have the locus and mandate to call for industrial action and the strike notice so issued was annuity for being issued without authority.

Orders

71. Having found as above, I find for the claimant applicants as prayed and declare the industrial action issued by the 2nd respondent *vide* a letter dated 13th January, 2023 set to commence on February 6, 2023 was unprotected and unlawful, illegal, null and void and I declare it so.

72. I grant orders restraining the respondents and/or their agents or servants howsoever from proceeding with industrial action as issued by the 2nd respondents dated January 13, 2023 pending the hearing and determination of this cause or until further orders of this court.

73. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 23RD DAY OF MAY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Konosi for Claimant – present

Bosibori holding brief for Ndubi for Claimant – present

Respondents – absent

Court Assistant – Fred