



**Kenya National Union of Nurses v Ministry of Health & another (Cause E617 of 2022) [2023] KEELRC 3021 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3021 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E617 OF 2022  
SC RUTTO, J  
NOVEMBER 24, 2023**

**BETWEEN**

**KENYA NATIONAL UNION OF NURSES ..... CLAIMANT**

**AND**

**THE MINISTRY OF HEALTH ..... 1<sup>ST</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant herein moved this Court through a Statement of Claim dated 5<sup>th</sup> September 2022, in which it seeks the following orders:
  - a. An order be and is hereby issued directing the 1<sup>st</sup> Respondent to reinstate the position of the Directorate of Nursing Services in the administrative organogram of the Ministry of Health as per the scheme of service for nursing personnel.
  - b. An order be and is hereby issued directing the Respondents to redraft for the adoption of the Administrative Organogram of the Ministry of [Health Act](#) No. 21 of 2017.
  - c. The Public Service Commission be and is permanently restrained from advertising and or publishing the draft administrative organogram of the Ministry of Health minus the position of Director of Nursing Services and stay implementation of such organogram without the position of Directorate of Nursing Services.
2. On 30<sup>th</sup> June 2023, the parties consented to have the matter disposed of by way of documentary evidence in line with Rule 21 of the [Employment and Labour Relations Court \(Procedure\) Rules](#), 2016.



### **Claimant's case**

3. The gist of the Claimant's case is that following the gazettelement of the [Health Act](#), the 2<sup>nd</sup> Respondent formulated an Administrative Organogram as provided for in Section 15(1) (b), and ignored Section 18 of the [Health Act](#) No. 21 of 2017 and excluded the Directorate of Nursing.
4. The Claimant averred that the 1<sup>st</sup> Respondent forwarded the Administrative Organogram to the 2<sup>nd</sup> Respondent for recruitment of the vacant positions as required in Article 234 of the [Constitution](#).
5. The Claimant further averred that the 2<sup>nd</sup> Respondent posted an advertisement in its website on 14<sup>th</sup> June 2022 declaring vacant various positions in the public service, including the health department and invited interested and qualified persons to apply for the same.
6. According to the Claimant, the position of the Director of Nursing Services was approved through a Scheme of Service for Nursing Personnel which came into effect from May 2014 but the Respondents have acted in contravention of the said Scheme of Service.
7. The Claimant further stated that it was not involved in the decision to exclude the Directorate of Nursing which is a statutory provision as per Section 15(1)(a) of the [Health Act](#), which provides that all stakeholders in health services be involved.
8. The Claimant further averred that, on 16<sup>th</sup> June 2022 it wrote to the Respondents and registered its objection to the posted advert together with the Administrative Organogram which letter the Respondents refused to respond to.
9. The Claimant further contended that Section 18 of the [Health Act](#), provides for five (5) mandatory Directorates to deal with matters of medical services, nursing, pharmaceutical services, public health and administration.
10. It was the Claimant's case that no other Directorate is capable of dealing with nursing matters except the Nursing Directorate itself and the delivery of quality and efficient nursing services in the country will be hampered if its management is vested in any other Directorate.
11. The Claimant further averred that the position of the Director of Nursing services has been in existence since 2017 just as other directorate positions as provided for in the [Health Act](#).
12. In the Claimant's view, the action by the 1<sup>st</sup> Respondent amounts to unfair labour practices and violates the right to fair administrative action and therefore ought to be stopped.
13. The Claimant further termed the action by the Respondents to exclude the Directorate of Nursing while formulating the Administrative Organogram without notice, as a subversion of law as well as a calculated measure to weaken the career progression of nurses.
14. According to the Claimant, the action to scrap the position of the Directorate of Nursing is discriminatory and contrary to the Scheme of Service for Nurses.

### **2<sup>nd</sup> Respondent's case**

15. The 2<sup>nd</sup> Respondent responded to the Statement of Claim through the Replying Affidavit sworn on 5<sup>th</sup> October 2022 by its Secretary/Chief Executive Officer, Mr. Simon K. Rotich.
16. Mr. Rotich admitted in his Replying Affidavit that the 2<sup>nd</sup> Respondent approved the reviewed organizational structure for the Ministry of Health and in so doing, relied on the Fourth Schedule



of the Constitution. That under the Fourth Schedule, health is majorly a devolved function and the national government only deals with health policy and National Referral Health Services.

17. Mr. Rotich further averred that whereas it is true that Section 18 of the Health Act provides that there should be a Directorate responsible for Nursing Services among other services, the Act does not state that the same shall be a stand-alone Directorate.
18. Mr. Rotich contended that the reviewed organogram is function-based and not cadre-based and is designed in such a way that any person with qualifications in a health-related field can rise to the topmost position including becoming a Director General.
19. He further stated that the Ministry of Health has over thirty-three cadres and as such it is not possible to have an organogram where each of the cadres has a stand-alone Directorate. He denied the Claimant's assertion that without a dedicated Directorate for Nursing, the issues of nurses will not be addressed.
20. According to Mr. Rotich, whereas there is a Scheme of Service for Nurses which provides for the position of Nursing Director, there must be reasons why the said position has not been filled.
21. The 1<sup>st</sup> Respondent did not file a response to the Claim nor participate in the hearing.

### **Submissions**

22. It was the Claimant's submission that the Respondent did not consult it or any stakeholder in the decision to exclude the Directorate of Nursing which is a statutory provision as per Section 15(1)(a) (b) of the Health Act.
23. The Claimant posited that the subversion of the provision of the aforestated statutory by the Respondent is illegal and if left unabated, will undermine the tenets of Kenya's Constitution as well as jeopardize provisions of quantity, quality and efficient nursing services in the entire country.
24. It was the Claimant's further submission that the action by the 1<sup>st</sup> Respondent to exclude the Directorate of Nursing while formulating the Administrative Organogram without involvement of the stakeholders as required under Section 13 of the Health Act is a subversion of law and a well calculated measure to weaken the career progression of nurses.
25. The Claimant maintained that no other Directorate is capable of dealing with nursing matters except the Nursing Directorate itself whose uniqueness calls for a full-fledged Directorate for Nursing Services as demonstrated in Article 2 of the *ILO Nursing Personnel Convention No. 149*.
26. It was the Claimant's further submission that unless the Nursing Services are allocated a full-fledged Directorate of Nursing, the quality and co-ordination of Nursing Services shall be compromised in turn contravening Article 43 of the Constitution on the right of every person to the highest attainable standard of health, which includes the right to health care services, including reproductive health care which nurses form the largest group as caregivers.
27. The Claimant further contended that the action by the Respondents amounts to unfair labour practices and violates the right to fair administrative action and therefore ought to be stopped.
28. On 21<sup>st</sup> September 2023, when the matter came up for mention to confirm filing of written submissions, the 2<sup>nd</sup> Respondent indicated that it would not be filing any submissions in the matter.



## Analysis and determination

29. I have considered the pleadings, the evidentiary material on record as well as the Claimant's submissions and to my mind, the singular issue falling for determination is whether the Court should grant the reliefs sought.
30. As stated herein, the gist of the Claimant's case is that the Administrative Organogram formulated by the 2<sup>nd</sup> Respondent does not include the Directorate of Nursing contrary to Section 18 of the [Health Act](#).
31. Section 18 of the [Health Act](#) provides as follows:
- For purposes of section 15(1)(b), the Cabinet Secretary shall—
- (a) form directorates to deal with the following matters—
- i. medical services;
- ii. nursing;
- iii. pharmaceutical services;
- iv. public health; and
- v. administrative services;
- (b) notwithstanding paragraph (a), form other directorates based on policy priority areas in consultation with the Director-General.
32. With respect to Section 15(1) (b) of the [Health Act](#), the National Government Ministry responsible for Health is mandated to develop and maintain an organizational structure of the Ministry at the national level comprising technical directorates.
33. In support of its case, the Claimant exhibited an Administrative Organogram developed by the 1<sup>st</sup> Respondent containing four Directorates being, the Directorate of Public Health, Directorate of Healthcare Services, Directorate of Preventive & Promotive Health Services, Directorate of Health Standards Quality Assurance & Regulations, Directorate of Health Policy, Research, Monitoring & Evaluation and Directorate of Health Sector Coordination and Intergovernmental Relations.
34. As can be discerned from the Administrative Organogram exhibited, there is no Directorate of Nursing.
35. It is notable that the Administrative Organogram further provides for departments under each of the Directorates established.
36. According to the 2<sup>nd</sup> Respondent, the [Act](#) does not state that there should be a stand-alone Directorate responsible for Nursing Services.
37. Revisiting the Administrative Organogram formulated by the Respondents, it is clear that the same is not in accordance with the provisions of Section 18 of the [Health Act](#).
38. This is further noting that none of the departments established under each Directorate is responsible for matters relating to Nursing Services. Therefore, in as much as the 2<sup>nd</sup> Respondent has argued that the [Act](#) does not state that there should be a stand-alone Directorate responsible for Nursing Services,



it is evident that none of the Directorates established is responsible for Nursing Services, even at the departmental level.

39. Indeed, as per the Administrative Organogram exhibited, it is not clear under which Directorate, the matters relating to Nursing Services fall.
40. In formulating the Administrative Organogram, the Respondents were bound to comply with the express provisions of Section 18 of the Health Act. In this case, the Respondents did not present a plausible reason for non-compliance with the said statutory provision.
41. Indeed, the Parliament of Kenya must have had a justified reason for enacting Section 18 as it did, hence providing expressly for the Directorates to be established within the National Government Ministry Responsible for Health, which in this case is the 1<sup>st</sup> Respondent.
42. On account of the foregoing reasons, it is clear that the Administrative Organogram as formulated by the Respondents is not in accord with Section 18 of the Act.
43. Accordingly, this Claim succeeds and the Respondents are hereby directed to formulate afresh, an Administrative Organogram that is in consonance with the provisions of Section 18 of the Health Act.
44. Owing to the nature of the dispute herein, there will be no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2023.**

.....

**STELLA RUTTO**

**JUDGE**

Appearance:

For the Claimant Mr. Ruteere

For the 1<sup>st</sup> Respondent No appearance

For the 2<sup>nd</sup> Respondent Ms. Iseme

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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 Civil 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.

**STELLA RUTTO**

**JUDGE**

