



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT KERICHO

CAUSE NO. 13 OF 2020

JOHN KIPYEGO BIIY.....CLAIMANT

VERSUS

KENYA NATIONAL UNION OF NURSES.....RESPONDENT

JUDGMENT

1. By a Memorandum of Claim filed on the 6th day of March, 2020, the claimant alleges that the respondent has continuously failed to protect his rights and interests, which the respondent owes him as a member of the union. He further alleges that the respondent has instead acted in utmost bad faith by giving instruction to withdraw a suit which had been instituted on his behalf by the Union against the County Government of Uasin Gishu. He further alleges that the respondent has denied him monthly allowances as the chairman of the union and it is influencing the claimant's employer to deny him entry back to employment. Therefore the suit seeks the following remedies:

- (a) A declaration that the Respondent failed to discharge its mandate owed to the Claimant in accordance to the Respondent's Constitution and the Labour Relations Act;**
- (b) A declaration that the respondent's conduct and actions against the claimant was in contravention of the respondent's constitution, bad in law and against the respondent's constitution;**
- (c) A declaration that the respondent's conduct of causing the claimant lose his employment with Uasin Gishu County Government is bad in law and against the respondent's Constitution;**
- (d) General Damages;**
- (e) Interest in (c) above from June, 2017 until payment in full pegged on the current outstanding amount;**
- (f) Costs and interest of this suit; and**
- (g) Any other relief the honorable court deems fit to grant in the circumstances of this case.**

2. The respondent entered appearance on the 17th day of July, 2020, and filed a response to the Memorandum of Claim on the 16th day of November, 2020, denying that the claimant is a registered nurse and an active member of the respondent. The respondent further denied that the claimant is its National chairman and a member of the National Executive Council (NEC). It averred that the claimant was procedurally and lawfully removed from the respondent's leadership and as such the claimant is not listed as an official of the respondent within the Registrar of Trade Union records. It further averred that the claimant was dismissed from service as a nurse by his employer, Uasin Gishu County Public Service Board, for disciplinary reasons, hence he is not a member of the respondent.

3. It is stated that the respondent has always acted in good faith and it has never acted arbitrarily as alleged by the claimant. The respondent stated that it has always offered fair representation when an issue affecting its legitimate member arises, and that as at the 1st of February, 2017, there was no subsisting relationship between the claimant and the respondent. It is stated that the claimant was not reinstated into employment, and that the claimant had not even sought for a prayer for reinstatement into employment.

4. It is stated that the matter before the court is *res Judicata* and therefore legally untenable as the subject matter of this suit, being the claimant's dismissal from employment, was conclusively handled in *Nakuru ELRC no. 369 of 2015 between Kenya National Union of Nurses versus County Government of Uasin Gishu and Others*.

5. It is stated that this matter is further *res judicata*, because it revolves around the claimant's removal from the position of branch official and national chairperson of the respondent, and claim for damages and allowances which are issues that have already been determined in another case being, *Nairobi Cause no. 12 of 2017, John K. Biiy versus Kenya National Union of nurses and others*.

6. It is stated that the respondent has never denied the claimant legal representation, financial assistance and has never denied the claimant entry back into employment. It is further stated that the claimant is guilty of perjury and that this court lacks jurisdiction to hear and determine this matter.

7. By consent of the parties, the suit was disposed by way of written submissions, and that the documents and witness statements by both parties be adopted as evidence.

Claimant's Case

8. The Claimant in his witness statement, stated that he was elected as the Kenya National Union of Nurses, National Chairperson to the National Executive Council in the year 2014, and as such, the respondent by virtue of the Constitution of the Republic of Kenya, the respondent's constitution, the Labour Relations Act and the Employment and Labour relations (procedure) Rules, 2016, was mandated to protect the interest of its members, and to offer in good faith and honesty, legal representation when an issue affecting its employer arises.

9. The claimant stated that the respondent instituted a suit on behalf being ***Nakuru cause no. 369 of 2015, Kenya National Union of Nurses versus Uasin Gishu Public Service Board & 3 others*** in which he was challenging unfair termination of his employment. However, the respondent, through the office of the Secretary General vide a letter dated the 1st of February, 2017, arbitrarily and in extreme bad faith withdrew the suit on scrupulous and unsubstantiated grounds thus forcing the claimant to seek leave of the court to act in person.

10. The claimant stated that he later won the case and as a result he was reinstated to employment by his employer, the County Government of Uasin Gishu, vide an internal Memo dated the 23rd of May, 2017.

11. He further stated that on the 3rd of July, 2018, the respondent through the office of the Secretary General, in extreme bad faith, wrote to the Governor, Uasin Gishu County and the County Public Service Board, Uasin Gishu County, among others, alleging that the claimant had been fraudulently re-introduced into the payroll, leading to the claimant losing his employment.

12. As a result of the foregoing matters, the claimant avers that the respondent owed him a duty of protection of his rights and interest as a member of the union and National chairperson to the National Executive Council of the respondent, which duty the respondent has continuously breached and failed to protect.

13. The claimant again stated that, in further abuse of his rights, the respondent stopped, without any explanation, remitting to the claimant his monthly allowance of Kshs. 80,000 and airtime allowance of Kshs. 5, 000 as from the month of June, 2017. Therefore he contends that he is entitled to the reliefs sought.

Respondent's case.

14. The respondent's Secretary General, Mr. Seth Ambusini Panyako, stated that the claimant was procedurally removed from the respondent's leadership pursuant to a clarification of the court ruling in ***Nairobi ELRC no.12 of 2017, John Biiy versus Kenya National Union of Nurses***, and therefore the claimant is no longer the National Chairman or member of the National Executive Council of the respondent.

15. The respondent further stated that no positive order of reinstatement was issued by the court, neither was it one of the claimant's prayers in ***Nakuru ELRC cause no. 369 of 2015, Kenya National Union of Nurses versus County Government of Uasin Gishu***; and that the respondent's letter dated the 3rd of July, 2019 which the claimant alleges was the cause of his dismissal from employment only sought to inform the claimant's employer of the court's judgment. It also sought clarity on why the claimant had been re-introduced into the payroll system yet he had been dismissed and the court had awarded him dues which he had already been paid .

16. The respondent further stated that the claimant's suit is *res judicata* owing to the fact that the subject matter of this suit, being the claimant's dismissal from employment, and also the claimant's removal from the position of branch official and National chairperson of the respondent were conclusively handled in ***Nakuru ELRC cause no. 369 of 2015, Kenya National Union of Nurses versus County Government of Uasin Gishu*** and ***Nairobi ELRC cause no.12 of 2007, John K.Biiy versus Kenya National Union of Nurses***. Therefore it is respondent's case that the said matters cannot be re-litigated in a fresh suit.

Claimant's Submission:

17. The claimant submitted that the respondent owed him a duty of care and a duty of fair representation, which duty the respondent breached in extreme bad faith on several occasions, when firstly, it withdrew from representing the him in ***Nakuru ELRC no.369 of 2015***, contrary to the union constitution, thereby forcing the claimant to act in person; secondly, when the respondent participated in influencing the claimant's employer to terminate his employment; and thirdly, when the respondent stopped remitting to the claimant his monthly allowance and airtime allowance. The foregoing acts amounted to discriminating him, despite being the National Chairperson of the respondent at the time.

18. The claimant reinforced his case by quoting the case of ***Benson Oyugi Ambuni versus Union of Kenya Civil Servants, [2019] eKLR*** and ***Seth Panyako versus Kenya Union of Domestic, Hotels, Educational institutions, Hospitals & Allied workers [2013] eKLR***.

Respondent's submissions.

19. The respondent submitted that it has never denied the claimant legal representation or financial assistance as alleged, and if the

respondent withdrew from offering legal representation to the claimant, then the onus is on the claimant to prove that he suffered prejudice as a result of the respondent's actions. The respondent further stated that it is not liable for the alleged negligent conduct, and urged that the claimant must prove that he was owed a duty of care by the respondent and that it was in breach of that duty of care, and the claimant suffered damage, as a result of breach of that duty of care. For emphasis, the respondent relied on the case of **United Steelworkers versus Rawson, 495 U.S 362 (1990)**.

20. The respondent submitted that the claimant did not suffer any damage, because immediately the respondent withdrew from representing the claimant, judgment was delivered on the same day being 28th of April, 2017, thereby proving that the claimant was not prejudiced in any way. It further submitted, that the claimant has not pleaded any damage or injury that he suffered as a result of the respondent withdrawing legal representation.

21. The respondent also submitted that as at the 1st of February, 2017, there was no subsisting relationship between the claimant and the respondent, because the claimant had been procedurally and lawfully removed from the respondent's leadership. Further, the respondent submitted that the claimant had a chequered disciplinary history at the union, and was found guilty of fraudulently opening Union bank accounts and was ordered to pay a sum of Kshs. 9, 686, 436.15 through a court judgment, which sum, the claimant has failed to pay. For emphasis, the respondent relied on the case of **Kenya National Union of Nurses versus Eco Bank Kenya Limited & John Biiy & 7 others, (2020) eKLR**.

22. The respondent submitted that the claimant was dismissed from service as a nurse by the County Public Service Board, Uasin Gishu, for disciplinary reasons and that the claimant was never reinstated into employment by the court as alleged, and as such he is not a member of the respondent.

23. The respondent maintained that this suit is *res judicata* and therefore legally untenable on the grounds that the subject matter of this suit, being the claimant's dismissal from employment, the claimant's removal from the position of branch official and National Chairperson of the union and the claim for damages and allowances are issues that have already been determined in **Nakuru ELRC no. 369 of 2015, Kenya National Union of Nurses versus County Government of Uasin Gishu and Others** and **Nairobi Cause no. 12 of 2017, John K. Biiy versus Kenya National Union of Nurses and others**. It was submitted that this honourable court has no jurisdiction to entertain the claim, to the extent that it is in breach of Section 6 and 7 of the Civil Procedure Act.

24. The respondent also submitted that the claimant is guilty of perjury, because firstly, he has misled the court that he is the current National Chairman and member of the National Executive Council of the respondent, contrary to section 35(6) of the Labour Relations, Act; and secondly, he has deliberately lied on oath by stating that there have been no previous proceeding between the parties over the same subject matter, contrary to the Oaths and Statutory Declarations, Act. For emphasis, the respondent relied on the case of **Abdullahi Mohammed Sheikh versus Gulf Africa Bank Limited & another; Greenbelt Warehouse Limited (interested Party) (2019) eKLR**.

Issues for determination and analysis.

25. Having carefully considered the pleadings, evidence and submissions, the issues for determination are:-

a) Whether this court lacks the jurisdiction to hear and determine this matter on the ground that it is *res judicata*?

b) Whether the claimant was, a member of the Union and the National chairperson to the National Executive Council as at the time of the alleged violation of his rights and interests?

c) Whether the respondent breached any duty of care and fair representation owed to the claimant?

d) Whether the claimant is entitled to the reliefs sought?

Whether this court lacks jurisdiction to hear and determine this matter on the grounds that it is *res judicata*?

26. The issue as to whether or not this suit is *res judicata* was addressed by Hon. Lady Justice, Hellen Wasilwa in her ruling dated the 30th day of September, 2021. The respondent had filed a Notice of Preliminary Objection, on the 16th November, 2021 alleging that the court has no jurisdiction to hear this matter, on grounds that the suit was *res judicata*, as it revolved around matters that had already been determined in **Nakuru ELRC no. 369 of 2015, Kenya National Union of Nurses versus County Government of Uasin Gishu and Others** and **Nairobi Cause no. 12 of 2017, John K. Biiy versus Kenya National Union of Nurses and others**.

27. The court considered the objection on merits and dismissed it stating that the three claims are different in terms of the remedies sought. The court also directed that the suit proceeds for determination on merit. No application was made by the respondent to review this ruling, nor was an appeal preferred against it. Therefore the decision in the ruling still stands and the court has jurisdiction to determine the suit.

Whether the claimant was a member of the Union and the National Chairperson to the National Executive Council, as at the time of alleged violation of his rights and interests?

28. The answer to this question is very important in order to determine whether the claimant is entitled to the reliefs sought in this claim. **Chapter III (1)** of the respondent's constitution states as follows:

“Membership of the Union, shall be open to all employed Nurses (Enrolled and registered).”

29. It is not in dispute that in the year 2013, the claimant was an employed and registered nurse. It is also not in dispute that the claimant was appointed by the respondent as the National Chairman to the National Executive Council on the 26th of May 2014. What is in dispute, is whether or not at the time of the alleged violations of the claimant's right by the respondent, he was a bona fide member not only of the union, but of the National Executive council.

30. The alleged violation occurred between 1st February 2017 and 3rd July 2019. There is no dispute that the claimant succeeded in convincing the court that his dismissal was unfair and the employer reinstated or re-engaged him. It has not be denied that the employer had the discretion to reinstate or re-engage the claimant even without a court order. What is not clear is whether he continued to be in employment after the union's letter dated 3rd July 2019.

31. Under Chapter III section 1 of the respondent's constitution the claimant was eligible to membership of the union and remained the Chairman of the respondent's NEC until the second termination. The foregoing is fortified by the fact that there was injunction order in favour of the claimant in **Nairobi Cause no. 12 of 2017, John K. Biiy versus Kenya National Union of Nurses and others** up to 2019.

Whether the respondent breached a duty of care and fair representation owed to the claimant?

32. One of the ways through which the claimant avers that his rights were violated by the respondent, is when its General Secretary issued instructions to its Advocates, vide a letter dated 1st of February, 2017, to cease representing the claimant and proceed to withdraw **Nakuru ELRC no. 369 of 2015, Kenya National Union of Nurses versus County Government of Uasin Gishu and Others** in which the claimant was challenging unfair dismissal from employment. As at this date, the claimant was still a member of the respondent, and that is why the respondent had instituted the said suit against the claimant's employer, on his behalf.

33. The respondent's constitution, under Chapter II provides for its objectives as a union. One of its core objectives, as stipulated under paragraph 7:

“is to get legal advice and any other assistance on any matters affecting the union, or for protecting the rights of a member or members on matter arising out of the relations with their employer. Provided that the National Executive Council shall have the sole right to decide whether or not legal advice or assistance is in the best interest of the union or members concerned, but must always be obtained if a member so requests and after approval by the legal secretary.”

34. The Labour Relations Act, 2007, Section 39 (c), provides that the funds of a trade union, maybe used only for:

“the prosecution or defence of any legal proceedings to which the trade union, employers' organisation or federation or any member thereof is a party, when the prosecution or defence is undertaken for the purpose of securing or protecting its rights or the rights of any member in any matter concerning employment or the application of any employment law”

35. The above provision is similar to Chapter XI (4) (c) of the respondent's Constitution, which states that, the funds of the union may be used only for the following object:-

“The prosecution or defense of any legal proceedings to which the union or any member thereof is a party, when such prosecution or defense is undertaken for the purpose of securing or protecting any rights of the trade union as such or any rights arising but of the relations of any member with his/her employer.”

36. Having considered the above provisions of the law and the respondent's constitution, it is evident that the respondent had an obligation to extent to the claimant, legal as well as financial assistance, and that he was well represented in the claim against his employer to its logical conclusion. The said obligation is what has gained notoriety as duty to fair representation. Therefore the court finds that the respondent breached the said duty of fair representation that it owed to the claimant by attempting to withdraw his suit and thereafter withdrawing its lawyer from the suit.

37. I gather support from **Seth Panyako v Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers [2013] eKLR** where Rika J held that: -

“The respondent like many other Trade Unions is recruiting member, and professing business capability. The respondent assumed the duty of fair representation of its members at the workplace, in Court and the Collective Bargaining Platforms. It owed the claimant a duty of care, and is shown in every clear terms to have breached that duty by failing to fairly represent the claimant on interdiction despite the promise made by the Chairperson Jared Conan. ... The failure by the Respondent to skillfully represent the claimant ended in a very unfair outcome”

38. I gather more support from **Benson Oyugi Ambuni v Union of Kenya Civil Servants [2019] e KLR** where Radido J held that:

“A trade union has certain obligation towards its membership. These obligations include extending to a member legal assistance during disciplinary process...”

In providing legal assistance or representation to a member facing a disciplinary action, it is widely accepted globally that the Union owes the member a duty of fair representation...

Under the duty of fair representation, a trade union should not act in bad faith. It should act fairly, impartially and should not

discriminate.”

39. The other way in which the claimant avers that the respondent breached his rights is when it failed to remit to him his monthly and airtime allowance of Kshs. 80,000 and 5,000 respectively. It has already been established that the claimant remained as a National Chairman of the respondent’s National Executive council up to July 2019.

40. The claimant further stated that the respondent violated his rights when they wrote a letter that was the cause of his termination from employment, after reinstatement. It was the claimant’s assertions that he was reinstated to employment after the judgment of the court but the respondent’s letter, led to his termination.

41. Until the said termination and the change of Official of the union as per the Extract dated 20th July 2020, the claimant was the *de jure* Chairman of the NEC of the union and therefore entitled to his monthly allowances. Chapter XI (4) (b) of the respondent’s Constitution, states among other things that, the funds of the union may be used only for the following object:-

“Payment of allowances and expenses of officers of the Union in line with Trade union/Corporate practices in Kenya.”

d) Whether the claimant is entitled to the reliefs sought?

42. The respondent, had an obligation to the claimant to offer legal representation to him against his employer, which it did and later withdrew when the matter had been scheduled for judgment. Although the matter was only awaiting judgment, the respondent acted unfairly and discriminatory towards the claimant. It did so through its Secretary General, who wrote a letter dated the 1st of February, 2017 to its advocate instructing him to withdrawing the suit filed on behalf of the claimant for the reason that **“the grievant’s gross misconduct that had adversely affected the union, including his action to sue the union.”**

43. The said action by the respondent was indeed discriminatory and unfair since the respondent’s constitution, under chapter XXI (6) (iii) gives room to its members to sue the union. Consequently the claimant is entitled to a declaration that the Respondent breached the duty to fair representation which it owed him under its Constitution and the Labour Relations Act.

44. He is also entitled to a declaration that the respondent’s conduct and actions against him was in contravention of its constitution and bad in law. There is no doubt that the judgment of the court in **Nakuru ELRC no. 369 of 2015, Kenya National Union of Nurses versus County Government of Uasin Gishu and others**, did not reinstate the claimant to employment. However, the judgment did not bar the employer from reinstating or re-engaging the claimant in his earlier position. It was therefore malicious for the respondent to give the employer unsolicited legal advice on the court’s judgment. The said conduct was contrary to the letter and spirit of the respondent’s constitution, which primarily emphasizes on protection of its members and officials both individually and collectively.

45. It would appear that it was in the respondent’s best interest for the claimant to lose his employment so that his membership would also be lost, and not without a reason. There is evidence that the respondent had engaged in a spirited onslaught against the claimant even before the fall out on 1st February 2017 for the reason that the claimant and other branch officials had diverted union funds collected in the union branches to bank account other than the ones designated by the respondent. Such conduct led to litigation in **Nairobi RLRC No 50 of 2018, Kenya National Union of Nurses v Eco Bank Kenya Limited & 8 others**. In the suit, the claimant herein was the 5th respondent and a judgment was passed against him and other branch officials jointly in which they ordered to account for over Nine million Kenya shillings deposited in the strange account they had opened at the branch level.

46. The claimant urged the court to award him general damages for breach of duty to fair representation and violating its own constitution. Considering that the respondent arbitrarily withdrew from the case at its tail end of the case, I award him Kshs. 300,000 as general damages. The instant case is distinguishable from the cited cases because, in those cases unlike in the instant suit, the unions never represented their members at all.

47. As regards the prayer for monthly allowances, I see no reason for denying the claimant the unpaid sum of Kshs. 85000 per month from June 2017 to the day he lost his employment and his position as the Chairman of the respondent’s NEC. He did not state when he lost his job after the union wrote the letter dated 3rd July 2019. I will treat the termination date as 3rd July 2019 and award the claimant the arrears of his allowances up to that date being 24 months x Kshs.85,000 equalling to Kshs 2,040,000

48. In conclusion I enter judgment for the claimant in the sum of Kshs. 2,340,000 subject to statutory deductions. The claimant will have costs plus interest at court rates from the date hereof.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 22ND DAY OF APRIL, 2022.

ONESMUS N MAKAU

JUDGE

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall

be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE