



**Mwangi & 349 others v Council of Governors & 5 others; Kenya National Union of Nurses & another (Interested Parties) (Employment and Labour Relations Cause E002 of 2020) [2022] KEELRC 13081 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13081 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E002 OF 2020  
DKN MARETE, J  
OCTOBER 31, 2022**

**BETWEEN**

**DAVID NGUGI MWANGI ..... 1<sup>ST</sup> CLAIMANT  
JANEROSE MUGURE MUTAHI ..... 2<sup>ND</sup> CLAIMANT  
JOHN MBUTHIA WAGOKI & 347 OTHERS ..... 3<sup>RD</sup> CLAIMANT**

**AND**

**COUNCIL OF GOVERNORS ..... 1<sup>ST</sup> RESPONDENT  
PRINCIPAL SECRETARY, MINISTRY OF HEALTH ..... 2<sup>ND</sup> RESPONDENT  
MURANG'A COUNTY SECRETARY ..... 3<sup>RD</sup> RESPONDENT  
PUBLIC SERVICE BOARD, MURANG'A COUNTY GOVERNMENT .... 4<sup>TH</sup>  
RESPONDENT  
MURANG'A COUNTY CHIEF OFFICER FINANCE ..... 5<sup>TH</sup> RESPONDENT  
MURANGA COUNTY, CHIEF OFFICER HEALTH AND  
SANITATION ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**KENYA NATIONAL UNION OF NURSES ..... INTERESTED PARTY  
COUNTY ASSEMBLY OF MURANG'A ..... INTERESTED PARTY**

**JUDGMENT**

1. This matter was originated by way of a statement of claim dated September 2, 2020. It does not disclose an issue in dispute on its face.



2. The 3rd - 6th respondents in a 3rd - 6th respondents statement of defence dated November 23, 2020 deny the claim and pray that the same be dismissed with costs.
3. The 1st and 2nd respondents have not filed any defence, or at all. So are the interested parties.
4. The claimant's case is that at all material times to this case, they were permanently employed by the respondents as nurses and duly stationed at various hospitals and Health centres within Murang'a county.
5. The claimant's other case is that in June, 2017, or thereabouts, all nurses of the Republic of Kenya, including the claimants herein went on an industrial strike defending *inter alia* salary increments and improvement of their working conditions.
6. Their further case is that with a view to ending the strike, a consultative forum was held at the COG offices, Nairobi on November 2, 2017 between the County Government of Kenya, the National Government and KNUN.
7. The claimant's further case is that the national government was represented by the cabinet secretary and principal secretary of the Ministry of Health, The 47 County Governments was represented by the Council of Governors, county Secretaries and their respective County Public Service Boards. And in view of these agreements, work resumed.
8. It is the claimant's other case that the agreement *inter partes* was binding and did not have any rider for extension of time. Inasmuch, the County Government, Murang'a, the County Public Service Board, Murang'a and the Public Service Commission have blatantly and dishonestly refused and or declined to co-operate and abide by the terms of the agreement.
9. The claimant's further avers that all other County Governments in Kenya have complied with the return to work formula of November 2, 2017 except for Murang'a. She has a workforce of over 600 nurses.
10. The claimant's further aver that the terms of the said agreement have been implemented on some few nurses but discriminately omitted others (claimants) without explanation and therefore a claim for damages for discrimination and economic sabotage.
11. The claimant's further case is that their union issued a protest note to the Ministry of Health and Council of Governors pointing the latter to advise all governors to comply with the terms of the agreement but Murang'a refused to accede or heed. They have all along been non-committal.
12. The claimants' further case is that the salary arrears owing to the claimants is for the financial year 2017/2018 and 2018/2019 which was budgeted for and duly approved by both the County Assembly of Murang'a, the 2nd interested party and the National Assembly and the National Government. The same ought to have been paid on or before the end of the financial year in issue.
13. It is their other case that the outstanding unpaid salary arrears for all the 350 claimants is Kshs 208,512,500.00. They put it thus;
  32. That the outstanding areas for all the 350 claimants in this suit is Kenya shillings two hundred and seven million three hundred and twenty thousand (Kshs 208,512,500/-) as tabulated for every individual as here below thus:-
 

Kshs 119,150/- (outstanding salary arrears for June, July, August, September and October, 2017) x 350 claimants (total number of claimants in this suit)  
 .....Kshs 208,512,500/-



They in the penultimate pray as follows;

- a) Declaration that the claimants herein are entitled to be paid their salary arrears for the months of June, July, August, September and October, 2017.
- b) An order directing the respondents to comply with the terms of the agreement dated November 2, 2017 reached pursuant to the consultative forum between the County Governments of Kenya, The National Government and Kenya National Union of Nurses.
- c) A declaration that the claimants herein were discriminated upon and as such entitled to be damaged. Damages for discrimination to be awarded by the honourable court.
- d) Interest. The claimants claims interest on the sums due in their salary arrears for the months of June, July, August, September and October, 2017 at commercial or court rates prevailing from November 2, 2017 until payment in full.
- e) Costs. The claimants claims as against the respondent the costs of this suit together with interest thereon from the date of filing until payment in full.
- f) Judgment in the sum of Kshs 208,512,500.00 being salary arrears for the months of June, July, August, September and October, 2017 as tabulated here below for every individual claimant.
- g) That the arrears be paid through the claimant's advocates on record.
- h) Any other relief that the honourable court deems fit to grant.

14. The 3rd to 6th respondent's case is a denial of the claim.
15. The respondents further averment is that the cause of action herein arose out of the nurses strike in 2017, which strike was declared illegal. This claim therefore fails for being premised on an illegal strike. They posit that an illegal strike is not protected and the employees on strike are liable to appropriate sanctions under the *Employment Act* including summary dismissal and deduction of wages for desertion and absenteeism.
16. Again, the return to work formula adverted to in the suit was simply a political resolution of the dispute after the 1st interested party had blatantly disobeyed court orders to call off the strike. That resolution did not validate the illegal strike and the agreement to pay withheld salaries did not bind Murang'a County Government as the employer of nurses within Murang'a County. Therefore, the orders sought for payment of salaries withheld as a result of an illegal strike cannot issue and should be dismissed. An employer is not under a duty to commit public funds to pay salaries for employees engaged in an illegal strike.
17. Their further case is that nurses who did not participate in the illegal strike were all paid and that the claimants cases have no basis. The entire suit is therefore devoid of merit and material for dismissal. There is no pay for no work.
18. The 2nd respondents have not, as aforesaid filed any responses to the claim.



19. The 1st respondents case is a denial of the claim. She posits that the case against herself should be dismissed with costs. This comes out thus;

The 1st respondent states that the court has no jurisdiction to hear and determine the dispute against it as the same is barred by the provisions of sections 2 and 12 of the *Employment and Labour Relations Act*, 2012. This is in light of the fact that the claimants are not employees of the 1st respondent and as such the 1st respondent cannot address itself substantively on the issues presented against it before court.

The 1st respondents further case is that she is established under the provisions of section (19) of *Inter-Governmental Relations Act*, No 2 of 2012 to provide a forum for *inter alia*;

- a) Consultation amongst county governments.
  - b) Sharing information on the performance of the counties in the execution of their functions with the objective of learning and promotion of best practice and where necessary, initiating preventive or corrective action.
  - c) Considering matters of common interest to county governments.
20. It is her further case that the strike occasioning this suit was illegal and was declared unprotected by a ruling by Wasilwa, J. She however agrees that there was a consultative meeting on November 2, 2017 all aimed putting in place reasons to end the strike.
21. Further and in response to the averments made hereinabove the 1st respondent states that it cannot issue directives to county governors in the course of execution of their mandate. The fact that there was an agreement between the 1st respondent and the 1st interested party is not binding on the other respondents. The claimant has misapprehended the law establishing the 1st respondent to mean that it supervises county governors in exercise of their functions.
22. She ends in submitting a case of *res judicata* on the part of the court as this matter has been adjudicated by the court in Nyeri employment cause No 111 of 2018 which was heard and dismissed by the court on May 15, 2019 and Nairobi Employment petition 98 of 2019 between Kenya National Union of Nurses v Council of Governors and others which was dismissed by the court on the May 28, 2020. There is therefore no reasonable or justifiable cause of action to behold.
23. In a response to the 3rd-6th respondents statement of defence, the claimants in their response dated February 28, 2022 submit that the issue of jurisdiction has raised was heard and determined by this court.
24. The 1st respondent other case is that the claimant further in response to paragraph 3 and 4 of the 3rd to 6th respondent's statement of defence avers that the court vide a ruling delivered on July 26, 2021 made its determination on the issue of *res judicata* raised by the 1st respondent clearly stating that the suit refers to a different subject matter that has never been litigated to its finality thus the suit is not *res judicata* the 3rd to 6th respondents are invited to strict proof to the contrary.
25. Further, they reiterate their cases for entitlement to the relief sought and acknowledgment of the jurisdiction of this court to hear and determine this case.

The issues for determination therefore are;

1. Whether the respondents' complied with the terms of the agreement dated November 2, 2017.
2. Whether the claimants are entitled to the relief sought.



3. Who bears the costs of this cause.
26. The 1st issue for determination is whether the respondents' complied with the terms of the agreement dated November 2, 2017. The claimant submits a case on the respective roles of the respondents' in the return to work formulae signed on November 2, 2017. It is their case and submission that all the respondents' relate to the agreement and were duty bound to see to its implementation without exception. This includes the 1st respondent, the council of governors which was instrumental in the formulation, execution and implementation of the said agreement. All the respondents' collectively participated in the drawing and execution of the agreement and the parties were in consensus on the way forward. This is illustrated as follows;
- “Pursuant to the agreement entered into on the November 2, 2017 between the county government, the national government and the Kenya National Union of Nurses, it was resolved *inter alia* that all withheld salaries be paid into the nurses accounts by end of November, 2017 and in any case not later than 31st November, 2017...
- ...the agreement culminated into the striking nurses returning to work, ending their industrial strike that had plunged the health sector into a crisis...
- ...this is to request all the counties to comply with the terms of the afore mentioned agreement and promptly pay all the nurses their outstanding dues...”
27. The claimants case and submission is that the respondents' have neglected compliance with the return to work agreement aforesaid and should now be compelled to implement the same. It is their case and submissions that all other counties involved have complied with the agreement except the present case. On this they seek to rely on the authority of *Combe v Combe* 1995 1 All ELR 766 at 770, where Denning LJ observed as follows;
- “the principle as I understand it is that where one party has by his words or conduct made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, the once the other party has taking him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but accept legal relations subject to the qualification which he himself has so introduced even though it is not supported in point of law by any consideration, but only by his word.”
28. In similar circumstances, this court has in the authority of *Elgeyo Marakwet v Elgeyo Marakwet Public Service Board*, Eldoret ELRC No 233 of 2018 come out as follows;
- “The Kenya Union of Nurses has a recognition agreement with the Elgeyo Marakwet County Government Public Service Board. This agreement accords the Union the right to represent and negotiate with the respondent on behalf of its members on any matter affecting its members. Further the respondent has not denied that the County Government of Elgeyo Marakwet is not a member of the Council of Government established under *Intergovernmental Relations Act*. One of the mandates of the Council of Governors is to discuss and possibly find solutions to matters of mutual concern to the counties. It is commons knowledge that the nurses strike which took place around June 2017, affected the entire county almost grinding to a halt health services in public hospitals. Each county may well have dealt with the issue individually and came up with their home-grown solutions.



However, the issue being of national concern and of great public interest and to have a common approach, the council of governors together with the national government was the best forum suited to resolve the matter. The court will take judicial notice that several issues which are of concern to the counties have been discussed by the council of governors and a resolution reached and implemented by the counties. Issues of industrial relations are resolved through negotiations and where they fail parties have the right to resort to strike in case of employees or a lock-out in case of the employers. The nitty-gritty of Law of contract such as privity of contract may not be helpful under the circumstances.

The national and county government on one hand and the KNUN meet and hammered out a return to work formula that brought to an end the debilitating nurses strike. The nationwide strike was called off but on terms agreed by the parties and captured in the November, 2nd agreement. It would therefore be an unfair labour practice of the County Government Elgeyo Marakwet to introduce matters of privity of contract to escape the terms of a negotiated return to work formula and more so where there are allegations that some counties have honoured the agreements.

Besides if there was not privity of contract, why did the county nursing officer covenant through a letter dated January 8, 2018 that the process of paying outstanding salary was on.

To this extent the court hereby orders the 1st respondent through its authorised officers to honour the agreement dated November 2, 2017 between the National and County Government on one hand and Kenya National Union of Nurses on the other and pay the claimants as agreed in the agreement.

For avoidance of doubt the court will not make any pronouncement on the actual amount payable but will leave that to the parties to work out in accordance with the parameters set in the agreement of November 2, 2017 and return to court in 60 days for the recording of final orders.”

29. The claimants further submits that they have complied and met their side of the bargain by returning to work in accordance with the agreement. The balance of compliance is the respondents’.
30. The respondents’ variously brings out submissions in denial of the claim. The 1st respondent denies an employer-employee relationship with the claimant and also the jurisdiction of this court in hearing and determining the issue in dispute. They further submits that the return to work formulae is not possible as this was executed by parties who are not in an employment relationship with the claimants. Thus deny culpability in making payments of salary arrears owed to the claimants.
31. The defence by the 1st respondent as displayed in their case and written submissions amounts to nought. It is a defenceless defence. It is holey, punctured and unsustainable. In any events, the larger portion is spent, the same having been disposed off at a preliminary stage.
32. The 2nd – 6th respondents in their written submissions dated June 2, 2022 submit in reiteration of their case.
33. Overall, this is clearly a very straight forward matter. The parties herein went into an agreement for return to work on November 2, 2017 thereby ending the stalemate and ugly scenario occasioned by the national nurse’s strike subsisting at the time. The respondents’ to date have declined to honour their side of their bargain. They have not met or implemented payment of the nurses’ due salaries as per the return to work formulae. This is despite the fact that the claimants have resumed work in tandem



with the return to work formulae. I therefore find a case of non-compliance with the agreements as executed and set out.

34. The 2nd issue for determination is whether the claimants are entitled to the relief sought. They are. Having established and won on a case of non-compliance with the return to work formula, they become entitled to the relief sought.
35. I am therefore inclined to allow the claim and order relief as follows;
- i. A declaration be and is hereby issued that the claimants are entitled to be paid their salary arrears for the months of June, July, August, September and October, 2017.
  - ii. An order be and is hereby issued directing the respondents to comply with the terms of the agreement dated November 2, 2017 reached pursuant to the consultative forum between the County Governments of Kenya, The National Government and Kenya National Union of Nurses.
  - iii. That an order and is hereby issued that the respondents shall meet and pay to the claimants the sum of Kshs 208,512,500.00 being salary arrears for the months of June, July, August, September and October, 2017 as tabulated for every individual claimant.
  - iv. An order be and is hereby issued that the respondents shall meet and pay interest on the claimant's withheld salaries at court rates from the date of this judgment till payment in full.
  - v. The costs of this cause shall be met by the respondents.

**DATED AND DELIVERED AT NYERI THIS 31ST DAY OF OCTOBER 2022.**

**D.K.NJAGI MARETE**

**JUDGE**

**Appearances**

- 1. Mr. Kirwa instructed by Mwakio Kirwa & Co.Advocates for the claimant.**
- 2. Mr. Lawi instructed by Eugene N.Lawi Advocates for the 1st Respondent.**
- 3. Mr.Kamau instructed by Mbogo Ng'ang'a & Co.Advocates for the 3rd-6th Respondents.**
- 4. Mr.Kinoti for the 1st Interested Party/Union.**
- 5. No appearance for the 2nd Interested Party.**

