



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

PETITION NO. E007 OF 2020

IN THE MATTER OF ARTICLES 2, 10,, 22(1), 23, 24(1)(2) (5), 25, 28,36,37,40,41

(1) (2), 43, 47, 50, 159, 176, 258 and 259 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE ALLEGED VIOLATION AND / OR THRETNED

VIOLATION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUALS

AS ENSHRINED UNDER ARTICLES 25, 28, 36, 40, 43, and 47 OF THE CONSTITUTION OF KENYA.

BETWEEN

KENYA MEDICAL PRACTITIONERS,

PHARMACISTS AND DENTISTS' UNION(KMPDU).....PETITIONER

-VERSUS-

COUNTY GOVERNMENT OF BOMET.....RESPONDENT

JUDGMENT

1. The petitioner filed the petition dated 1st October, 2020 on 2nd October, 2020 through the firm of Ms. D.L Were & Were company advocates. Accompanying the Petition was an application brought under Certificate of Urgency seeking certain orders which the court directed be served upon the Respondents. It seems the application under Certificate of Urgency was abandoned and the parties proceeded with the main Petition.

2. The petition was based on the annexed supporting affidavit of **Doctor Davji Bhimji Atellah**, the petitioner's Secretary in the south Rift Branch. The petitioner prayed for the following orders:

a) A declaration be issued that the collective bargaining agreement between the Respondent and the petitioner that became effective on 1.07.2017, registered under RCS 239 of 2017, return to work formula between the petitioner and the respondent entered on 14.3.2017 and the petitioners scheme of service are legally binding and enforceable.

b) A declaration be issued that the Respondent is in contempt with respect to ELRC Certificate of registration of collective bargaining agreement- CA No.288 of 2017 issued by Hon Justice Nzioka wa Kamau and accordingly prescribe relevant punishment against the respondent as this Honourable Court deems appropriate.

c) That a declaration be issued that the strike called by the petitioner in its Notice dated 14· 09.2020 is lawful and therefore protected.

d) That the Respondent be compelled to comply with, address and or to implement the collective bargaining agreement between that the Respondent and the petitioner that became effective on 1.07.2017 and registered under RCA No. 239 of 2017 return to work formula entered into on 14. 03.2017 by the parties herein and the petitioners scheme of service with the Respondent and /or the contents of the strike notice dated 14.09.2020 and /or the petitioner concerns and grieves therein.

e) That the Respondent be condemned to pay costs of the petition.

3. The respondent opposed the petition by filing a replying Affidavit on 23rd November, 2020 sworn by Stella Langat, the county secretary of Bomet County, the Respondent herein.

PETITIONER'S CASE.

4. The petitioner avers that it entered into a Collective Bargaining Agreement(CBA) with the Respondent that took effect on **1st July, 2017** and duly registered under **RCA 239 of 2017** which up to date the Respondent has failed, neglected and or refused to fully honor the said agreement. They attached the Certificate of registration of the CBA and the CBA marked as annexure **1(a) & 1(b)** respectively.

5. On 14th March, 2017, the Petitioner and the Respondent further entered into a Return to work formula (**RTWF**)which according to the petitioner, Respondent has equally failed to implement. They annexed a copy of the return to work formula marked as annexure **2**.

6. It is averred that the Respondent failed to fully honor the petitioner's scheme of service with the respondent and other entitlements and annexed a copy of SRC Circular marked as annexure **3**.

7. The petitioner avers that the negotiation team developed a harmonized implementation matrix for the petitioners Collective Bargaining Agreement to be adopted by all counties whose intention was to ensure that all counties do form the CBA implementation and monitoring committee to spearhead the implementation of the petitioner CBA. They annexed a copy of the letter dated **20th December, 2017** from council of Governors which is marked as annexure **4**.

8. The Petitioner states that, the Respondent did not fully implement the **CBA, RTWF** and the scheme of service as a result of which the petitioner sought implementation of the same and legal redress from its counsel who issued demand notice and a subsequent reminder which they attached the minutes of 3rd June, 2020 together with a demand letter and a further reminder marked as **annexure 5 (a), (b) and (c)** respectively.

9. On **4th February, 2020**, the petitioner made a declaration of dispute over the implementation of the ministry of health and County Governments CBA's by reporting the same to the ministry of labour and attached a letter dated 4th February, 2020 marked as annexure **6**.

10. The petitioner states that they did not received any sufficient response from the ministry of labour and the respondent herein forcing them to issue a strike notice on 14th September, 2020 which notice expired on 4th October, 2020. They attached a copy of strike notice marked as annexure **7**.

11. They contended that they are adamant that the respondent will not address their grievances unless compelled by this court. Further that the petitioner members are due to strike to the detriment of the public especially the people of county government of Bomet who will be denied access to health service.

12. The petitioner contends that if the respondent is not compelled to address their grievances and concerns, they will proceed on strike and their members will be wrongly victimized by all and sundry for acting unprofessionally in neglect of their duties.

13. The petitioner avers that the intended strike is protected under section 79 of the labor relations Act 2007 and in compliance with sections 76 and 78(1)(e) of the Labour Relations Act.

14. It is stated that the failure of the respondent to implement the CBA that took effect on 1st July, 2017 and the RTWF that came to force on 14th March, 2017 exposed the petitioner's member to poor terms of service as such denying them the right to human dignity.

The Respondents case.

15. The Respondent admitted having entered into a collective Bargaining Agreement(CBA) with the petitioner whose effective date was 1st July, 2017.

16. The respondent states that it is desirous of implementing the CBA and have shown good faith by availing themselves on several occasions for consultative meetings with the petitioner with a view of resolving the outstanding issues with regard to implementation of the CBA.

17. It is averred that the Respondent has made several strides in implementing most of its obligations in the Collective Bargaining Agreement and gave example of the issue of promotions which they allege the Human Resource advisory committee has already recommended a number of petitioner members to the county public service board for promotion.

18. The Respondent states however that, the petitioner has failed to plead with clarity the constitutional provisions alleged to have been violated by the respondent as such is against the well-established principles of the Court of Appeal case of **Mumo Matemu –versus- Trusted society of human rights alliance – Civil Appeal no. 290 of 2012.**

19. On 27th October, 2020 the petitioner filed a supplementary Affidavit sworn by Dr. Davji Bhimji Atallah on 26th November, 2020 in reply to the respondents replying affidavit.

20. The petitioner reiterated the contents of its supporting affidavit and in addition stated that, after filling this suit, the Parties herein entered into a memorandum of understanding (MOU) on 3rd October, 2020 to resolve some of the issue in the Collective Bargaining Agreement such as promotions, comprehensive medical cover, car loan and mortgages, payment of indemnity among others. However, the petitioner contends that the Respondent has thwarted, discarded and refused to honor the said MOU. They attached the MOU and marked as annexure **DBA-1**.

21. It is stated further that, the Respondent has refused completely to implement the CBA and RTWF despite several request and annexed the letters of 9th October, 2020 and 9th November, 2020 marked as annexure **DBA-2(a) & (b)** respectively.

22. The petition proceeded by way of written submissions with the petitioner filing its' submissions on 11th March 2021 and the respondent filing their on 16th March 2021..

PETITIONER'S SUBMISSIONS

23. The petitioner submitted that there exist a collective Bargaining Agreement(CBA) and Return to Work Formula(RTWF) between the respondent and the petitioner as shown in annexure 1 and admitted by the respondent at paragraph 4 of the replying affidavit. Further that the said CBA took effect on 1st July, 2017 and was duly registered by the Court under RCA 239 OF 2017.

24. It was submitted that the strike notice dated 14th September, 2020 was necessitated by the lack of good faith by the respondent in implementing the CBA, RTWF and the subsequent MOU. He submitted that the said strike was lawful and protected since they followed due process in attempting to resolve the issue therein and even wrote the letter of 4th February, 2020 addressed to the cabinet secretary of labour which letter was never acted upon. Further that the Respondent admitted the issues herein and entered into an MOU dated 3rd October, 2020 which they have equally failed to implement to date. Accordingly, counsel submitted that the strike is lawful and protected.

25. On the issue of implementation of the CBA and RTWF. It was submitted that both documents were negotiated and arrived at voluntarily and duly executed by the parties herein to avoid industrial action which might have adverse ramifications on the delivery of health services to the public more specifically the people of the County Government of Bomet.

26. Counsel argued that the Respondent is in willful disobedience of a consent Orders having failed to comply with the CBA duly registered by this Court under RCA 239 OF 2017 and cited the case of Kenya **Medical Practitioners Pharmacists & Dentists Union (KMPDU) v County Government of Kisumu [2020] eKLR**. Where justice Mathew Nduma held; -

“...Workers cannot be held to servitude by a defaulting employer and they have a constitutional right to withdraw their services to compel such an employer to comply with the terms of a service contract. Human rights protected in our bill of rights may be limited including the right to go on strike lawfully and on lawful grounds provided under article 24 of the constitution of Kenya 2010. This is an inherent right that cannot be denied any person since the day slavery and slave trade was banished on the face of the earth”

27. Finally, Counsel urged this Court to allow the petition as prayed with costs.

Respondent's Submissions.

28. The respondent submitted on four major issues: whether there exists a collective bargaining agreement between the respondent and the petitioner that became effective on 1st July, 2017, which this court had jurisdiction to enforce; whether the petitioner has established and proved the alleged gross violation of law and adduced factual evidence to support the allegations; whether the petitioner has established and or proved the alleged constitutional violations and adduced factual evidence to support the allegations and whether the petitioner is entitled to costs.

29. **On the first issue** the respondent submitted that it is not in dispute that there exist a Collective Bargaining Agreement(CBA) that took effect on 1.7.2017 and registered under RCA No. 239 Of 2017, the Return to Work Formula (RTWF)of 14th March, 2017, the petitioner scheme of work of service with the respondent and the contents of the petitioner Strike Notice dated 14th September, 2020.

30. Counsel argued that the respondent and the petitioner have been negotiating and discussing on the implementation of the documents above. He however argued that when a dispute arises between the parties herein regarding the implementation of the CBA, the same should have been submitted before the Labour Officer for concealing as required under **Section 67** of the **Labour relations Act**. Consequently, it was submitted that the failure by the petitioner to submit the said dispute before a conciliator makes this petition premature and urged this Honourable Court to decline jurisdiction to deal with this petition.

31. The Respondent took issue with the petitioner petition with regard to prayers sought arising from the alleged violation of the fundamental constitutional rights and submitted that the petitioner has failed to plead with specificity and particularity those Articles which it complains to have been infringed as required in the case of **Anarita Karimi Njeru –v- The Republic (No. 1) [1978] KLR 154**.

32. He argues that, apart from merely listing the constitutional provisions alleged violated, the petitioner ought to have demonstrated how the respondent has violated Articles 25, 28, 36, 40, 43 and 47 of the Constitution. Further that in constitutional litigation, where a party seeking reliefs on basis of violation of fundamental freedoms in the constitution, that party must plead with higher degree of precision, show the provisions violated, the manner which the said provisions are violated and the jurisdictional basis for litigation. Counsel argued that the petitioner has failed to illustrate as such.

33. Counsel directed this Court to section 107 of the Evidence Act which states that; Whoever desires any court to give judgement as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist. Further that section 108 of the Evidence Act places the burden of proof on that person who would fail when no evidence at all is given by either side. He cited the case of **Anarita Karimi Njeru -versus Attorney General (Supra)** where the court stated that;-

“that in matter concerning enforcement of fundamental right and freedoms, a petitioner must plead with particularity that of which he complains, the provisions said to be infringed and the manner in which the particular right is said to have been violated”

34. He further cited the case of **Mumo Matemu –versus- Trusted Society of Human Rights Alliance & 5 others** where the court of Appeal Held that;

“The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements

35. He affirmed his argument by citing the case of **Kenya Youth Parliament & 2 others –versus- A.G & Another** which Court Held that;-

“We have not been shown the constitutional provisions which were violated requiring this court’s intervention. None of the Articles quoted is unclear or capable of more than one meaning. The Petitioners eventually conceded only asserting that their petition was a challenge and/or attack on the procedure and process of appointment. They failed to show any defects in that procedure and process. There was no evidence that all the allegations, complaints and all other matters complained of as against the 2nd Respondent were not considered by all the organs responsible for the process of his appointment. Those organs arrived at decisions which this court cannot undertake a merit review of. The 2nd Respondent having been appointed after the prescribed due process was adhered to, even if someone else would have arrived at a different verdict, our finding is that anyone having a reason to have the Director of Public Prosecutions removed from office must comply with the requirements of Article 158(4).”

36. Accordingly, it was submitted that its trite law that he who alleges must prove his case. And that the petitioner has failed to prove the constitutional rights allegedly infringed by the respondent and cited the supreme court decision in **Communication Commission of Kenya & 5 others –versus- Royal Media Services Limited & 5 others {2014} eklr** where the court held that;

“Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Annarita Karimi Njeru v. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

37. On the issue of costs, it was submitted that costs usually follow event and that the failure by the petitioner to prove its case to the required standard disentitled them to costs they are seeking. Counsel urged this Court to exercise its discretionary power granted under Rule 26(1) of the constitution of Kenya (Protection of rights and fundamental freedoms) practice and Procedure Rules 2013, of awarding cost judicially. He cited the case of **Cecilia Karuru Ngayu –versus- Barclays Bank of Kenya & another [2016] eklr**. Which Court held that;

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice” (Emphasis added).

38. In Conclusion Counsel urged this Honourable Court to disallow the petition on the reason that firstly it was prematurely instituted before exhaustion of conciliatory process and secondly that the petitioner have failed to demonstrate with precision and particularity the specific Articles of the constitution which it alleges have been violated.

39. I have examined the averments of the parties and submissions filed herein. There is no contention that the petitioner and respondent have a CBA entered into and duly registered on 1/7/2017. The respondent agreed that they entered into the CBA with the petitioner and have averred that they are making every attempt to ensure its implementation. The respondent also admitted to having signed a RTWF with the petitioner on 14/3/2017.

40. The respondent’s counsel who intimated that the 2 parties have been negotiating over the implementation of the CBA and the RTWF and therefore the filing of this petition was premature.

41. It is true that the parties have been negotiating over the implementation of the CBA and the RTWF until it seems negotiations failed in December 2020. It would however been more prudent to start with negotiations before proceeding before this court.

42. That notwithstanding, the parties have been before court and the respondents have in my view admitted to not implementing the CBA and the RTWF in full. With that understanding prayer (a) & (b) stands and is allowed as follows;-

a) A declaration be issued that the collective bargaining agreement between the Respondent and the petitioner that became effective on 1.07.2017, registered under RCS 239 of 2017, return to work formula between the petitioner and the respondent entered on 14.3.2017 and the petitioners scheme of service are legally binding and enforceable.

b) A declaration be issued that the Respondent is in contempt with respect to ELRC Certificate of registration of collective bargaining agreement- CA No.288 of 2017 issued by Hon Justice Nzioka wa Kamau and accordingly prescribe relevant punishment against the respondent as this Honourable Court deems appropriate.

c) Costs to the petitioners.

43. As to the rest of the prayers what should follow is putting in place an implementation matrix of the orders granted failure of which appropriate action should be taken against the respondents.

DATED AND DELIVERED IN OPEN COURT THIS 18TH DAY OF MARCH, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mr. Were for the Petitioner – present

Respondents - absent