



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 45 OF 2020

KENYA NATIONAL UNION OF NURSES.....CLAIMANT

v

VIHIGA COUNTY PUBLIC SERVICE BOARD.....RESPONDENT

RULING

1. The Kenya National Union of Nurses (the Union) instituted these legal proceedings against the County Public Service Board, Vihiga (the Board) and the Issues in dispute was stated as:

- (i) Non-payment of worked salaries and allowances to 98 nursing officers from November 2019 to date by the Respondent.
- (ii) Unfair and unlawful labour practices by the Respondent.

2. Filed at the same time was a Motion under a certificate of urgency seeking interim orders.

3. On a date which is not clear from the record, the Court, after hearing submissions from the parties, ordered that:

Upon hearing the submissions both parties, the interim orders granted on 25th/6/2020 in Cause No. 113 /2019 to apply mutatis mutandis to the present suit. The two files (matters) are consolidated, and they be mentioned on 29th July 2020 to record consent and for further directions (the consolidated file is Kisumu Cause No. 113 of 2019, *Kenya Union of Clinical Officers & 76 Ors v County Government of Vihiga & 2 Ors* (consolidated with Kisumu Petition No. 40 of 2019 and Nairobi Petition No. 232 of 2019).

4. The Board had raised a preliminary objection in Kisumu Cause No. 113 of 2019, contending that the Court had no jurisdiction because of section 77 of the County Governments Act.

5. In a Ruling delivered on 25 June 2020, the Court identified one of the Issues as:

Whether a party may be allowed to pursue a suit before a court of law before exhausting the appeal procedure to the Public Service Commission under section 86 of the Public Service Commission Act 2017 and section 77(2) of the County Governments Act, 2012.

6. The Court, in answering the question, cited *Secretary Wajir County Public Service Board & Ar v Hulbhan Gedi Abdille* (2017) eKLR for holding that a suit alleging violation of fundamental rights and freedoms is not amenable to pre-appeal process to the Public Service Commission in terms of section 85(a) and 86 of the Public Service Commission Service Act, 2017 and section 77(2) of the County Governments Act, 2012.

7. Despite the Ruling, the Board filed a Notice of Preliminary Objection on 30 November 2020 contending that:

- (i) This suit has been filed in breach of section 77 of the County Governments Act, and therefore this Court has no jurisdiction to determine the same.

8. Section 77 of the County Governments Act provides:

77 Appeals to the Public Service Commission

- (1) Any person dissatisfied or affected by a decision made by the County Public Service Board or any person in exercise or

purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this part referred to as the "Commission") against the decision.

(2)

9. The Union filed grounds of opposition to the Objection on 25 January 2021.

10. The Court directed the parties on 26 January 2021 to file and exchange submissions on the Objection.

11. The Board filed its submissions on 1 April 2021 (should have been filed/served by 26 February 2021) while the Union had filed its submissions on 22 March 2021.

12. The Court has considered the submissions.

13. This Court differently constituted already rendered itself on the applicability of section 77 of the County Governments Act to these proceedings.

14. If this Court were to revisit the question in this particular proceedings, it would be purporting to sit on appeal of its decision.

15. The Court, therefore, declines to allow the objection.

16. The Court must, however, note as a matter of concern that the provisions of section 77 of the County Governments Act and sections 85, 86 and 87 of the Public Service Commission Act, 2017 have created a legal tension with regard to the timelines for dispute resolution of trade disputes as provided under Part VIII of the Labour Relations Act and section 47 of the Employment Act, 2007.

17. The Court cannot at this juncture speculate on how the tension will be resolved as the parties did not identify it as one of the Issues.

18. The parties are social partners. No order on costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 28TH DAY OF APRIL 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Union Odongo Okatch, Industrial Relations Officer

For Respondent Liko & Anam Advocates

Court Assistant Chrispo Aura