



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. E637 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

COUNTY GOVERNMENT OF MAKUENI **1ST CLAIMANT**

MAKUENI COUNTY PUBLIC SERVICE BOARD **2ND CLAIMANT**

VERSUS

KENYA UNION OF CLINICAL OFFICERS (KUCO) **1ST RESPONDENT**

KENYA NATIONAL UNION OF NURSES (KNUN) **2ND RESPONDENT**

KENYA HEALTH PROFESSIONAL SOCIETY (KHPS) **3RD RESPONDENT**

KENYA NATIONAL UNION OF MEDICAL

LABORATORY OFFICERS (KNUMLO) **4TH RESPONDENT**

KENYA NATIONAL UNION OF NUTRITIONISTS

AND DIETICIANS (KUNAD) **5TH RESPONDENT**

KENYA NATIONAL UNION OF

PHARMACEUTICAL TECHNOLOGISTS (KNUPT) **6TH RESPONDENT**

VERSUS

THE CABINET SECRETARY,

LABOUR AND SOCIAL PROTECTION **1ST RESPONDENT**

JUDGMENT

By Statement of Claim filed on 9th October 2020, the two Claimants, the Government of Makueni County and Makueni County Public Service Board seek orders as follows -

1. That this Court declares the strike called by the Respondents in their notice dated 28th September, 2020 unlawful, prohibited and therefore unprotected.
2. That this Court directs the Interested Party to appoint a conciliator to attempt to resolve the trade dispute between the Applicant and the Respondents which may remain unresolved through the ongoing engagements between the parties
3. That the Respondent be condemned to pay costs of this application

Due to the urgency of the matter the Claimants had filed this claim by way of a certificates of urgency and notice of motion application dated 9th October 2020 which sought for the following orders:

- (i) That for the reasons set out in the Certificate of Urgency filed herewith, service of this application upon the Respondents be dispensed with and the Application be certified as urgent and be heard *ex-parte* in the first instance.
- (ii) That pending the hearing and determination of this application, this Court be pleased to grant an injunction prohibiting/restraining the Respondents, its officials, representatives, agents, and/or its members from causing, effecting, inciting or otherwise calling for any industrial action and or withdrawal of services by the Applicant's employees.
- (iii) That pending the hearing and determination of this application, this Court be pleased to grant an injunction prohibiting/restraining the Respondent's members in the County Government of Makueni from engaging in any industrial action or withdrawing their services.
- (iv) That this Court declares the strike called by the Respondents in their notice dated 28th September, 2020 unlawful, prohibited and therefore unprotected.
- (v) That this Court direct the interested party to appoint a conciliator to attempt to resolve the trade dispute between the Applicant and the Respondents.
- (vi) That the Respondents be condemned to pay the costs of this Application

The court heard the motion *ex-parte* on 9th October, 2020 and granted interim orders in terms of prayers (ii) and (iii) of the application.

On the 14th October 2020 when the application came for inter-partes directions parties were referred to the County Labour Office Makueni for conciliation. On the 30th November 2020 parties informed the court that they were unable to resolve the issues during conciliation and had been issued with a letter of disagreement by the Labour Office Makueni to enable the matter to be adjudicated before the court. Parties took directions that the matter do proceed with the hearing of the main suit. They were granted leave to file their responses and orders made that the matter be dispensed with by way of written submissions.

Only the 2nd and 3rd Respondents filed their response to the statement of claim.

Claimant's Case

The Claimants in their statement of claim state that they have an existing recognition agreement with the 2nd and 3rd Respondents which provides for procedures on resolving disputes between the parties. That over time disputes have been resolved without resorting to industrial action.

The Claimant states that on 30th April 2020 the Respondents sought a meeting with the Claimants seeking to raise a number of matters which included promotions and salaries for the health workers. The Claimants maintain that between May 2020 and September 2020 the Claimants and the Respondents held several meetings to discuss the issues raised which they have continued to diligently and systematically address.

The Claimants state that despite the continued engagements between the parties the Respondents proceeded to serve them with a strike notice dated 28th September 2020 threatening to withdraw the services of their members at the expiry of the notice.

The Claimants plead that the 1st, 4th and 5th Respondents who have purported to join the said Strike have no locus to issue a strike notice as the Claimants do not have a recognition agreement with them. The Claimants maintain that the strike notice issued is unlawful and illegal and ought to be prohibited as parties are yet to exhaust all the available dispute resolution channels. The Claimants state that the Respondents are engaged in essential service provision and a call for industrial action should be resorted to only as the last option. They are apprehensive that unless the orders sought are granted the consequences of the strike will put to risk the public who rely on the services of the Respondents members.

The Claimant further contends that the strike is unprotected, prohibited and uncalled for.

2nd Respondents case

In response to the statement of claim, the 2nd Respondent acknowledges that it issued a Strike Notice to the Claimants but contends that the Claimants have failed to address the issues raised by the Respondents hence their resorting to the strike which is within the law. It further states that the Respondents raised issues of their members delayed promotions, unfair contractual employment and non-payment of gratuity benefits, which issues are genuine and ought to be resolved. Further it maintains that the right to go on strike is a fundamental right guaranteed by the Constitution and its members are protected under Article 41 of the Constitution of Kenya.

The 2nd Respondent states that the Claimant has not demonstrated any inconvenience they would suffer if they addressed the issues in dispute. It urges the court to dismiss the claim with costs to the 2nd Respondent.

3rd Respondent's Case

In response to the statement of claim the 3rd Respondent filed a statement of response dated 15th January 2021. It acknowledges that it has a recognition agreement with the Claimants herein. It maintains that being a registered trade union it is charged with constitutional duty to ensure that its members are within the scope of trade union representation and enjoys all the privileges and fair labour practices. It maintains that its members have legitimate expectations for re-designation, promotion and fairness in employment pursuant to the requirement endorsed in the Public Service Commission Human Resource Manual 2016 and it is endowed with the responsibility to ensure the same is implemented.

It maintains that issues relating to job groups and promotions are provided for in the Human Resource Policies and Procedures Manual 2016 and that matters pertaining to re-designation and promotions are equally provided for in the manual.

It maintains that the Constitution of Kenya recognizes the right to fair remuneration, that the Employment Act requires every employer to ensure that men and women workers are paid equally for work of equal value. As such Claimants should be barred from employing members of the 3rd Respondents on terms that are less favorable including biased contracts.

The 3rd Respondent states that the provisions of Article 41 of the Constitution which gives life to Section 76 of the Labour Relations Act No. 14 of 2007 should be enjoyed by all.

It maintains that the issues relating to re-designation and promotions are not issues to belabor in court but rather require the goodwill and action of the applicant without compulsion through an industrial action. It further states that the fact that its members provide essential services should not be used by the Claimants as a reason for failure to discharge its duties and that its actions cannot be deemed as unlawful or illegal as sufficient notice has been issued as required by law.

It maintains that the claim is unmerited, baseless, frivolous, and malicious and an abuse of the court process and urges the court to dismiss it with costs.

Submissions

The Court gave directions on the 20th of January 2021 that the main suit be dispensed with by way of written submissions. At the time the court was retiring to write this judgment only the 2nd Respondent had filed their submissions.

2nd Respondent's Submissions

The 2nd Respondent submits that the grievant nurses have written several letters to the Claimants requesting for what is rightfully theirs but the Claimants have always turned a deaf ear on them which prompted them to issue a strike notice.

Further it submits that despite the court referring the parties for reconciliation at the Labour Office in Makueni the Claimants failed to attend the conciliation meeting leading to the issuance of certificate of unresolved dispute from the conciliator.

The 2nd Respondent submits that the Claimants have not denied issues of promotion and re-designation have not been addressed hence the strike by the health workers to compel the Claimants to address the said issues. It further submits that Section 78 and 80 of the Labour Relations Act does not supersede the Constitution on the right to go on strike.

It submits that the Claimants have deliberately and willingly failed to confirm promotions for qualified and deserving 146 persons who had applied for the same. In so doing the Claimants have contravened Section 25 of the Human Resource Policy Manual for the public service 2016.

The 2nd Respondent further submits that the Claimants have failed to re-designate nine deserving nursing officers contrary to Section 21 of the Human Resource Policy Manual for the Public Service, 2016. It states that the Claimants actions to delay promotions and re designation for the deserving nursing officers constitute unfair labour practices contrary to Article 41 of the Constitution.

The 2nd Respondent submits that the Claimants have been engaging nurses on renewable contracts of 1 and 3 years since 2015 for a job that is permanent in nature and paying the contracted nurses lower salaries than their colleagues who are in permanent and pensionable terms yet they have equal qualifications and perform equal work. That this is contrary to section 5(2) and (3) of the Employment Act.

It submits that its members being 146 nurses who were due for promotion but have not been promoted be paid the arrears emanating from the lack of promotion and re-designation with interest.

The 2nd Respondent urges the court to direct the Claimants to issue letters of promotion to deserving nurses, absorb nurses working on contractual basis to work on permanent and pensionable terms and to regularize the salaries and allowances of nurses to be in tandem with the salaries and remuneration commission guidelines in respect of individual academic qualifications.

It further submits that the Claimants suit lacks merit and should be dismissed with costs.

Analysis and Determination

Having considered the pleadings and the submissions by the 2nd Respondent, the issue for determination is whether the strike called by the Respondents vide their notice dated 28th September 2020 is unlawful, prohibited, unprotected. The second prayer which was to appoint a conciliator was overtaken by events when parties were directed to attend conciliation at the Labour Office Makueni where a certificate of disagreement was issued after the parties failed to reach an agreement.

The Claimants have stated that the Respondents offer essential services and a withdrawal of the said services is likely to lead to loss of life.

Article 41(2) of the Constitution provides for the right of employees to go on strike as follows –

(2) Every worker has the right—

(a) to fair remuneration;

(b) to reasonable working conditions;

(c) to form, join or participate in the activities and programmes of a trade union; and

(d) to go on strike

Section 82 of the Labour Relations Act which prohibits strikes in essential services provides as follows –

81. Essential services

(1) In this Part “essential services” means a service the interruption of which would probably endanger the life of a person or health of the population or any part of the population.

(2) The Minister, after consultation with the Board—

(a) shall from time to time, amend the list of essential services contained in the Fourth Schedule; and

(b) may declare any other service an “essential service” for the purpose of this section if a strike or lock-out is so prolonged as to endanger the life, person or health of the population or any part of the population.

(3) There shall be no strike or lock-out in an essential service.

(4) Any trade dispute in a service that is listed as or is declared to be an essential service may be adjudicated upon by the Industrial Court.

(5) A collective agreement may provide that any service may be deemed to be an essential service.

Article 41 gives workers the right to strike while Section 81 of the Labour Relations Act prohibits strikes in essential services. Under the Fourth Schedule to the Act, health services are categorised as essential services.

Article 24 of the Constitution provides for limitation of right and fundamental freedoms under the Bill of Rights as follows –

24. Limitation of rights and fundamental freedoms

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

(4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

(5) Despite clauses (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service—

(a) Article 31—Privacy;

(b) Article 36—Freedom of association;

(c) Article 37—Assembly, demonstration, picketing and petition;

(d) Article 41—Labour relations;

(e) Article 43—Economic and social rights; and

(f) Article 49—Rights of arrested persons.

Withdrawal of medical services would derogate or violate other rights in the Constitution including the right to life under Article 26, the right to the highest attainable standard of health under Article 43(1) and the right to emergency medical treatment under Article 43(2).

Withdrawal of medical services would further subject patients and their relatives and minders to cruel, inhuman and degrading treatment where they are not able to obtain medical services from private medical providers.

The limitations under Section 81 are reasonable and justifiable as the intention of the Section is to preserve other core rights of innocent members of Society who would be subjected to inhuman treatment should the Respondent's members be allowed to withdraw their labour by going on strike. Article 20(4) permits the Courts to interpret the Bill of Rights in a manner that promotes –

(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(b) the spirit, purport and objects of the Bill of Rights.

Section 81(1) of the Labour Relations Act explains the reason for declaration of certain services or sectors as essential, being that the interruption of such services are likely to endanger life of a person or health of the population or any part of the population. Withdrawal of services by nurses would endanger the lives of all persons who require medical services in public medical institutions.

In **Petition No. 70 of 2014 Okiya Omtatah Okoiti v The Attorney General & 5 Others** Nduma J. held that -

"These provisions derogate from the core content of the right to strike provided under Article 41(2)(d) of the Constitution and the legislature should revisit the law with a view to remove the apparent conflict between the Constitutional provision and the statutory law.

In view of the above, the court holds that employees in the essential service only need to conclude a collective bargaining agreement which provides an effective frame work for expedient dispute resolution where the employer delays conclusion of a collective bargaining agreement, otherwise, the Labour Relations Act, 2007, provides sufficient dispute resolution mechanisms which include, mandatory conciliation before the matter is escalated for adjudication in court."

In **Kenya Ferry Services Limited v Dock Workers Union (Ferry Branch [2015] eKLR**, Rika J. stated as follows -

"46. The right to strike is a fundamental element in stable collective bargaining. Employees promote and protect their economic and social interest, and resolve labour disputes, through strike action. As is argued on the issue of wage determination however, the right to strike transcends the interests of the involved Employer and Employee. Strike action, particularly in essential services

sectors, have ramifications for the Public and the National Economy. The right to strike is therefore balanced against the fundamental rights of others. It is argued that the right of non- strikers, that is to say Employees who may feel they should continue to work during the strike, must be protected. Similarly the fundamental right of the Public to essential services must be protected.”

Further, in **Kisumu ELRC Petition No. 70 of 2014, Okiya Omtatah Okoiti v The Attorney General (supra)**, the right to strike under Article 41 is not absolute. Section 81 of the Labour Relations Act which prohibits strikes in essential services is not in conflict with Article 41, as Section 81 of the Labour Relations Act meets the threshold under Article 24 of the Constitution for limitation of rights and fundamental freedoms and is therefore a reasonable limitation to the right to strike.

For the foregoing reasons, I make the following orders –

1. I declare the strike called by the Respondents by notice dated 28th September 2020 unlawful and such strike prohibited under Section 81 of the Labour Relations Act, therefore unprotected.

Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF MAY 2021

MAUREEN ONYANGO

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 March 2020 and subsequent directions of 21st 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 has 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.

MAUREEN ONYANGO

JUDGE