



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 64 OF 2020

KENYA NATIONAL UNION OF NURSES.....CLAIMANT

VERSUS

KISUMU COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

KAKAMEGA COUNTY PUBLIC SERVICE BOARD.....2ND RESPONDENT

NAKURU COUNTY PUBLIC SERVICE BOARD.....3RD RESPONDENT

KERICHO COUNTY PUBLIC SERVICE BOARD.....4TH RESPONDENT

MAKUENI COUNTY PUBLIC SERVICE BOARD.....5TH RESPONDENT

LAIKIPIA COUNTY PUBLIC SERVICE BOARD.....6TH RESPONDENT

MURANGA COUNTY PUBLIC SERVICE BOARD.....7TH RESPONDENT

NYERI COUNTY PUBLIC SERVICE BOARD.....8TH RESPONDENT

NYANDARUA COUNTY PUBLIC SERVICE BOARD.....9TH RESPONDENT

KIAMBU COUNTY PUBLIC SERVICE BOARD.....10TH RESPONDENT

KITUI COUNTY PUBLIC SERVICE BOARD.....11TH RESPONDENT

KILIFI COUNTY PUBLIC SERVICE BOARD.....12th RESPONDENT

RULING

1. The Kenya National Union of Nurses (the Union) lodged a Statement of Claim against the 12 County Public Service Boards (the Boards) on 27 August 2020, and the issue in dispute was stated as:

Unfair labour practices by the Respondents.

2. The unfair labour practices, it was alleged, arose because the Boards had employed nurses on short term contracts on less remuneration than nurses on permanent and pensionable terms, and the Boards were discriminating against the contract nurses by not paying them a COVID19 allowance.

3. The Union asserted that the action of the Boards contravened Article 41 of the Constitution, sections 5(2) and (3), 26 and 37 of the Employment Act, 2007, Part II, Sections 16 and 17 of the Public Service Policy Manual as well as section C.2(1) of the Human Resource Policy Manual for the Public Service.

4. The Union prayed for the following remedies:

(1) THAT the Honourable Court issues a declaration order that the employment of nurses on short term contracts by the County Governments is unlawful as the jobs and responsibilities of nursing are permanent and pensionable in nature.

(2) THAT this Honourable Court issues an order directing the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th and 12th Respondents to convert the terms of all nurses who are employed on contract into permanent and pensionable terms in line with their qualifications.

(3) THAT this Honourable Court be pleased to issue an order directing the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th and 12th Respondents to pay in arrears the difference in payment of basic salary and allowances accruing from underpayment of the Grievant nurses.

(4) THAT this Honourable Court be pleased to grant any other orders as it deems fit and just to meet the ends of justice.

(5) THAT costs of this suit be borne by the Respondent.

5. Filed at the same time was a Motion seeking interim reliefs.

6. The Court directed the Union to serve the Motion and further that the parties file and exchange responses and submissions.

7. When the Cause was mentioned on 30 November 2020, the Court directed that both the Motion and Cause be taken together. The Union was directed to ensure all the Boards were served.

8. The County Public Service Board, Muranga, caused a Notice of Appointment of Advocate and Grounds of Opposition to be filed on 13 October 2020.

9. The County Public Service Board, Kakamega filed a Notice of Appointment of Advocates and a replying affidavit on 19 October 2020.

10. The Union filed a witness statement on 2 December 2020, and on the same day, the Union filed an Amended Statement of Claim in which it contended that the Court had issued an order staying and suspending the implementation of the policy of employing public and civil servants under contracts in Nairobi Petition No. 113 of 2019, *Kenya National Union of Nurses v Cabinet Secretary, Ministry of Public Service & Ors*, while the Court had ordered the County Public Service of Busia to regularise the salaries and allowances of nurses to be in compliance with the guidelines issued by the Salaries and Remuneration Commission in Kisumu Cause No. 32 of 2020, *Kenya National Union of Nurses v Busia County Public Service Board*.

11. The County Public Service Board, Muranga filed a Response to the Amended Statement of Claim on 29 March 2021

12. The County Public Service Board, Kilifi filed a Notice of Appointment of Advocates on 1 April 2021, and when parties appeared for directions on 24 May 2021, the Court directed the parties to address a jurisdictional question anchored on section 77 of the County Governments Act and section 87 of the Public Service Commission Act, 2017.

13. The Union filed its submissions on 25 June 2021, while the Respondents submissions were not on record by the agreed timelines.

14. In its submissions, the Union urged that the process envisaged by section 77 of the County Governments Act was optional because the word *may* had been used.

15. In the Union's view, the subject of the dispute had arisen after signing the contracts and therefore did not fall within the ambit of the Boards.

16. In the same vein, the Union contended that section 86(1) of the Public Service Commission Act made it optional whether a person dissatisfied ought to appeal to the Public Service Commission Act.

17. The Union cited the cases of *Abdikadir Suleiman v County Government of Isiolo & Ar* (2015) Eklr, *Thuranira Salesio Mutuma v County Public Service Board & 2 Ors* (2019) eKLR and *County Assembly of Embu v Embu County Public Service Board* (2021) eKLR to advance their submissions.

18. The Union was in the main challenging the terms and conditions of service under which the Boards had contracted nurses.

19. Article 234(2)(i) of the Constitution as read with section 77(2)(a) & (b) of the County Governments Act and sections 85(a) & (b), 86, and 87 of the Public Service Commission Act has given the Public Service Commission first instance jurisdiction in disputes concerning terms and conditions of service.

20. Section 85 of the Public Service Commission Act is in the following terms:

85. Appeal from County Government public service

The Commission shall, in order to discharge its mandate under Article 234(2)(i) of the Constitution, hear and determine appeals in respect of any decision relating to engagement of any person in a County Government, including a decision in respect of —

(a)...

(b) remuneration and terms and conditions of service;

21. On the other hand, section 87(2) of the Public Service Commission Act, 2017 expressly outlaws first instance court proceedings before the appellate procedure through the Public Service Commission have been exhausted.

22. Another applicable provision of the Act is section 87(2) of which provides that:

A person shall not file any legal proceedings in any Court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from county government public service unless the procedure provided for under this Part has been exhausted.

23. The Court of Appeal had occasion to consider the implication of section 77 of the County Governments Act in *Secretary, County Public Service Board and Ar vs Hulbhan Gedi Abdille (2017) eKLR* where it stated as follows:

There is no doubt that the Respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by Section 77 of the Act. The Section provides not the only forum through which the Respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one specifically tailored by the legislators to meet needs such as the Respondent's. In our view, the most suitable and appropriate recourse for the Respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance.

24. In terms of section 87(2) of the Public Service Commission Act, the Union's first port of call should have been to appeal to the Public Service Commission on the complaints regarding the terms and conditions of service of the contract nurses.

25. The Union did not demonstrate that it had utilised the avenue provided by the aforesaid provisions of law.

26. The Courts have now developed jurisprudence that where there are alternative dispute resolution mechanisms, they must be utilised before moving the Court (see the *Speaker of the National Assembly v Njenga Karume (2008) 1 KLR 425*, *Geoffrey Muthinja & Ar v Samuel Muguna Henry & 1756 Ors (2015) eKLR* and *Secretary, County Public Service Board & Ar v Hulbhai Gedi Abdille (2017) eKLR*).

27. On the merits of the Cause, the Employment Act, 2007, the primary law, recognises different types of contracts of definite and indefinite duration.

28. It is therefore left to party autonomy to agree on the type of contracts that fits their circumstances.

29. A contract would, in the circumstances, not be unlawful or discriminative merely because of its duration.

30. That is not to say that a contract should not incorporate the minimums contemplated by the law, such as minimum wage, annual leave, entitlement to housing or house allowance, and the like.

31. In the case of the nurses, the Union did not point out any term or condition in the contracts issued to the nurses herein that went against the prescribed minimums.

32. *Prima facie*, therefore, there is nothing unlawful about fixed-term contracts issued by the Boards.

33. Before concluding, the Court must note that it has observed that the Union filed suits on the same subject matter in different Courts (including those already mentioned above and Kisumu Cause No. 51 of 2020, *Kenya National Union of Nurses v Bungoma County Public Service Board*).

34. Such type of litigation is not only a waste of precious judicial time but has the potential to cause embarrassment to the Court.

35. The Court further notes that Union filed a Motion on 2 November 2021, contending that the Issues in dispute had been resolved after the Public Service Commission issued a Circular on 3 August 2021 on the question of contract employees.

36. Without determining whether that is so, the Court must observe that it was dealing with a jurisdictional question and not the substance of the dispute.

Conclusion and Orders

37. In light of the above, the Court declines jurisdiction, and even if it were wrong on that conclusion, it would still have dismissed the Cause for lack of merit.

38. The Cause is dismissed with costs to the 2nd and 7th Respondents.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 17TH DAY OF NOVEMBER , 2021

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For the Union Mr Mwendwa, Industrial Relations Officer

For 2nd Respondent Phoebe Munihi Muleshe & Co. Advocates

For 7th Respondent Muchoki, Kang'ata, Njenga & Co. Advocates 1st, 3rd, 4th, 5th, 6th, 8th, 9th, 10th,

11th and 12th Respondents did not participate

Court Assistant Chrispo Aura