



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

(Before Hon. Lady Justice Maureen Onyango)

CAUSE NO. 2 OF 2018

ALEX MAKAU AND 114 OTHERS.....CLAIMANTS

VERSUS

ST MARY'S MISSION HOSPITAL LIMITED..... 1ST RESPONDENT

ASSUMPTION SISTERS OF NAIROBI

REGISTERED TRUSTEES..... 2ND RESPONDENT

CONSOLIDATED WITH

CAUSE NO. 3 OF 2018

WISTON MAKANGA AND 228 OTHERS..... CLAIMANTS

VERSUS

ST MARY'S MISSION HOSPITAL LIMITED..... 1ST RESPONDENT

ASSUMPTION SISTERS OF NAIROBI

REGISTERED TRUSTEES..... 2ND RESPONDENT

JUDGMENT

St. Mary's Mission Hospital is a limited liability company registered in Kenya as a company limited by guarantee. It was incorporated in Kenya on 22nd June 1999 to among other powers, run a hospital and training facility for medical interns, postgraduate students and nurses. The company operates two hospitals, St. Mary's Mission Hospital in Langata Nairobi, and St. Mary's Mission Hospital, Elementaita, Nakuru County.

The claimants are employees of the two hospitals in Langata, Nairobi and Elementaita. The origin of this suit is **Nakuru Civil Suit No. 224 of 2010** between **William Charles Fryda v Assumption Sisters of Nairobi Registered Trustees and Another** as consolidated with **Nakuru ELC Civil Suit No. 238 of 2012** between **Regina Pacis University College (through the Board of Trustees) and Another v William Charles Fryda**. The two suits arose out of disagreement over ownership and management of the two hospitals in Langata, Nairobi and Elementaita. In his judgment delivered on 28th September 2017, Sila J. ordered as follows –

- (i) That the properties LR No. 27228; LR No. 2 7229; LR No.9361/10 and Kiine/Rukanga/2846 are not held in trust for Rev. Dr. William Fryda.*
- (ii) That the properties LR No. 27228; LR No. 27229; LR No.9361/10 and Kiine/Rukanga/2846 currently registered in the name of Assumption Sisters of Nairobi Registered Trustees be transferred to the company St. Mary's Mission Hospitals being a company limited by guarantee and to be held by the said company under a charitable trust for purposes of developing, maintaining and/or operating a hospital specifically aimed for the poor in society.*
- (iii) That the hospitals located in LR No. 27228 and/or LR No. 27229, and LR No. 9361/10 commonly identified as St. Mary's*

Mission Hospitals be henceforth under the management of the company St. Mary's Mission Hospitals a company limited by guarantee.

(iv) That Regina Pacis University has no claim over the land parcel LR No. 27229, or over any of the other land parcels in issue in this suit and the Trust Deed assigning land to the said University is void to the said extent.

(v) That the user of the properties LR NO. 27228; LR No. 27229; LR No. 9361/10 and Kiine/Rukanga/2846 other than that of providing health services to the poor or such other auxiliary purposes is null and void and Assumption Sisters of Nairobi are hereby directed to embark on a relocation or discontinuation programme of any such purposes.

(vi) That in respect of accounts, Dr. William Fryda to provide details of all accounts forthwith and to surrender the same to St. Mary's Mission Hospital (the company) and if found necessary submit to an audit as directed in this judgment.

(vii) That the prayer to have Dr. William Fryda permanently restrained is not granted but the parties to agree on the position of Dr. Fryda within the hospitals given the import of the judgment herein that ownership of the suit properties and management of the hospitals will be with the company St. Mary's Mission Hospital.

(viii) There shall be no orders as to costs."

Following the judgment, there appears to have been a dispute over the handing over of the hospitals between William Charles Fryda a.k.a "Fr. Fryda" a.k.a "Dr. Fryda" on the one hand and the Assumption Sisters of Nairobi on the other. By order dated 23rd November 2017 the court ordered that -

1. The 2nd Defendant and/or its appointed agents/employees are granted authority to break into and gain forceful entry into L.R NO 27228 AND 22729 situated in Langata in Nairobi in execution of the Orders of the Court on 28th September, 2017.

2. The Officer Commanding Langata Police Station (O.C.S) or any other officer of the said station of the rank above an Assistant Inspector of Police do provide security and police assistance of the execution of Order, 1 above.

3. The 2nd Defendant and/or its appointed agents/employees are granted authority to break into and gain forceful entry into L.R NO L.R NO 9361/10 situated in Elementaita in Nakuru in execution of the orders of the Court on 28th September, 2017.

4. The Officer Commanding Gilgil Police Station (O.C.S) or any other officer of the said station of the rank above an Assistant Inspector of Police do provide security and police assistance of the execution of Order 3 above.

5. That order do issued directing any bank holding an account relating to St. Mary's Hospitals not to allow any transactions on the same by any other person other than the Applicants and/or their agents, and to hand over such accounts to the Applicants herein.

6. That costs for this application are awarded to the Applicants against the Respondent and any costs that the Applicants may incur in enforcing the Orders of this court will also be shouldered by the Respondent.

Before and during the hearing of the two suits in ELC Nakuru, the management and operations of the two hospitals were carried out by Dr. Fryda as the Chief Executive Officer (CEO). The employees in both hospitals were therefore recruited by him or under his leadership.

It is not contested that following the decision in Nakuru ELC Case Numbers 224 of 2010 as consolidated with ELC 238 of 2012, there was a takeover of the hospitals in both Langata and Gilgil. The takeover of Nairobi was on the morning of 28th December 2017.

According to the evidence of the claimants, the takeover was violent. Their evidence was that staff in St. Mary's Nairobi were thrown out of the hospital and their residences within the hospital at about 5.00 am on 28th December 2017 by what CW2 referred to as about 200 hired goons with about a similar number of policemen. The goons and policemen evicted both staff who were on duty and those in their residence within the compound.

The takeover of Elementaita was on 19th January 2018. As at the time of filing the instant claims St. Mary's Mission Hospital Elementaita had not been taken over by the respondents.

In cause No. 2 of 2018 filed by staff in Elementaita, the claimants seek the following orders –

1. That a permanent injunction be issued to restrain the Respondents from dismissing the Claimants from the employment with the 1st Respondent and also an order restraining the Respondents from evicting the Claimants from their places of work and the staff houses at St. Mary's Mission Hospital Elementaita.

2. That the Court be pleased to find and uphold (sic) that the decision of the Respondents to dismiss and replace the Petitioners (sic) with new employees is illegal and procedural (sic) and unfair.

3. A decree that the Claimants are entitled to their salaries and all the benefits accruing thereto.

4. The cost of this claim.

In Cause No. 3 of 2018 filed by staff of St. Mary's Hospital Nairobi, the claimants seek the following remedies-

1. An order of preservation of the Claimants' employment by the Respondent.
2. An order directed at the Respondents to reinstate the Claimants to their various positions/post held with the Respondents as at 28th December 2017.
3. An order of permanent injunction restraining the Respondents, its servants, agents and/or employees from sacking the petitioners, advertising for new employees or in any way interfering with the Plaintiff's employment with St. Mary's Mission Hospital Langata.
4. An order of mandatory injunction directing the Respondent to pay all the employees of St. Mary's Mission Hospital all their salaries as and when they fall due.
5. Any other or such better relief that this Court may deem fit and just to grant.
6. Cost of this Petition be provided for.

Together with the claims, the claimants filed an application seeking the following orders –

Cause No. 2 of 2018

1. This application be certified urgent, service of the same be dispensed with in the first instance and the same be heard on priority basis.
2. That the Court do issue a conservatory order by way of an injunction to restrain the respondent, their servants, agents and/or employees from dismissing from work, evicting the applicants from their houses located with St. Mary's mission Hospital Elementaita.
3. The court do issue interim conservatory orders by way of injunction to restrain the respondents from evicting the applicant from their houses located with St. Mary's Mission's Hospital Elementaita pending the hearing and determination of this application.
4. That the Court do issue conservatory order of injunction restraining the respondent, their servants, agents and/or employees from dismissing from work, evicting, or/in any way interfering with the applicants' jobs and normal daily duties, at the hospitals pending the hearing and determination of this petition.
5. The Court do issue orders of injunction restraining the respondent, their agents, servants and/or employees from advertising and/or filling the positions of the applicants in the said hospitals pending the hearing and final determination of the substantive petition filed herewith.
6. The Court do issue orders it deems fair and just in the circumstances of this case.
7. Cost of this application be provided for.

Cause No. 3 of 2018

1. This application be certified urgent, service of the same be dispensed with in the first instance and the same be heard on priority basis.
2. That the Court do issue a mandatory injunction directed at the respondents to re- instate all the evicted applicants to go back to their houses and places of work within the said hospital
3. That the Court do issue conservatory orders of injunction restraining respondents, their servants, agents and/or employees from dismissing from applicants' jobs and normal daily duties at the Langata Hospital pending the hearing and determination of this claim.
4. The Court do issue orders of injunction restraining the respondents, their agents, servants and/or employees from advertising and d or filling the positions of the applicants in the said hospital pending the hearing and final determination of the substantive claim filed herewith.
5. The Court do issue orders it seems fair and just in the circumstances of this case.
6. Cost of this application be provided for.

Upon hearing the applications exparte the court granted the following orders –

Cause No. 2 of 2018

1. Spent
2. The respondents are restrained from terminating the employment of the applicants or in any other way interfering with their employment, from evicting them from the premises of the Respondents and from recruiting new staff to replace the applicants in terms of prayers 3 and 5 of the application pending inter-partes hearing.
3. The application is fixed for hearing inter-partes on 18th of January 2018

Cause No. 3 of 2018

1. Spent
2. The Respondents are restrained from terminating the employment of the applicants pending hearing of the application inter-partes.
3. The Respondents are restrained from recruiting new employees to replace the applicants pending inter-partes hearing of the application.
4. The application is fixed for inter-partes hearing on 18th January 2018.

The respondents filed defence in response to the claims and replying affidavits in response to the two applications. In response to Clause No. 2 of 2018 the respondent stated that there is a misjoinder of the 2nd respondent and that this court has no jurisdiction to determine the averments in paragraphs 5, 6, 6 and 8 of the statement of claim. The respondents denied advertising the posts held by the claimants and averred that when they took over management of the hospital, they found only 45 employees. They further aver that there were no records of employment and in line with good labour practices and labour laws they demanded that all employees found working furnish all relevant documents to enable the respondents issue them with new contracts.

It is the averment of the respondents that as at 13th April 2018 when the defence was filed, 37 employees were working. The names of the 37 are given at paragraph 9 of the defence.

The respondents further aver that 32 employees whose names are listed at paragraph 10 of the defence had absconded duty and had either been dismissed or were undergoing disciplinary process. Further that 22 employees were dismissed for failing to submit employment records.

The names of the 22 employees are listed at paragraph 11 of the response to the claim.

The respondents further aver that the contracts of employees whose names are listed at paragraph 13 of the response had expired in January, February, March and April 2018 as indicated against their names.

The respondents thus pray that the claim be dismissed as it is misconceived, is bad in law and lacks any basis.

In the response to the claim in Cause No. 3 of 2018, the respondents deny the averments in the statement of claim. They aver that when they took over the management of St. Mary's Elementaita Hospital they did not find any employees. They deny throwing out the claimants as alleged in their claims. The respondents pray that the claims be dismissed.

The claims were heard together

Determination

I have considered the pleadings filed by the parties, their submissions and the evidence presented before this.

The claimants seek a permanent injunction restraining the respondents from evicting the employees from their staff houses at Elementaita, an order reinstating the employees of St. Mary's Nairobi, an order preserving their employment and an order that the respondents pay their salaries.

The issues herein arose in December 2017 (for Nairobi) and January 2018 for Elementaita. It emerged during the hearing that the respondents have since reinstated and or issued fresh contracts to several employees, some of who have withdrawn from the suit. It further emerged that although there were orders preserving their employment, the respondents went ahead and dismissed some employees for failure to either submit employment records or for absconding duty.

Apart from such dismissal being in disobedience of the court orders of 4th January 2018, it is evident from the testimony of the witnesses for both the claimants and respondents that the employees who were dismissed were never taken through disciplinary process as envisaged in Sections 41, 43 and 45 of the Employment Act.

The circumstances of this case are unique. The claimants were not to blame for what happened to them. They were affected by leadership

wrangles between the founder members that resulted in the judgment in **Nakuru ELC No. 224 of 2010**.

As was stated by the court in the judgment, employees were not to be affected. The respondents however went ahead and evicted employees in St. Mary's Nairobi at 5 am on 28th December 2017.

CW1 who was Medical Director at Elementaita testified that after the violent takeover at Nairobi, the staff in Elementaita were apprehensive that what happened in Nairobi would happen to them. He testified that on 4th January 2018 the security committee of Nakuru County summoned him together with other managers of Elementaita and briefed them that the new management would be taking over the Hospital and they should not cause trouble. That Dr. Seth Manera, the Administrator of Elementaita and himself were warned that they would be personally held liable for any trouble. That when they took this message to their colleagues, there was panic and confusion which escalated to a breakdown of law and order as the staff moved out. That there was vandalism. That calm was restored when the claimants' advocate informed them that the court had reversed the orders for taking over. That all equipment vandalised was returned and from 5th January 2018 the hospital resumed normal operations. That some of the staff who moved out returned.

CW1 testified that when the respondents took over Elementaita on 19th January 2018 they were accompanied by men who had bows and arrows and the police. That they were directed to move out.

From the evidence on record it is clear that the situation was caused by the violent manner in which the respondents took over the management of the two hospitals. There are photos filed by the claimants which show that the employees in Nairobi were thrown out. The employees at Elementaita can therefore not be blamed for reacting to the imminent takeover in the manner that they did. The vandalism of equipment though criminal cannot be blamed on all the employees indiscriminately.

As I have already stated above, the circumstances of the case have changed. It is no longer possible to grant the orders sought by the claimants. I do not think it would be a good idea to reinstate all the employees who left the employment as a consequence of the takeover. The claimants did not establish exceptional circumstances to warrant orders of reinstatement which as provided under Section 49(4) must be sparingly done only in very exceptional cases. The court is cognisant of the large number of employees involved and the fact that some must have moved on. The court further recognises that the hospitals in both Nairobi and Elementaita have been in operation and must have recruited new staff.

However, having found that the claimants lost their jobs as a direct consequence of the violent manner in which the respondents took over the Hospitals and the respondents disobedience of the court orders preserving such employment, in both suits herein and in ELC Case No. 224 of 2010, it is my finding that the claimants were unfairly terminated.

For these reasons I award each of the claimants the following against the respondents jointly and severally –

1. Salary for January 2018.
2. One month's salary in lieu of notice
3. 6 months' salary as compensation.

For the avoidance of doubt, all employees who were dismissed will be paid as per award as the dismissal did not comply with the relevant provisions of the Employment Act.

The employees who were re-employed and/or withdrew from these proceedings will not benefit from the award herein.

The respondents shall jointly and severally pay the claimants' costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF MARCH 2020

MAUREEN ONYANGO

JUDGE