



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION 98 OF 2019

(Before Hon. Justice Hellen S. Wasilwa on 28th May, 2020)

KENYA NATIONAL UNION OF NURSES.....PETITIONER/APPLICANT

VERSUS

THE COUNCIL OF COUNTY GOVERNORS.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF MURANG'2ND RESPONDENT

THE COUNTY PUBLIC SERVICE BOARD MURANG'A COUNTY.....3RD RESPONDENT

THE CABINET SECRETARY MINISTRY OF HEALTH.....4TH RESPONDENT

THE CABINET SECRETARY LABOUR & SOCIAL PROTECTION.....5TH RESPONDENT

JUDGMENT

1. In June 2017, the Petitioner called for a nationwide strike that lasted for 5 months. Consequently, the Petitioner, the 1st and 4th Respondents negotiated and signed the return to work formula of 2/11/2017.
2. The following were the terms of the Agreement-
 - a. All disciplinary cases initiated against the Petitioner's members during the period of the strike shall stand withdrawn.
 - b. All withdrawn salaries be paid into the nurses' accounts not later than 31/11/2017.
 - c. All the cases relating to the industrial action that had been instituted by the Respondents against the Petitioner and its members be withdrawn save for Petition 1998 of 2017 on the nurses' grading structures.
 - d. The Petitioner to call off the strike and direct its members to report to work not later than 31/11/2017.
3. The Petitioner called off the strike and advised its members to report back to work, and its members resumed their duties. 46 counties complied with the agreement save for the 2nd Respondent who disregarded the payment of the nurses' salaries and allowances, despite follow ups from the Petitioner. The Petitioner avers that, currently, only 332 nurses out of 642 nurses have been paid the salary that was withheld during the strike period.
4. It is averred that the 2nd and 3rd Respondents transferred nurses without paying their dues, instituted disciplinary proceedings and summarily dismissed some nurses without cause or justification; as punishment for not reporting to work during the subsistence of the strike.
5. The Petitioner avers that such action violated the provisions of articles 27 (1), (2) and (4), 32, 33, 37, 41, 47 and 50 of the Constitution.
6. Aggrieved by the Respondents' actions, the Petitioner instituted this petition on 17th June 2019 and which is supported by the Affidavit of Seth Ambusini Panyako sworn on 6th June 2019; seeking the following orders-

a. A declaration that the actions of the Respondents jointly and/or severally in refusing to pay the nurses their salaries and allowances, a violation of not only the Return to Work Agreement but also the Constitution of Kenya articles 10, 27, 28, 32, 33, 37, 41, 47 and 48.

b. A declaration that the disciplinary process of interdiction, dismissal and suspension against the 310 nurses was un-procedural, discriminatory and in bad faith against articles 47 and 50 (1) of the Constitution of Kenya.

c. An order of mandamus directed at the Respondents jointly and/or severally and their agents and any persons howsoever acting compelling them to pay or cause the payment of all the outstanding salaries and allowances payable to the nurses.

d. An order directed at the 2nd and 3rd Respondents to withdraw and recall all dismissal letters, notices to show cause that were issued to the nurses during the period of strike.

e. An order compelling the Respondents to pay the Petitioner the costs of this suit.

7. The 1st Respondent opposed the Petition vide the Grounds of Opposition dated 23rd October 2019. They contend that the 1st Respondent is not a proper party to this suit due to the inexistence of an employer-employee relationship within the meaning of section 2 of the Employment Act as it only provides a forum for consultation and considering matters of common interest to the county governments.

8. Further, the Petitioner has not provided sufficient particulars and the manner of the 1st Respondent's constitutional violations hence there is no cause of action against them.

9. The 2nd and 3rd Respondents have set out some grounds in opposition to the Petition in their Grounds of Opposition dated 17/7/2019, filed in opposition to the Application dated 14/6/2019. They contend that a similar petition: Nyeri ELRC 111 of 2018 was filed, heard and determined and is the subject of appeal. As such, this matter is *res judicata*.

10. The 4th Respondent has opposed this Petition vide the Replying Affidavit of Susan Mochache sworn on 17th October 2019. She contends that health services were devolved to the counties hence the 4th Respondent has a limited role in ensuring equitable, affordable, accessible and quality healthcare to citizens.

11. She avers that the county governments are in charge of salaries, staffing and discipline among others, and that the national government cannot interfere with such functions unless it is an interference under article 190 (3) of the Constitution and section 21 of the County Governments Act.

12. The Affiant contends that the 4th Respondent's roll in the Return to Work Agreement was to facilitate negotiations and come up with a formula that was beneficial to all citizens. It is further contended that the allegation of discrimination is untenable since the compliance by the 46 counties is not attributable to the 4th Respondent.

13. The Affiant denies any constitutional violation by the 4th Respondent. Lastly, she urged this Court to strike out the 4th Respondent from this Petition.

14. There is no record of the 5th Respondent's response to the petition, in the court file.

15. Parties agreed to dispose of the Petition by way of written submissions. The Petitioner filed its petition on 24/2/2020, the 4th and 5th Respondents on 19/2/2020 and the 2nd and 3rd Respondents on 5/3/2020.

The Petitioner's Submissions

16. The Petitioner submits that the Respondents failure to implement the return to work formula is a violation of the right to fair administrative action under article 47 of the Constitution of 310 of its members, as they were adjudged unheard. They rely on the case of **County Government of Kakamega & 2 Others vs. Salaries Remuneration Commission; County Government of Mombasa (Interested Party) [2018] eKLR** to support their case.

17. They further submit that there has been no justification for limiting the rights of these members since there was an agreement applicable to all nurses. It is submitted that the 2nd Respondent's failure to adhere to the terms of the Return to Work Agreement amounts to discrimination since 46 other counties already complied.

18. The Petitioner submits that the Respondents actions of failing to adhere to the terms of the return to work formula, breached the Petitioner's members' legitimate expectation. They rely on the cases of **Republic vs. Kenya Revenue Authority ex parte KSC International Limited (In Receivership)** as cited **Keroche Industries Limited vs. KRA & 5 Others [2005] KLR 240 at 295** and **Town Council of Kikuyu vs. The National Social Security Fund Board of Trustees & Others [2015] eKLR** where the Courts observed as follows-

“...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by doing so upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation.”

The 2nd and 3rd Respondents' Submissions

19. The 2nd and 3rd Respondents submit that the issues raised in this petition have been conclusively determined in Nyeri ELRC Cause 111 of 2018 hence the petition herein is an abuse of the court process.

The 4th and 5th Respondents' Submissions

20. The 4th and 5th Respondents submit that the 4th Respondent has no role to play in this petition as this matter is employer-employee in nature, as they did not participate in the return to work agreement and are not privy to the non-payment of salaries or the withdrawal of actions instituted against the Petitioner and its members.

21. It is their position that health services were devolved to the county governments who are independent from the national government. They rely on the case of **Republic vs. Transition Authority and Council of Governors ex parte KMPDU [2013] eKLR** to fortify their position.

22. I have considered the averments of both Parties herein. The Petitioner herein has sued The Council of Governors, Murang'a County Government, The County Public Service Board - Murang'a, Cabinet Secretary Ministry of Health and Cabinet Secretary – Labour and Social Protection.

23. The Petitioner contends that the Respondents breached the return to work agreement entered into by the Petitioner and 1st and 4th Respondents on 2/11/2017.

24. The 1st Respondent have submitted before this Court that they are not a proper Party to be sued in the initial Petition because they are not an employer of the Petitioner within the meaning of Section 2 of the Employment and Labour Relations Court Act.

25. The argument by the 1st Respondent does not in my view hold much water because the status of the 1st Respondent has not changed since the time of the return to work agreement to date.

26. The 2nd and 3rd Respondents on their part have argued that this matter is res judicata the same having been considered and fully determined in Nyeri ELRC 111/2018.

27. They aver that this Petition is an abuse of the Court process.

28. I have looked at the judgement of ELRC Nyeri 111/2018. The said Claim was filed by the Petitioner herein against the 2nd and 3rd Respondents herein. It is true that the issues discussed therein related to the return to work agreement which is also the subject matter of the current Petition.

29. Judgement was rendered therein on 15/5/2019 dismissing the Claim. This Petition was filed on 17/6/2019 without disclosing the existence of the judgement rendered in Nyeri ELRC 111/2018. I agree that this was done in bad faith and is an abuse of the Court process.

30. I therefore agree with the submissions of the 2nd and 3rd Respondents that this matter is res judicata and I will not therefore delve into the merits or otherwise of this Petition. The only option the Petitioner has is to pursue their appeal in the Court of Appeal.

31. I therefore dismiss this Petition accordingly with no order as to costs.

Dated and delivered in Chambers via zoom this 28th day of May, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties