



REPUBLIC OF KENYA

THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 6 OF 2020

COUNTY GOVERNMENT OF KISUMU.....1ST CLAIMANT

KISUMU COUNTY PUBLIC SERVICE BOARD.....2ND CLAIMANT

VERSUS

KENYA UNION OF CLINICAL OFFICERS.....1ST RESPONDENT

KENYA UNION OF NURSES.....2ND RESPONDENT

KENYA UNION OF MEDICAL LABORATORY OFFICERS.....3RD RESPONDENT

UNION OF CIVIL SERVANTS.....4TH RESPONDENT

THE CABINET SECRETARY-LABOUR & SOCIAL PROTECTION.....INTERESTED PARTY

RULING

1. The twin applications dated 5th June 2020 and 11th June 2020 were filed by the County Government of Kisumu praying for an order declaring the strike notice by members of the respondents who work for the county government illegal in the first instance and in the second application direct the workers who had commenced the strike on 9th June 2020 to return to work.
2. The applications are premised on the grounds set out on the face of the notices of motion and in the supporting affidavits thereof the nub of which is that the applicants have complied with the terms of the consent order entered into by the parties on 30th January 2020 and that the strike is unlawful by dint of the 4th schedule to the Labour Relations Act 2007 read with sections 78(1) and 81(5) thereof in that the employees in the health sector are categorised as essential workers and are prohibited from going on strike.
3. That whereas all employees have a right to engage in a strike in terms of article 41 of the constitution of Kenya 2010, that right is limited by article 24(1) of the constitution.
4. That the fact of the workers going on strike at this time of COVID-19 and in disregard of the Hippocratic oath which binds health professionals does not only violate their professional ethics but is also contrary to the Public Health Act Cap 242 laws of Kenya and specifically the Public Health (prevention, Control and Suppression of COVID-19) Regulations 2020.
5. That Kisumu has reported cases already and there is a national spike in COVID-19 cases making it critical to have the workers back to service to implement the necessary emergency measures to curb the spread of the pandemic.
6. That the applicants have to date promoted all health workers who were due for promotion in terms of the consent order and have even exceeded the number to 1080 promotions as at the time of arguing this application.
7. That all salaries for the promoted workers have been factored in the payroll for June 2020 and therefore they will receive the salaries by 30th June 2020
8. That the applicants have only been unable to pay arrear salaries that accrued from 1st July 2019 the effective but backdated date of promotions

9. That however the applicants have factored the said arrear salaries in the 2020/2021 budget in the sum of Ksh. 196,803 million shillings

10. That the respondents have therefore no legitimate grievance to abandon work and the court should declare the strike unlawful and direct the health workers to resume work immediately.

RESPONSE

11. The respondents filed a replying affidavit sworn to by the Deputy Secretary General of the Kenya National Union of Nurses in which they vehemently oppose the application on the grounds that the applicants are hell bent to perpetuate violation of the basic rights of their members by not paying their salaries on time from month to month; not complying with the terms of the consent order freely and voluntarily entered into by the parties by not:

i. Promoting all the health workers who were due for promotion with effect from 1st July 2019

ii. Not paying salaries to all the promoted employees as agreed in the consent order

iii. Not paying arrear salaries within the time frames agreed in the consent order and as per enlargement made thereafter at the behest of the applicants and condonation granted by the court respectfully

iv. Not engaging the employees and or union officials to update them on the progress made so far in the implementation of the consent order

12. The respondents relied extensively on attached documentation to demonstrate lack of seriousness and good faith on the part of the applicants stating that the applicants were only interested in undermining the legitimate efforts made by the respondents to have their rights respected by the applicants.

13. The respondents accused the applicants of double speak and material misrepresentations of facts regarding promotions made thus far and the payments made and those due to be made by the end of June 2020.

14. The respondents added that the applicants had further not honoured the promises made by their legal counsel in open court and are guilty of prevarication, dishonesty and dilatory tactics.

15. That the court having been told by the applicants that they had budgeted for Ksh. 250 million in 2019/2020 budget to pay all salaries and arrears upon effecting all promotions agreed upon could not now be heard to say that they had budgeted again the same amount and for the same purpose in the 2020/2021 budget

16. The respondents submitted further that the right to proceed on strike was covered in the consent order entered into by the parties in the event of default and that right had lawfully accrued to the respondents and so the argument by the applicants that the strike was unlawful was dishonest and should not be countenanced by the court.

17. The respondents pray that the application be dismissed with costs.

DETERMINATION

18. The parties filed written submissions and highlighted their respective positions virtually vide Microsoft Teams platform. The issues for determination are:

i. Whether the applicants have satisfied the requirements for grant of a mandatory injunction in a public law dispute

ii. What reliefs if any should be granted on the facts of the case

19. The locus classicus guiding grant of interim mandatory injunctions in public law disputes is the case of **Gatirau Peter Munya -Vs- Dickson Mwenda Kithinji & 2 others, SC Application No. 5 of 2014 (Ojwang & Wanjala, SCJJ), (2014) eKLR**. The Judges stated thus: -

20. "(86) "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in public interest. Conservatory orders, therefore, are unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the applicant's case. Orders, consequently, should be granted on inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes."

21. In the present case the applicants entered into a consent order on 30th January 2020 which reads as follows:

22. It is hereby ordered by consent:

i. That the strike notice issued by the 1st to 4th respondents on 13/01/2020 stands suspended on the following terms and conditions: -

ii. That the 260 letters of promotion for healthcare workers which are already prepared be delivered to the employees within three days from to date.

iii. That the claimants do prepare and supply the remainder of 616 letters of healthcare employees on or before the 28/02/2020

iv. That the 260 employees whose letters of promotion are ready to receive their salary increment effective 1/07/2019 in lump sum together with their January 2020 salary

v. That the 616 employees whose letters are to be delivered by 28/02/2020 to receive their salary increment effective 1/07/2019 by 31/03/2020.

vi. That the matter be mentioned on 10/3/2020 to confirm receipt of promotion letters by members of the 1st to 4th respondents.

vii. That in default of compliance by the claimant as agreed the respondents to be free to resume industrial action.

23. This is the background upon which the current strike is premised which was a product of consensus by the parties in this suit. It is pertinent to note that the *dominus litis* and therefore the initiator of the consent order aforesaid is the present applicant

24. It is common cause that the applicants came back to court for the enlargement of time within which to comply with the terms of the consent order and based on information given to court by counsel for the applicants and their undertaking to fully comply with the consent order by 30th May 2020, the court enlarged the period of compliance to that date.

25. The strike action commenced on 9th June 2020 upon failure by the applicants to fully comply with the consent order by 30th May 2020. The applicants now propose to partly comply with the consent order by 30th June 2020 by paying all current salaries pursuant to promotions which they submit have already been fully done and letters issued to the 876 health workers covered by the consent order and more others who have also been promoted.

26. The applicants pray for further condonation to pay arrear salaries backdated to 1st July 2019 in the 2020/2021 financial year because the money to pay the arrears was not budgeted for and therefore not allocated by the county assembly in the 2019/2020 financial year. This is the real bone of contention between the parties currently.

27. The court is satisfied that the applicants have substantially complied with the consent order provided all promotions and salary increments are paid by 30th June 2020

28. The court finds that the applicants have not been candid with the court regarding the budgeting for arrear salaries due and owing to all promoted health workers with effect from 1st July 2019.

29. In this respect words from officers of the court which now appear to have been uttered in vain are a source of serious concern by the court on the integrity of the concerned officers and those they represent. Counsel should not take lightly undertakings they make before court and upon which orders in favour of those they represent are made and apparently to the detriment of the other parties.

30. Furthermore, courts of law are not given to reviewing and or setting aside consent orders unless conditions that warrant cancellation of a contract between parties are met which include prove of fraudulent misrepresentation by a party; mutual mistake; illegality or *force majeure*.

31. The applicants herein have not satisfied any of the requirements for the court to review and or set aside the consent order aforesaid and have also not demonstrated inherent merit for grant of a mandatory injunction as guided in the Munya case(supra).

32. However, given the enormous public interest demonstrated by the applicants in having the health workers resume their services to treat COVID-19 patients and put in place measures to stem the spread of the pandemic in the county. And having considered the submissions by the applicants that they have since received Ksh. 159,820 million from the national government COVID-19 Fund and that the county government had also set aside Ksh. 200 million to cater for the pandemic which amounts total Ksh. 359,820, and having also considered the apparent realisation by the applicants that court orders are not mere pieces of paper to make kites with, the court finds that the upper most priority for the applicant is to utilise part of those funds to pay the arrear salaries for the 876 promoted employees covered in the consent order by latest 30th July 2020.

33. Accordingly, the court makes the following orders: -

a. The application is granted and all the health workers the subject of this suit directed to resume work on or before Friday 26th June 2020

b. The applicants to pay all arrear salaries in terms of the consent order entered into by the parties on 30th January 2020 on or before the 30th July 2020 failing which the respondents be at liberty to resort to the terms of the consent order.

c. Costs in the cause

Dated, Signed and Delivered Virtually at Nairobi this 24th Day of June 2020

Mathews Nderi Nduma

Judge

Appearance:

Mr. Amondi appearing with Mr. Indris for the Claimants/Applicants

Mr. Charles Onyango for the Respondents

Chrispo: Court Clerk