



**REPUBLIC OF KENYA**

**THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**PETITION NO. 43 OF 2019**

*(Before Hon. Justice Mathews N. Nduma)*

**KENYA MEDICAL PRACTITIONERS PHARMACISTS AND**

**DENTISTS UNION(KMPDU).....PETIONER**

**VERSUS**

**THE COUNTY GOVERNMENT OF KISUMU.....RESPONDENT**

**RULING**

1. The Petitioner/applicant filed application dated 29/11/2019 seeking the respondent to fully comply with the Collective Bargaining Agreement (CBA) between the parties which became effective on 1<sup>st</sup> July 2017 and registered by the court as RCA. 241 of 2017 and the Return to Work Formula (RTWF) entered into by the parties on 24<sup>th</sup> June 2019.
2. That the court to declare the strike called by the applicant union lawful and protected if the respondents do not comply with the aforesaid instruments on or before 6<sup>th</sup> December 2019.
3. The application is premised on grounds set out in the notice of motion and the supporting affidavit of Dr. Ouma Olunga Secretary General of the applicant union as follows:
4. That the respondent has to date dishonoured the terms and conditions of the CBA and RTWF and the doctors have been forced to embark on a strike action.
5. That the court should declare the strike action lawful and direct the respondent to fully comply with the terms of the CBA and RTWF both adopted by the court as orders of the court.
6. That the purported compliance with promotions by the respondent is not genuine since there was no confirmation yet by the respondent of existence of vacancies in job groups R, S & T despite the board having promoted the doctors accordingly.
7. The application is opposed by a replying affidavit of the respondent sworn to by the county secretary of the respondent in which he admits that the parties entered into a RTWF dated 6<sup>th</sup> June 2017 in which agreed terms were set out and the bone of contention to date is the promotion of identified 126 doctors within the timelines agreed upon and payment of unpaid arrear salaries including backdated accrued salaries upon promotion with effect from 1<sup>st</sup> July 2019.
8. That the targeted doctors were promoted and confirmation to that effect done by the secretary to the county public service board by a letter dated 4<sup>th</sup> February 2020
9. That by a letter dated 19<sup>th</sup> December 2019 the secretary to the County Public Service Board also confirmed that letters of promotion were not issued to 13 doctors as they did not meet the qualifications for promotion.
10. That arrear salaries have been budgeted for in the 2020/2021 budget and according to counsel for the respondent payments would be done by latest 30<sup>th</sup> August 2020 allowance being made for the national treasury to disburse the funds.
11. That the members of the petitioner on strike are medical doctors who are categorised essential service in terms of section 78(1) and 81(3) of the Labour Relations Act 2007 and are prohibited from engaging in a strike and therefore the strike action by the doctors is unlawful and should be declared so by the court.

12. That the court should direct the doctors to return to work forth with in view of the prevailing COVID-19 pandemic which threatens the health of humanity and particular in Kisumu County where cases have been reported which require immediate attention of the doctors.

### **Determination**

13. The parties filed their respective submissions and the issues for determination are:

(i) Whether the respondent has fully complied with the CBA and the RTWF registered and adopted as orders of the court within the agreed timelines

(ii) Whether the applicant union is entitled to the reliefs sought

14. The applicant's members embarked on a strike action that was called off upon conclusion of the Return to RTWF on 24<sup>th</sup> June 2019 and as at the time the suit was filed the respondent had not complied with the CBA and the terms of the RTWF.

15. The doctors embarked on another strike action on 6<sup>th</sup> June 2020 due to the apparent failure by the respondent to comply with the terms of the CBA and the RTWF.

16. The doctors are still on strike to date awaiting the respondent to fully comply with the terms of the RTWF.

17. Whereas the respondent has promoted the doctors covered by the CBA and the RTWF, the respondent admittedly has been unable to date to pay the promoted doctors arrear salaries backdated to 1/7/2019.

18. The respondent promises to pay the arrear salaries by 30<sup>th</sup> August 2020 to the promoted doctors upon disbursement of the monies appropriated in the 2020/2021 budget by the national treasury.

19. The applicant on the other hand demand full payment of arrear salaries before the doctors return to work in full compliance with the RTWF.

20. The respondent did not come back to court for condonation and enlargement of time upon being unable to comply with the CBA and RTWF. To this end the respondent is in wilful disregard of a consent order styled RTWF

21. The respondent lack good faith and clean hands in the circumstances of this case.

22. The applicant on the other hand sought the court to endorse their intended strike action on 29<sup>th</sup> November 2019 before they embarked on the strike but the court was unable to hear and determine the application timeously due to the COVID-19 pandemic. The doctors however proceeded on strike on 6<sup>th</sup> June 2020 and now seek endorsement of their action after the fact.

23. Strike action whether it qualifies to be a protected strike or unprotected strike has adverse consequences of withdrawal of work and in case of essential service serious consequences on the public whose life and limb are put at risk by withdrawal of medical services.

24. This situation has been amplified by the COVID- 19 pandemic which makes the services of doctors to the public of essence and a matter of life and death in the true sense of the word.

25. On the other hand, employers are bound by the terms and conditions of service they solemnly enter into in contracts of employment which include CBAs and RTWFs.

26. The respondent has inordinately delayed to fulfil the terms of the CBA and has dishonoured the timelines set in the RTWF.

27. Workers cannot be held to servitude by a defaulting employer and they have a constitutional right to withdraw their services to compel such an employer to comply with the terms of a service contract.

28. Human rights protected in our bill of rights may be limited including the right to go on strike lawfully and on lawful grounds provided under article 24 of the constitution of Kenya 2010.

29. This is an inherent right that cannot be denied any person since the day slavery and slave trade was banished on the face of the earth.

30. Statutory exceptions cannot override the primary right of the person guaranteed in the constitution except in permitting the employer not to pay any employee involved in the strike, if the strike is protected and the right of an employer to initiate disciplinary action and punish any employee involved in unprotected strike

31. The Court is however satisfied that this time round the respondent has belatedly promoted all the doctors who had satisfied the requirements for promotion and has budgeted for payment of arrear salaries backdated to 1<sup>st</sup> July 2019 on or before 30<sup>th</sup> August 2020

32. The Court therefore in consideration of the overriding public interest in having the doctors return to work to deal with the COVID-19 pandemic directs the doctors to call off the strike and return to work awaiting the full compliance by the respondent.

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

- (a) The applicants are engaged in a protected strike having satisfied all procedural requirements prior to taking the drastic action.
- (b) The respondent to provide promotion letters to all the 126 doctors the subject of this suit who have satisfied the requirements for such promotion.
- (c) The respondent to pay all arrear salaries due and owing to the promoted doctors back dated from 1<sup>st</sup> July 2019 on or before 30<sup>th</sup> August 2020
- (d) All the doctors to return to work on or before Thursday 16<sup>th</sup> July 2020.
- (e) Respondent to pay costs of the suit

**Dated, Signed and Delivered at Embu this 14<sup>th</sup> Day of July 2020**

**Mathews N. Nduma**

**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 15<sup>th</sup> March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

**Mathews N. Nduma**

**Judge**