



**REPUBLIC OF KENYA**

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

**PETITION NO.35 OF 2020**

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

**KENYA MEDICAL PRACTITIONERS, PHARMARCISTS**

**AND DENTISTS UNION(KMPDU).....PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF NYAMIRA.....RESPONDENT**

**RULING**

1. The Applicant Union in the application dated 1<sup>st</sup> October 2020 prays for an order in the following terms-

a. That the Court do issue a prohibitory injunction restraining the Respondent from victimising, harassing or intimidating in any manner petitioner members by payment of their withheld salaries and withdrawal of Show Cause letters issued to Petitioner members pending hearing and determination of the petition dated 15<sup>th</sup> September 2020;

b. That the Court do issue an order directing the Respondent to engage in bipartite negotiations between the Petitioner and Respondent within reasonable time frame to end the health services catastrophe in Nyamira County and file a report pending hearing and determination of the petition.

2. The application is founded on grounds set out in the notice of motion and the supporting affidavit of Dr. Laameck Omweri, the Secretary General of the Petitioner Nyanza Branch.

3. The grounds may be summarised that the petitioner filed a petition on 15<sup>th</sup> September 2020 seeking the court to compel the Respondent to comply with the CBA that became effective on 6<sup>th</sup> July 2017 and to declare the strike which commenced on 14<sup>th</sup> September 2020 by the Petitioner members legal.

4. On 21<sup>st</sup> September 2020 the respondent resorted to victimisation and harassment of the petitioner members by sending them show cause letters, stopping their salary payments and unreasonable transfers and deployment.

5. The Petitioner members are currently on strike and faced with the unlawful conduct by the Respondent and the Respondent is reluctant to engage the Petitioner in constructive negotiations to end the industrial action by Petitioner members.

6. That the application was brought without undue delay and the citizens of Nyamira County continue to suffer the blunt of the strike action due to the withdrawal of health services by the medical practitioners.

7. That the application be granted as prayed.

**RESPONSE**

8. The Respondent filed grounds of opposition dated 5<sup>th</sup> October 2020 on 6<sup>th</sup> October 2020 in that the application lacks any sound legal basis and is an abuse of court process.

9. The Respondent further filed a replying affidavit sworn by Dr. Jack Magara the County Chief Officer in which he deposes that the Petitioner issued a strike notice dated 3<sup>RD</sup> August 2020 and the respondent and the Petitioner subsequently held a meeting in which the parties agreed that the County Government of Nyamira would fast track the ongoing exercise of Doctors Promotion and that specifically

Doctors on common cadre will receive their letters of promotion by 24<sup>th</sup> August 2020.

10. That Doctors who fall on competitive cadre would undergo suitability tests and be promoted by 28<sup>th</sup> August 2020.
11. That the process would commence there after by the two parties engaging accordingly.
12. That the Petitioner would then call off the strike action immediately.
13. That the Respondent issued a communique dated 10<sup>th</sup> August 2020 to confirm its commitment to implement the agreement marked annex 2 to the response.
14. In the said response the Respondent stated that the failure by the Respondent to pay salary arrears arising from the 2017 Doctor's promotions is "a totally new grievance" and ought not to be a cause to continue the strike action.
15. That the issues agreed upon have since been implemented by the Respondent as per the letter dated 27<sup>th</sup> August 2020 in which 27 doctors were promoted and letters of promotion dispatched to them accordingly.
16. A further letter dated 17<sup>th</sup> September 2020 dispatched 13 letters of promotion of Doctors.
17. That the Petitioner did not call off the strike as agreed and the Respondent issued show cause notices to the few doctors who had refused to resume duty pursuant to the agreement for absconding work in terms of the Respondent's Human Resource Manual and has since withheld salaries in respect of those officers for absconding work.
18. That only 10 Doctors out of 57 Doctors and 1,253 Health Workers have absconded work and are facing appropriate disciplinary action.
19. That the application lacks basis and it be dismissed with costs

#### **DETERMINATION**

20. Issuance of conservatory injunction in the Public Sector is guided by the principles enunciated by the Supreme Court in the case of **Gatirau Peter Munya –Vs- Dickson Mwenda Kithinji & 2 others [2014] Eklr at Para. 86** as follows-

*“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 the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “probability of success” in the supplicant’s case for orders of stay. Conservatory orders therefore 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, upon a careful evaluation of the inherent merit of the case and bearing in mind the public interest in having orderly health sector especially during the COVID-19 pandemic and the constitutional values that mandate public institutions to respect professionalism and therefore professionals in their cadre and the professional services they render to “Wanjiku”, the court finds that the Respondent is not candid even at this interim stage in the manner it has treated the issues agreed upon in the CBA concluded by the parties and to take effect with retroactive effect from 6<sup>th</sup> July 2017 which issues were well captured in the strike notice dated 7<sup>th</sup> September 2020 to include failure by the Respondent “to promote 62 Doctors” and failure by the Respondent to pay “salary arrears arising from 2017 Doctor’s promotion”.
22. More than three years down the line from date of conclusion of the CBA, the Respondent still pretend that payment of salary arrears with respect to delayed promotions of medical Doctors and another cadre in the County Medical service is a matter separate and not connected to the actual promotions.
23. In this pretence, the Respondent failed to honour the agreement reached in the meeting by the parties upon issuance of the strike notice vide letters dated 3<sup>rd</sup> August 2020 and 7<sup>th</sup> September 2020.
24. Accordingly, the Respondent *prima facie* lack legitimacy and credibility to punish Doctors who refused to call off the strike provided the respondent had not met their side of the bargain.
25. Without pre-empting factual matters that shall be dealt with during the hearing and determination of the Petition, the court finds that the Petitioner has met the requirements for grant of a conservatory order in the following terms:

- a. The Respondent is prohibited by section 79(2) and (3) of the Labour Relations Act 2007 from taking any punitive measures against members of the petitioner in any manner not permitted by the Labour Relations Act 2007 for engaging in a lawful strike the petitioner having *prima facie* complied with the procedural requirements before calling the strike action and a conservatory prohibitive order is issued pending the hearing and determination of the petition accordingly.
- b. The Respondent is meanwhile directed to honour the agreement entered into by the parties and the subject of the communique by

the Respondent dated 10<sup>th</sup> August 2020 by promoting all concerned doctors and health personnel including payment of agreed arrear salaries in terms of the CBA.

c. Costs in the cause

**Dated Signed and Delivered at Nairobi this 27<sup>th</sup> Day of October 2020**

**Mathews Nderi Nduma**

**Judge E & LRC Kisumu**

**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**