



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CASE NO. 111 OF 2018

KENYA NATIONAL UNION OF NURSES.....CLAIMANT

VERSUS

MURANG'A COUNTY SERVICE PUBLIC BOARD.....1ST RESPONDENT

THE GOVERNOR, MURANG'A COUNTY GOVT.....2ND RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for non-payment of arrears after a strike by health workers. The parties to the dispute consented to having the dispute resolved in terms of Rule 21 of the Employment and Labour Relations Court (Procedure) Rules 2016. The arrears in dispute were for a period of 5 months and the Claimant asserts that the return to work formula entered into with the Council of Governors should be respected and honoured. The Respondent on its part denied the claim by the Claimant and asserts that the return to work formula was not binding on the county governments. It is not in dispute that upon signing of the agreement, the Claimant called off the strike and asked its members to return to work. The Claimant avers that its members had a legitimate expectation that the Respondent would pay the dues for the months when they were on strike. The Claimant argues it is therefore irrational, illegal and unreasonable for the Respondents to refuse to pay the members of the Claimants and term the agreement a "gentleman's agreement". The Claimant averred that in the case of **Keroche Industries Limited v Kenya Revenue Authority & 5 Others [2007] eKLR** the court in ascertaining whether a claim was based on legitimate expectations is properly grounded held

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 so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation.

An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way. In this case the applicant did not expect an abrupt change of tariff where the process of manufacture or its products had not changed. Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised. In this case imposing a liability of 1 billion on the applicant to be paid within 14 days though attractive in terms of enhanced public revenue and perhaps for the zeal of meeting annual tax targets, I find is not such an overriding interest for the reasons set out in this judgment including failure to satisfy the principle of legality.

The Claimant submits that the Council of Governors is an agent of the 2nd Respondent, the Governor of Murang'a County and that it can transact business on behalf of the 2nd Respondent. The Claimant argued that this can be seen from Sections 19 and 20 of the Intergovernmental Relations Act, No. 2 of 2012. The Claimant submitted that this position has been restated by courts in earlier decisions and cited the case of **Murang'a County Public Service Board v Grace N. Makori & 178 Others [2015] eKLR**. The Claimant asserts that having agreed to pay the members of the Claimant their dues in order that the strike may be averted the Respondents cannot now approbate. The Claimant cited the case of **Behan & Okero Advocates v National Bank of Kenya Limited [2007] eKLR** and argued that the intention of parties in entering the agreement of 2nd November 2017 was to the effect that the same was to be binding on the parties to the said agreements. The Claimant submits that the position taken by the Respondents is to ask the court to rewrite the contract between the parties and relied on the case of **National Bank of Kenya Limited v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR** where the Court of Appeal held that a court of law cannot be asked to rewrite a contract between parties. The Claimant submitted that the Respondent has not pleaded the grounds that can vitiate a contract which are coercion, fraud or undue influence. The Claimant thus urged the grant of the claim with costs.

2. The Respondents on their part submitted that the claim is for the Claimant's members to be paid their dues for the period that they engaged in an unprotected strike. The Respondents cited the Latin maxim *ex turpi non oritur action* (it would seem the phrase the Respondents were looking to quote was *ex turpi causa non oritur action* – “from a dishonorable cause an action does not arise”). The Respondents argue that the Claimant would be unable to pursue legal remedy if it arises from its own illegal act. The Respondents assert that no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. The Respondents relied on the case of **Root Capital Incorporated v Tekangu Farmers Co-operative Society Ltd & Another [2018] eKLR** for the proposition that courts should not aid or lend its authority to a party seeking to enforce an agreement or object the law prohibits. The Respondent submitted that it was not denied that the strike was not protected and that the Claimant's members proceeded with the strike at their own peril. The Respondents argue that the employees knew that they were engaging in an illegal strike and cannot now derive protection from a directive from the Council of Governors. The Respondents assert that no single provision of the law is cited that makes such *ad hoc* declarations legal and sustainable all over the country. The Respondents submit that this case is based more on emotions than any solid evidence and that there is no evidence of non-payment and proof of who was paid and who was not paid. The Respondents submit that it is not lost on the court that the illegal actions of the Claimant led to loss of life. They thus urged the claim to be dismissed with costs.

3. The dispute as framed relates to alleged non-payment of salary arrears. As captured in pleadings and arguments of parties, the dispute arose after a strike by employees who work in the health sector. The Respondents assert there was loss of life and that the Claimant cannot seek to recover on account of an illegal strike. Under Section 19 and 20 of the Intergovernmental Relations Act, the law provides as follows:-

19. Establishment of Council of County Governors

(1) There is established a Council of County Governors which shall consist of the governors of the forty-seven counties.

20. Functions of the Council

(1) The Council shall provide a forum for—

(a) consultation amongst county governments;

(b) sharing of information on the performance of the counties in the execution of their functions with the objective of learning and promotion of best practice and where necessary, initiating preventive or corrective action;

(c) considering matters of common interest to county governments;

(d) dispute resolution between counties within the framework provided under this Act;

(e) facilitating capacity building for governors;

(f) receiving reports and monitoring the implementation of inter-county agreements on inter-county projects;

(g) consideration of matters referred to the Council by a member of the public;

(h) consideration of reports from other intergovernmental forums on matters affecting national and county interests or relating to the performance of counties; and

(i) performing any other function as may be conferred on it by this Act or any other legislation or that it may consider necessary or appropriate.

(2) The Council shall have powers to establish other intergovernmental forums including inter-city and municipality forums.

(3) The Council may establish sectoral working groups or committees for the better carrying out of its functions.

As can be seen from the provisions of the law, nothing suggests that the Council of Governors is mandated to give directives to the Governors but the CoG is merely an instrument for inter county co-operation. The fact that there was an agreement between the CoG and the Claimant is not binding on the Respondents. The Claimant did not enjoin the Council of Governors and misapprehends the law cited to mean that the CoG supervises the Governor in his functions. Under the Constitution of Kenya 2010, the devolved system of Government only recognizes the existence of the second house of Parliament, the Senate as the body that calls Governors to account. The suit before me therefore is without merit and I dismiss it with costs to the Respondents.

It is so ordered.

Dated and delivered at Nyeri this 15th day of May 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar