



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1545 OF 2018

EDWARD GITHINJI & 131 OTHERS.....CLAIMANTS

VERSUS

KENYA MEDICAL RESEARCH INSTITUTE.....1st RESPONDENT

DIRECTOR, KENYA MEDICAL RESEARCH INSTITUTE.....2nd RESPONDENT

BOARD OF MANAGEMENT,

KENYA MEDICAL RESEARCH INSTITUTE.....3rd RESPONDENT

SALARIES AND REMUNERATION COMMISSION.....4th RESPONDENT

MINISTRY OF HEALTH.....5th RESPONDENT

CABINET SECRETARY, NATIONAL TREASURY.....6th RESPONDENT

ATTORNEY GENERAL.....7th RESPONDENT

AND

UNION OF NATIONAL RESEARCH & ALLIED

INSTITUTES STAFF OF KENYA (UNRISK).....INTERESTED PARTY

RULING

1. The 132 Claimants instituted legal proceedings against the Respondents on 22 November 2018 and the Issues in Dispute were stated as
 1. Refusal to pay the Claimants allowances; emergency call allowances in the sum of Kshs 80,000/- per month, health services allowance (Kshs 20,000/- per month, health risk allowance/medical risk allowance (Kshs 20,000/-) per month, extraneous allowance (Kshs 30,000/-) per month and non-practising allowance (Kshs 51,000/-) per month.
 2. Discrimination against the Claimants.
 3. Unlawfully withholding allowances due to the Claimants; emergency call allowances in the sum of Kshs 80,000/- per month, health services allowance (Kshs 20,000/- per month, health risk allowance/medical risk allowance (Kshs 20,000/-) per month, extraneous allowance (Kshs 30,000/-) per month and non-practising allowance (Kshs 51,000/-) per month.
 4. Unlawfully withholding allowances due to the Claimants.
2. The *Memorandum of Claim* was filed together with a motion under certificate of urgency. The import of the application is not relevant for purposes of this ruling.

3. On 18 February 2019, the 1st, 2nd and 3rd Respondents filed a *Preliminary Objection* in the following terms

The Respondent opposes the Claimants' Claim dated 16th November, 2018 on the following grounds:-

1. The Claim offends the rights and fundamental freedoms of the 1st Respondent as provided under Article 41(5) of the Constitution of Kenya which provides that:

Every trade union, employers' organisation and employer has the right to engage in collective bargaining

2. The declaratory prayers sought by the Claimants and averments on infringements of their Constitutional Rights are subject to limitations under Article 24(1) of the Constitution of Kenya which provides that A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

a) the nature of the right or fundamental freedom

b) the importance of the purpose of the limitation

c) the nature and extent of limitation

d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

e) the relation between the limitation and its purposes and whether there are less restrictive means to achieve the purpose.

3. The Claim offends the provisions of section 57(1) of the Labour Relations Act, 2007 which provides that

An employer, group of employers or an employer's organisation that has recognised a trade union in accordance with the provisions of this Part shall conclude a collective bargaining agreement with the recognised trade union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement.

4. The Claimants lack *locus standi* to institute the present claim as a representative suit in light of the recognition agreement and CBAs entered between the 1st Respondent and UNRISK (the Claimants Union), the Claimants waived their rights and interests to negotiate directly with the employer and/or file a representative suit on their own behalf and on behalf of their colleagues. Section 2 of the Labour Relations Act defines a Recognition Agreement as an agreement in writing made between a trade union and an employer, group of employers or employers' organisation regulating the recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers' organisation.

5. The Claim offends the provisions of section 59 of the Labour Relations Act, 2007 which provides as follows:

(1) A collective agreement binds for the period of the agreement

(a) the parties to the agreement (b) all unionisable employees employed by the employer, group of employers or members of the employers' organisation party to the agreement or

(c) the employers who are or become members of an employers' organisation party to the agreement, to the extent that the agreement relates to their employees

(2) A collective agreement shall continue to be binding on an employer or employees who were parties to the agreement at the time of its commencement and includes members who have resigned from that trade union or employers' association

(3) The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.

6. The Claim against the 2nd and 3rd Respondents offends the provision of section 19 of the Science, Technology and Innovation Act which provides that:

A research institute established in accordance with this Part shall be a body corporate with perpetual succession and shall have power to sue and be sued in its corporate name and to acquire, hold and dispose of movable and immovable property for its own purposes.

7. The Claim offends the provisions of the Industrial Relations Charter which promotes tripartism, social dialogue and collective bargaining.

4. The Claimants filed a replying affidavit sworn by Eric Lelo in opposition to the *preliminary objection* on 7 March 2019. Filed on the same day was a List of Authorities.

5. During an appearance on the same day, the Court gave directions as to the filing of submissions.
6. The Respondents were to file and serve their submissions on or before 14 March 2019 while the Claimants and Interested Party were to file submissions by 20 March 2019. The submissions were to be highlighted on 20 March 2019.
7. The Respondents did not file/serve the submissions as directed. The Claimants filed their submissions on 19 March 2019.
8. The Court took oral arguments on 20 March 2019 as scheduled.
9. It is regrettable that the Respondents who raised the *preliminary objection* did not file/serve submissions despite raising substantial questions of law whose determination would be felt beyond the instant contestation.
10. In presenting the oral submissions, these Respondents merely repeated the contents of the preliminary objection. Such a course of prosecuting the objection did not assist the Court.
11. In the view of the Court, proceeding to determine the *preliminary objection* on the state of the record as it is now, the Court would only be writing what is akin to a *thesis* on the legal provisions of law invoked in the objection.
12. Such a course of proceeding, in the view of the Court would not do justice to the parties and the public at large whose interests and rights may be affected.
13. In the circumstances, the Court declines to determine the objection, and directs that the legal issues which were raised therein be taken up as part of the hearing on the merits.
14. The Objecting Respondents to meet the Claimants costs of the preliminary objection.

Delivered, dated and signed in Nairobi on this 14th day of June 2019.

Radido Stephen

Judge

Appearances

For Claimants Mr. Jaoko instructed by Nchoe Jaoko & Co. Advocates

For 1st – 3rd Respondents Ms. Kanyiri, Federation of Kenya Employers

For 5th – 7th Respondents Office of the Attorney General

For Interested Party Mr. Enonda instructed by Enonda & Associates

Court Assistant Lindsey