



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CASE NO. 17 OF 2019**

**COUNTY GOVERNMENT OF KIRINYAGA.....CLAIMANT**

**VERSUS**

**KENYA MEDICAL PRACTITIONERS,**

**PHARMACISTS & DENTISTS UNION.....1<sup>ST</sup> RESPONDENT**

**KENYA NATIONAL UNION OF NURSES.....2<sup>ND</sup> RESPONDENT**

**KENYA UNION OF CLINICAL OFFICERS.....3<sup>RD</sup> RESPONDENT**

**KENYA NATIONAL UNION OF MEDICAL**

**LABORATORIES OFFICERS.....4<sup>TH</sup> RESPONDENT**

**AND**

**THE CABINET SECRETARY,**

**LABOUR AND SOCIAL PROTECTION.....1<sup>ST</sup> INTERESTED PARTY**

**SALARIES AND REMUNERATION COMMISSION.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. The Claimant’ application dated 24<sup>th</sup> May 2019 seeks the following orders:-

1. THAT for the reasons set out in the Certificate of Urgency filed herewith, service of this application upon the Respondents be dispensed with and the Application be certified as urgent and be heard *ex-parte* in the first instance.

2. THAT pending the hearing and determination of this application, this honourable Court be pleased to grant an injunction prohibiting/restraining the Respondents, its officials, representatives, agents, and/or its members from causing, effecting, inciting or otherwise calling for any industrial action and or withdrawal of service by Applicant’s employees.

3.THAT pending the hearing and determination of this application, this Honourable Court be pleased to grant an injunction prohibiting/restraining the Respondent’s members in the County Government of Kirinyaga from engaging in any industrial action or withdrawing their services.

4. THAT this Honourable Court declares the strike called by the Respondents in their notice dated on 20<sup>th</sup> May, 2019 unlawful, prohibited and therefore unprotected.

5. THAT this Honourable Court declares that the 4<sup>th</sup> Respondent has no locus to call a strike or industrial action on behalf of its members.

6. THAT this Honourable Court direct the 1<sup>st</sup> Interested Party to appoint a conciliator to attempt to resolve the trade dispute between the Applicant and the Respondents.

7. THAT this Honourable Court to allow the Applicant to serve the Respondents by way of substituted service by way of their known emails, registered post and or advertisement through the Nation Daily Newspaper.

8. THAT the Respondent be condemned to pay the costs of this Application.

2. The motion was unopposed and was heard *ex parte* as the Respondents had refused to purge a contempt of the court orders which were issued by Onyango J. and this court on 24<sup>th</sup> May 2019 and 28<sup>th</sup> May 2019 respectively. The orders were to the effect that the staff were to resume work and even on the date of the hearing the courtroom was jam packed by members of the Respondents who were not at work as required. Counsel for the Claimant Mr. Kibet Rono urged the motion and relied on the affidavit of Joe Muriuki and the grounds on the face of the motion. He urged the Court to grant the motion arguing that the 1<sup>st</sup> – 3<sup>rd</sup> Respondents did not have the basis to call for a strike through the notice of 4<sup>th</sup> May 2019. He submitted that the court should declare the strike unlawful, prohibited and therefore unprotected. The Claimant submitted that the 4<sup>th</sup> Respondent had no *locus* as there was no collective bargaining agreement or a recognition agreement with the Claimant to allow for their interaction since it was not a body recognized by the Claimant. He submitted that the Respondents had not responded to the motion despite seeking time on 12<sup>th</sup> June 2019 to file a response. Counsel asserts that the collective bargaining agreements and the recognition agreements between the Claimant and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents provide the procedure for the resolution of disputes between the said Respondents and the Claimant and that the call for strike did not comply with procedures. He cited the case of **Inter-Public Universities’ Councils Consultative Forum of Federation of Kenya Employers v Universities’ Academic Staff Union & 5 Others [2018] eKLR** and submitted that any strike called before referring the dispute to conciliation under Section 62 of the Labour Relations Act as required under Section 76(b) and 78(1)(e) of the Act is unprotected. He sought orders to permit the Claimant to take any disciplinary action against the members of the Respondents who had defied the order to resume work.

3. The motion is pursuant to a strike called by the Respondents. Section 76, 77 and 78 of the Labour Relations Act contemplate that before a strike is called that there would be various steps taken. In order to appreciate the tenor of these provisions of law, it is imperative that I reproduce them here *in extenso*:-

*76. A person may participate in a strike or lockout if?*

*(a) the trade dispute that forms the subject of the strike or lock-out concerns terms and conditions of employment or the recognition of a trade union;*

*(b) the trade dispute is unresolved after conciliation-*

*(i) under this Act; or*

*(ii) as specified in a registered collective agreement that provides for the private conciliation of disputes; and*

*(c) seven days written notice of the strike or lockout has been given to the other parties and to the Minister by the authorised representative of –*

*(i) the trade union, in the case of a strike;*

*(ii) the employer, group of employers or employers’ organisation, in the case of a lock-out.*

*77.(1) A party to a dispute that has received notice of a strike or lock-out may apply to the Industrial Court to prohibit the strike or lockout as a matter of urgency if –*

*(a) the strike or lock-out is prohibited under this Part; or*

*(b) the party that issued the notice has failed to participate in conciliation in good faith with a view to resolving the dispute.*

*(2) .....*

*(3) .....*

*78.(1) No person shall take part in a strike or lock-out or in any conduct in contemplation of a strike or lock-out if?*

*(a) any law, court award or a collective agreement or recognition agreement binding on that person prohibits a strike or lock-out in respect of the issue in dispute;*

*(b) the subject matter of the strike or lock-out is regulated by a collective agreement or recognition agreement binding on the parties to the dispute;*

*(c) .....*

(d) .....

(e) .....

(f) the employer and employees are engaged in an essential service;

(g) the strike or lock-out is not in furtherance of a trade dispute; or

(h) .....

(2) .....

(underline mine)

4. The strike that has been going on in Kirinyaga County is therefore, from a plain reading of the law, illegal and unprotected. The members of the Respondents are engaged in an essential service. The term essential services means services, by whomsoever rendered, and whether rendered to the Government or to any other person, the interruption of which would endanger the life, health or personal safety of the whole or part of the population. We have to conform to international labour standards. The International Labour Organisation (ILO) provides legislative guidelines on essential services and emergency situation as follows:-

*National legislation frequently places some form of limitation on the right to strike in certain activities, usually defined as essential services. In this respect, the ILO's supervisory bodies have taken the position that it is admissible to limit or prohibit the right to strike in essential services, defined as those the interruption of which would endanger the life, personal safety or health of the whole or part of the population (General Survey, para. 159).*

*In this connection, legislation may establish a general definition of essential services and leave its interpretation in specific cases to a public authority or the courts. Or it may establish a procedure for determining whether an activity should be deemed to be an essential service, sometimes with the participation of employers' and workers' organizations. In some cases, the legislation includes a list of activities deemed to be essential services in which work stoppages are not permitted.*

*The determination of which services are to be considered essential in each case is a delicate matter. For example, the interruption of a specific activity in many countries might not be considered such as to endanger the life, personal safety or health of the whole or part of the population, while such a service may be essential in other countries in view of their particular conditions. By way of illustration, port or maritime transport services might be considered essential on an island that is heavily dependent on them for basic supplies, whereas they would not be considered essential in most countries. Moreover, the impact of a strike may depend on its length. A stoppage of a few days may pose few problems, while one of several weeks or months may cause serious prejudice to the population concerned (for example, in household refuse collection services). In view of the above, in some countries a specific authority is entrusted with the power to declare a service to be essential or to prohibit a strike in a service or activity when its length has created a situation that is akin to an emergency for the whole or part of the population.*

*The ILO's supervisory bodies have taken the position that where the right to strike is subject to restrictions or a prohibition, the workers concerned should be afforded compensatory guarantees, such as conciliation and mediation procedures leading, in the event of deadlock, to arbitration machinery seen to be reliable by the parties concerned. In such cases, it is essential that the parties are able to participate in determining and implementing the procedure, which should provide sufficient guarantees of impartiality and rapidity. Moreover, arbitration awards should be binding on both parties and once issued should be implemented rapidly and completely (General Survey, para. 164).*

5. The above clearly places the workers whose case is before court in the category of people who cannot go on strike such as the Police, defence forces, doctors, nurses, clinicians and the like and generally people whose withdrawal of services would endanger life such as emergency vehicle drivers and operators. Since the strike is expressly prohibited by Section 78(1)(f) of the Labour Relations Act, the motion by the Claimant applicant is merited and granted. As the Claimant/Applicant has been successful it will be entitled to costs.

It is so ordered.

**Dated and delivered at Nyeri this 4<sup>th</sup> day of July 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a

true copy of the Original

**Deputy Registrar**