



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 94 OF 2019

(Before Hon. Lady Justice Hellen S. Wasilwa on 30th September 2019)

KENYA NATIONAL UNION OF NURSES.....CLAIMANT

VERSUS

COUNCIL OF GOVERNORS.....1ST RESPONDENT

JACQUELINE OMOGENI.....2ND RESPONDENT

RULING

1. The application pending for determination is the one dated 15th February, 2019. The Application was filed under Certificate of Urgency through a Notice of Motion filed under Rule No. 17 (1) & (3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and all other enabling provisions of the Law.

2. The Application seeks the following Orders that:-

1. This Application be and is hereby certified as urgent and service thereto be dispensed with in the first instance.

2. Pending inter-partes hearing and determination of this Application, the letter of Ref.COG/6/40/IB Vol 6(68) dated 11th February 2019 by the Council of Governors be and is hereby stayed in its implementation, and the 1st and 2nd Respondents are restrained by themselves, their Agents, Servants and or anybody acting in their names from issuing any directives through circulars or letters to Forty Seven (47) County Public Service Boards on employment matters including disciplinary actions directed at the nurses.

3. After inter-partes hearing of this application, the Honourable Court be pleased to issue a conservatory order suspending the implementation of the letter of Ref:COG/6/40/IB Vol. 6(68) dated 11th February 2109 pending hearing and determination of the main suit.

4. After inter-partes hearing of this application, the Honourable court be pleased to issue a conservatory order restraining the Council of County Governors and its Chief Executive Officer by themselves, their agents, servants or anybody acting in their names from issuing any directives through Circulars, memos, letters to the Forty Seven County Public Service Boards on any matter relating to Employment and discipline management of the Nurses who are in employment of the Forty Seven (47) County Governments.

5. Costs be in the cause.

3. The Application is supported by the Affidavit of SETH PANYAKO, the General Secretary of the Claimant Union, sworn on 15th February, 2019, is premised on the following grounds:-

1. THAT on 11th February 2019, in a letter of Ref:COG/6/40/IBVol.6(68) dated 11th February 2109, one Jacqueline Mogeni MBS acting as the Chief Executive Officer of the Council of Governors wrote to all Governors instructing them to implement the following resolutions:-

a) Counties need to immediately take disciplinary measures against nurses who are on strike.

b) County Governments should immediately issue show cause letters to the striking nurses.

c) *County Governments should not pay all the nurses who are on strike as per Section 76 sub section 6 of the Employment and Labour Relations Act.*

d) *Counties should withhold the nurses' remittance.*

e) *Parties to the dispute through their officials and representative submit themselves.*

2. ***THAT*** *the said resolutions were arrived at in a Consultative Meeting held between the Council of Governors, the Ministry of Health and Ministry of Labour and Social Protection, which entities do not have a role in employment and discipline management of Nurses employed by County Governments through the Respective County Public Service Boards.*

3. ***THAT*** *halting remittance of Trade Union dues would be in contravention of Section 48 of the Labour Relations Act read together with Section 52 which states inter alia:-*

48(1) *In this part, "trade union dues " means a regular subscription required to be paid to a trade union by a member of the Trade Union as a condition of Membership:-*

a) *deduct trade union dues from the wages of its members, and*

b) *pay monies so deducted:-*

i) *into a specified account of the trade union or*

ii) *in specified proportion into specified accounts of a trade union and a federation of trade unions.*

4. ***THAT*** *the resolutions made in the said consultative meeting are null and void as employment matters in the county governments can only be handled by the County Public Service Boards whose mandate includes employment and disciplining of personnel Pursuant to the provisions of Section 59(l),(c) of the County Government Act which provides as follows;*

1. *The functions of the County Public Service Board shall be on behalf of the County Governments:-*

a)

b)

c) *Exercise disciplinary control over, and remove persons holding or acting in those offices as provided for under this part,*

d)

e)

f)

g)

h) *Advise the County Government on Human Resource Management and Development.*

i)

j)

5. ***THAT*** *the resolutions arrived at by the Council of Governors, Ministry of Health and Ministry of Labour are therefore outside of their mandates as none of the three entities have any mandate on management of employees of County Governments including on disciplinary matters as this is the mandate of County Public Service Boards which did not participate in the meeting of 11th February 2019 where the resolutions were made.*

6. ***THAT*** *the Ministry of Health which participated in the meeting of 11th February 2019 is equally not the employer of nurses in County Governments hence it cannot initiate disciplinary measures against the nurses.*

7. ***THAT*** *the Ministry of Labour and Social Protection which took part in the meeting and resolved to initiate disciplinary action against the nurses does not have mandate to do so as it is supposed to be a neutral conciliator in the event of any disputes being referred to it.*

8. ***THAT*** *unless the orders sought herein are granted the claimant and its members are apprehensive that they will suffer irreparable prejudice occasioned by the entities which do not have mandate to discipline them.*

9. ***THAT*** In as far as the Council of Governors, Ministry of Labour and the Ministry of Health are not the employers of Nurses in the (47) Forty SEVEN counties, the resolutions arrived at on 11th February 2019 are Null and Void and hence the Applicant has a prima facie case with high chances of success necessitating the court to allow this application and grant interim orders as prayed.

10. ***THAT*** as such, we pray that this court finds favour with the Applicants application and grant the orders as prayed for.

4. The Respondents on the other hand opposed the instant Application vide its Grounds of Opposition dated 6th March, 2019 and filed in Court on 14th March, 2019, in which the Respondents' raises the following grounds:-

1. ***THAT*** the instant Application lacks merit, is misconceive, frivolous and an abuse of this Court and is for dismissal with costs.

2. ***THAT*** the Application does not take cognizance of the powers of employers to exercise disciplinary processes to employees as provided under the law.

3. ***THAT*** the instant Application fails to give accord to the provisions of Section 79 (6) and Section 80 (1) (a) of the Labour Relations Act 2007.

4. ***THAT*** the Applicant has failed to show any good reason as to why this Honourable Court should exercise its discretion in it's favour.

5. ***THAT*** it would be premature for this Court to exercise its jurisdiction on matters that fall within the jurisdiction of other authorities.

5. AND any other grounds and reasons to be adduced at the hearing of the Petition.

6. The Claimant in response to the Respondent's Grounds of Opposition filed a Supplementary Affidavit sworn by **DAVID OMULAMA**, an Industrial Relations Officer of the Claimant union in which he avers that the 1st Respondent lacked the capacity to direct the County Governments to conduct disciplinary action as there was no common interest as envisaged under the provisions of Section 20 (c) of the Intergovernmental relations Act.

7. It is further the Claimant's contention that the Respondents are not mandated to declare a strike illegal and/or unprotected and as such cannot purport to punish employees in taking part in such a strike yet the matter is still pending before the Court for determination.

8. The Claimant further contends that it has through the instant Application shown that it has a prima facie case with probabilities of success and that it is bound to suffer loss of revenue in addition to its members suffering loss of employment and livelihood should the orders sought in the instant Application not be granted by this Honourable Court.

9. In conclusion the Claimant/Applicant urged this Honourable Court to allow the instant Application as the prejudice it stands to suffer cannot be compensated by way of damages in the event the Respondents' proceed to implement the directive issued in the letter Ref COG/6/40/1B VOL(18).

10. In disposing of the instant Application, the parties agreed to file written submissions.

Claimant/Applicant's Submissions

11. In its written submission the Claimant/Applicant contends that its Application has met the threshold for grant of temporary injunctions as set out in the landmark decision **of Giella Vs Cassman Brown Co. Ltd** and therefore urged this Honourable Court to allow their Application as prayed.

12. It is further submitted that the Council of Governors and its Chief Executive officer engaged in un-procedural action of intimidating the nurses by intimating that disciplinary measures would be taken against them without advice of the respective County Service Boards as required under the provisions of Section 59 of the County Government Act.

13. The Claimant further contended that the Ministry of Health had no *locus standi* to participate in the meeting that resolved in disciplinary action ought to be taken against the members of the Claimant union.

14. The Claimant/Applicant further contends that the decision made of withholding nurses' union dues was ill advised and made contrary to the provisions of Article 41 of the Constitution of Kenya, 2010 and Section 48 (1), (2) (a), (b) (i) and (ii) of the Act.

15. The Claimant/Applicant submits that if the orders sought in the Application are not granted then it stands to suffer loss of members as failure to deduct and remit trade union dues shall effectively remove members from the union as provided in Section 48 (1) of the Labour Relations Act.

16. They further contend that allowing the implementation of the letter would lead to unfair dismissal of its members and that since reinstatement after unfair dismissal is discretionary it is not a guarantee that the said relief would be available to them then.

17. In conclusion, the Claimant/Applicant union urged this Honourable Court to allow its Application as prayed.

Respondents' Submissions

18. The Respondent on the other hand submitted that the Claimant's Application seeks to abrogate the statutory mandate of employers as provided under law to conduct disciplinary action against employees who breach terms of their employment.

19. The Respondents' further contend that the instant Application fails to give accord to the provisions of Sections 79 (6) and 80 (1) (a) of the Labour Relations Act. To fortify this argument the Respondents rely on the findings in the case of **Dennis Nyagaka Ratemo Vs Kenya Film Classification & Another (2014) eKLR** where the Court was guided by the finding of the Industrial Court Cause **Number 1200 of 2012 Professor Gitile J. Naituli Vs University Council, Multimedia University of Kenya(Unreported)**, where the Court stated:-

“It is the prerogative of the employer in managing its business and administration of its staff, should not be unduly stifled by judicial intervention through issuance of provisional injunctive measures, such as those sought by the Claimant. The Employment Act and the Industrial Court Act seek to protect the weaker of the two parties in an employment relationship, not to deprive the employer of the management prerogative altogether.”

20. The Respondents further cited the authority of **Rose W. Kiragu Vs Teachers Service Commission (2016)eKLR** where the court was of the view that the Courts should not interfere with internal disciplinary process of the employer. The Respondents therefore urged the Court not to allow the Application as prayed as in doing so it would be tantamount to it interfering with the disciplinary process, which the Court should not do.

21. It is further submitted that the Respondents are justified not to make any remittance to the Claimant union as members of the union failed to resume duty despite the fact that they were served with a court order requiring them to resume duty.

22. They further contend that under the provisions of Section 79 (6) of the Labour Relations Act, an employer is not obligated to remunerate an employee for services that has not been rendered and therefore they are justified to withhold their salaries and/or institute disciplinary proceedings against them.

23. The Respondents contends that the 2nd Respondent has been improperly enjoyed in these proceedings and urged the Court to dismiss the Claim as against the 2nd Respondent. For emphasis the Respondents cited the court of Appeal decision in the case of **Anthony Francis Wareheim T/a Wareham & 2 others Vs Kenya Post Office Savings Bank (2004) eKLR**.

24. In conclusion, the Respondents submitted that it should be allowed to proceed with the disciplinary proceedings and that the Court ought to dismiss the instant Application with costs to the Respondents.

25. I have considered all the averments of the Parties. The main issue for consideration is whether the Applicant has established a prima facie case with a likelihood of success.

26. The main contention by the Applicant is that the 1st Respondent Council of Governors is not an employee of the Applicants and so should not issue circulars directing the employer of the Claimants members on what to do in disciplinary matters.

27. The offending circular in this case is the circular Ref. No. COG/4/40/1B Vol.6 (68) addressed to all Governors of the 47 Counties instructing them to implement certain resolutions, which include taking disciplinary measures against nurses who are on strike and issuing them with show cause letters and also withholding their remittances.

28. On the face of it indeed, the Council of Governors, the 1st Respondent is not an employee of the Applicants members. They cannot issue specific circulars directing the disciplinary measures to be taken against the Claimants measures.

29. The County Governments Act provides explicitly that this function to hire, discipline and deal with Human Resource functions of the County Government employees is vested in the County Public Service Boards.

30. This is explicitly provided under Section 59(1)(c) of the County Government Act.

31. It is therefore prima facie that the Council of Governors have no jurisdiction to handle particular disciplinary issues of Staff of the County governments. The Ministry of Health in particular also does not have such jurisdiction because the jurisdiction of discipline at the national level is held by the Public Service Commission. It is therefore my finding that the circular by the Council of Governors directing the County Governors on disciplinary action has no force of law.

32. The Applicants asked the Court to quash the offending circular. I find the prayers sought are warranted and I proceed to stay the said circular in the interim pending hearing and determination of the main claim.

33. Costs in the cause.

Dated and delivered in open Court this 30th day of September, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kinoti for Applicant – Present

Respondent – Absent