



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NUMBER 36 OF 2019

BETWEEN

KENYA UNION OF NURSES.....CLAIMANT

VERSUS

- 1. KILIFI COUNTY PUBLIC SERVICE BOARD**
- 2. KWALE COUNTY PUBLIC SERVICE BOARD**
- 3. TANA RIVER COUNTY PUBLIC SERVICE BOARD**
- 4. TAITA TAVETA COUNTY PUBLIC SERVICE BOARD**
- 5. WYCLIFFE AMBETSA OPARANYA**
- 6. MINISTRY OF PUBLIC SERVICE, YOUTH AND GENDER, STATE
DEPARTMENT FOR PUBLIC SERVICERESPONDENTS**

RULING

1. This Claim was initially filed at the E&LRC Nairobi, registered as Cause Number 393 of 2019.
2. The Claim arises out of a circular issued by the 5th Respondent, who chairs a group of County Governors, under the banner of Council of Governors. The circular issued on 15th February 2019 to all County Governments. The circular directed:

“...County Governments should not deduct and remit the union dues to the Kenya National Union of Nurses, instead the full salaries should be paid to the nurses, to enable them remit their dues to the Union if they so wish...”
3. The circular has resulted in a flurry of Claims filed by the Claimant, in different E&LRC Courts countrywide.
4. The Claimant seeks orders quashing the circular, and enforcing payment of outstanding trade union dues.
5. An Application dated 18th June 2019 was filed by the Claimant under Certificate of Urgency, seeking provisional measures, reflective of the substantive orders sought.
6. The Application was placed before Hon. Judge Byram Ongaya at the Court in Nairobi, who ordered on 20th June 2019, that the Claim is transferred to Mombasa for *inter partes* hearing “on 16th July 2019, or as will be listed on that date.”
7. On 16th July 2019, the Claimant attended Court at Mombasa. The Respondents did not. There were Affidavits of Service filed, indicating the Respondents had been served. The Cause List for the day shows the matter was not listed for hearing.
8. The Claimant obtained the following Orders, *ex parte*: -

- Stay of implementation of the 5th Respondent's circular of 15th February 2019.
- 1st, 2nd, 3rd, and 4th Respondents to resume deductions and remittance of trade union dues from the end of June 2019, in accordance with Legal Notice No. 160 of 2018.
- The 5th Respondent to write to all 47 Counties informing them not to implement his circular.
- The 6th Respondent to develop a code and effect Legal Notice No. 160 of 2018.

9. The 5th Respondent has filed an Application dated 22nd July 2019, seeking reversal of the above Orders. He seeks leave to respond to the Claimant's Application.

10. The Application is based on the Affidavit of Jacqueline Mogeni, CEO of the group known as Council of Governors, sworn on 22nd July 2019.

11. She states that the 5th Respondent was not aware of the hearing date; he was not given a chance to be heard; the matter was not on the cause list of 16th July 2019; the Orders granted are substantive; and the 5th Respondent is ready to respond to the Application.

12. The Claimant filed Grounds of Opposition on 31st July 2019. There is no Replying Affidavit filed, but curiously, there is what is described as a Verifying Affidavit, accompanying the Grounds of Opposition. The Claimant's position is that:-

- The Order of 20th June 2019 clearly stated the hearing date at Mombasa would be 16th July 2019.
- The Order was served upon the 5th Respondent.
- The Application was therefore unopposed on 16th July 2019.
- The Claimant would be prejudiced if the Court reverses its Orders of 16th July 2019, as it continues to lose revenue.

13. 5th Respondent's Application was heard at length, on 31st July 2019. Parties restated and underscored the contents of their Pleadings and Affidavits. It was the common position of the Parties that there are various Claims, based on a common nucleus of facts, pending before different E&LRC Stations countrywide.

The Court Finds:-

14. There is adequate evidence on record to show that the 5th Respondent was aware of the hearing date, 16th July 2019. The date was specifically given in the Order of the Court at Nairobi. The Order was served upon all the Respondents.

15. It does not follow that because a matter is not on the cause list, a Party who is otherwise aware of the hearing date, should keep away on the date the matter is scheduled for hearing. The date was given in Court by the Hon. Judge Ongaya. The addendum to the Order, stating '... or as will be listed on that date,' was directed at the Court in Mombasa. The Court in Nairobi was telling the Parties hearing would be on 16th July 2019, or on any other date suitable to the Court in Mombasa, as determined by the Court in Mombasa, on 16th July 2019. It was mandatory for the Parties to avail themselves on 16th July 2019, and if not ready to be heard, seek another date from the Court on 16th July 2019. There was no room left in the Order of the Court, for Parties to absent themselves.

16. The Respondents kept away leading to grant of *ex parte* Orders the 5th Respondent is now complaining about.

17. The circular issued by Governor Oparanya is obviously against the Labour Relations Act, and should remain suspended, pending hearing of the Main Claim.

18. Legal Notice No. 160 of 2018 was issued by the Cabinet Secretary for Labour and Social Protection. It is in the following terms:

- This Order may be cited as the Kenya National Union of Nurses Deduction of Dues Order 2018.
- An Employer who employs more than 5 Employees belonging to the Kenya National Union of Nurses shall-

[a] deduct on a monthly basis, the sum specified in respect of trade union dues from the wages of an Employee who is a Member of the Kenya National Union of Nurses;

[b] pay within ten days of the date of deduction, by crossed-cheque or electronic funds transfer-

[i] a sum of five hundred shillings under paragraph [a] payable to the Kenya National Union of Nurses account number 01120309515200, Cooperative Bank of Kenya, Aga Khan Walk, Nairobi; and,

[ii] a sum of one hundred and fifty shillings deducted under paragraph [a] payable to the Central Organization of Trade Unions, account number 229-741-204, Kenya Commercial Bank, Moi Avenue, Nairobi.

[c] commence deducting the trade unions dues from an Employee's wages within thirty days of being served with this Order by the Trade Union; and,

[d] file returns with the Registrar of Trade Unions at P.O. BOX 40326-00100 Nairobi.

19. Governor Oparanya's circular seeks to undo Legal Notice No. 160 of 2018. It is completely illegal. Once a Ministerial Order has issued under Section 48 of the Labour Relations Act, an Employer must [the word used in the law is shall] commence deductions.
20. The Legal Notice can only be revoked or suspended by the issuing Labour Cabinet Secretary under Section 50 [2] of the Labour Relations Act, if he is satisfied that:
- a. The Order was obtained by misrepresentation or fraud;
 - b. Money is not being paid into the designated account; or
 - c. The money is being used for a purpose other than the lawful Trade Union or Federation activities.
21. There is no room for a Governor to vary, revoke or suspend an Order issued by the Cabinet Secretary for Labour under Section 48 of the Labour Relations Act.
22. Even the Cabinet Secretary for Labour is circumscribed in his power to suspend or revoke an Order, as shown at paragraph 20 above.
23. Section 52 of the Labour Relations Act allows Members of a Trade Union to pay trade union dues directly to the Union. This is a discretion extended to Employees, which has nothing to do with their Employers. It is not a provision capable of being enforced by the Employers, or which takes away the obligation imposed on the Employers by the law, to deduct and remit Union Dues. Section 52 enables Employees to have easy access to union membership unhindered by other complexities of industrial relations. It is not a law created for Employers to evade their legal duty of deducting and remitting of trade union dues. The circular seems to the Court, to be part of an effort by the two levels of Government, at disabling the Claimant Union, by denying the Claimant Union stable cash-flow and union security.
24. The circular by Governor Oparanya is plainly illegal and cannot be allowed to stand, even as Parties litigate other aspects of the dispute across the Counties.
25. The Court has taken note that there are multiple Claims, in relation to the subject, involving the same Nationwide Trade Union and similarly situated County Governments. This was confirmed by the Parties in their address to the Court. Similar points of law have been raised. In one Claim at Nyeri County, there is a Ruling dated 3rd July 2019, relating to propriety of documents filed by the Claimant, under the Oaths and Statutory Declarations Act. Similar objection has been placed on record in the current dispute filed at Mombasa. Parties in their submissions urged the Court to adopt or reject the Ruling made by the Court in Nyeri. Why should the Court be compelled to do either? Substantive and procedural issues cut across the different files, if the Court understands the submissions of the Parties herein correctly.
26. There is a high potential for conflicting decisions being made in different Courts. It is likely to result in problems of enforceability and lack of public confidence in the Judiciary in effective resolution of disputes. The Claimant ought to file an Affidavit, bringing to the attention of the Court, all matters filed in various Courts, attaching basic Pleadings and Orders made in all the Claims. Having done so, the various files should be placed before the Principal Judge at Nairobi, for consolidation and direction on the hearing before a single Judge of the E&LRC at the station most central to the Parties. It is not healthy for the Parties to regularly fly all over the Kenyan airspace, arguing the same issues, in different Counties.
27. The Court has also looked into its *ex parte* Orders of 16th July 2019, and formed the view that Order 3 is not necessary in light of grant of Orders 1 and 2. The Orders 1 and 2 are sufficient and effective provisional measures. Order 4 appears not suited as a provisional measure. The Court agrees with the Respondents' position that the Order is substantive in nature, and ought not to have been granted, on interlocutory basis. The Claimant did not supply details of the code contemplated under Order 4. That aspect of the dispute, should abide hearing of the main Claim or Claims as the case may be.

IT IS ORDERED:-

- a. The Application filed by the 5th Respondent, seeking to set aside Orders made on 16th July 2019 in their entirety is rejected.**
- b. Interim Order, staying implementation of circular issued on 15th February 2019 by the 5th Respondent, is hereby confirmed.**
- c. Interim Order, directing the 1st, 2nd, 3rd and 4th Respondents to resume deductions and remittance of Trade Union Dues from the end of June 2019, in accordance with Legal Notice No. 160 of 2018, is confirmed.**
- d. Orders 3 and 4 issued on 16th July 2019 are set aside.**
- e. The Claimant shall file and serve an Affidavit disclosing all Claims pending before other E&LRCs countrywide, attaching basic Pleadings and Orders made.**
- f. The file is hereby transferred back to Nairobi, to be placed before the Principal Judge for directions, alongside other matters filed in different E&LRCs.**

Dated and delivered at Mombasa this 30th day of September 2019.

James Rika

Judge