



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

PETITION NO. 62 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

THE PUBLIC SERVICE COMMISSION.....1ST PETITIONER

THE CABINET SECRETARY MINISTRY OF

LABOUR SOCIAL SECURITY SERVICES.....2ND PETITIONER

THE CABINET SECRETARY

MINISTRY OF DEVOLUTION.....3RD PETITIONER

THE TEACHERS SERVICE COMMISSION.....4TH PETITIONER

THE CABINET SECRETARY

MINISTRY OF EDUCATION.....5TH PETITIONER

VERSUS

TRADE UNION CONGRESS OF KENYA.....RESPONDENT

TOM ODEGE, THE CHAIRPERSON

TRADE UNION CONGRESS OF KENYA.....2ND RESPONDENT

WILSON SOSSION, THE SECRETARY GENERAL

TRADE UNION CONGRESS OF KENYA.....3RD RESPONDENT

AND

NATIONAL HOSPITAL INSURANCE FUND...1ST INTERESTED PARTY

COUNCIL OF GOVERNORS.....2ND INTERESTED PARTY

JUDGMENT

Introduction

This petition is filed by the Public Service Commission, The Cabinet Secretary Ministry of labour, Social Security and Services, The Cabinet Secretary, Ministry of Devolution and the Cabinet Secretary Ministry of Education, the 1st, 2nd, 3rd, 4th and 5th petitioners respectively, seeking the following reliefs:-

- a) A declaration that the notice of industrial action dated 19th June, 2015 addressed to the Acting Cabinet Secretary, Ministry of Labour, social Security and Services Ref. TUC/NHIF/2015 is illegal, null and void *ab initio*.
- b) A declaration that the respondents' industrial action is unprotected under the Labour Relations Act.
- c) A prohibitory injunction restraining the respondents, its officials and their members from engaging in, participating and/or continuing with their illegal strike.
- d) Any other order that the court may deem fit and just to grant.
- e) Costs of this petition to be borne by respondents.

The respondents are the Trade Union Congress of Kenya, a Federation of trade unions in the public sector of Kenya, registered under the Labour Relations Act (the 1st respondent) together with its Chairperson (2nd respondent) and Secretary (3rd respondent). The 1st respondent draws membership from:-

The Kenya Union of Teachers (KNUT), the Union of Kenya Civil Servants (UKCS), the Dock Workers' Union (DWU), Kenya Union of Employees of Polytechnic Colleges (KUEPC), Kenya National Union of service Employees (KNUSE), Kenya Universities Staff Union (KUSU) and Universities Academic Staff Union (UASU).

The petitioners joined the interested parties being the National Hospital Insurance Fund and the Council of Governors.

Background

Vide Legal Notice No. 14 of 2015, the 1st Interested Party, the Board of the National Hospital Insurance Fund, gazetted new rates of contributions which were published under Kenya Gazette Supplement No. 12 of 6th February 2015. The 1st respondent was aggrieved by the Gazette Notice and filed **Petition No. 61 of 2015** at Milimani High Court seeking a stay of implementation of the new rates of contributions.

In its ruling delivered on 15th June 2015 the court dismissed the application for temporary stay of implementation of the Gazette Notice.

On 19th June 2015, the 1st respondent wrote a letter to the Cabinet Secretary, Ministry of Labour, Social Security and Services, the 2nd petitioner, issuing a 7 day strike notice. The 1st respondent demanded the suspension of the Legal Notice and refund of all deductions made from 1st April 2015 to the date of the letter.

The petitioners moved to court vide this petition to stop the strike, and by application dated 2nd July 2015 filed under certificate of urgency together with the petition, obtained interim injunctive orders on 3rd July 2015.

The respondents filed replying affidavits of the 2nd and 3rd respondents in response to both the petition and the application. The 1st interested party also filed a replying affidavit of Simeon Ole Kirgotty, its Chief Executive Officer.

The petition was disposed of by way of written submissions and the replying affidavits were adopted as replies of the respondent. Submissions were filed on behalf of the petitioner, 1st and 3rd respondents. One of the submissions is for the 1st and 3rd respondents filed through Moses Nyambega and Company advocates, the other is for the 3rd respondent alone filed through Oraro and Company advocates. Both are filed on 4th December 2017.

Petitioners' case

It is the petitioners' case that the strike notice was not valid as the petitioners were not consulted, and that the respondents breached the principle of fair administrative action. The petitioners further submit that the respondents having already moved to court seeking determination of the legality of the new National Hospital Insurance Fund deductions, it was a blatant abuse of the law for them to issue the notice for industrial action after the court had declined to stop or suspend the new NHIF deductions. The petitioners further submit that their right to fair labour practice was breached by the respondents and that the strike was in violation of Section 76 of the Labour Relations Act.

The petitioners submit that the 1st respondent's members are civil servants who provide essential services and the strike would shut down all government services against public interest. They submitted that the rights of respondents should be balanced against the fundamental rights of others as expressed in **Cause No. 338 of 2014. The Kenya Ferry Services Limited V. Dock Workers Union (Ferry Branch)**.

Respondent's Case

For the respondents it was submitted that it is a right of every worker to go on strike as enshrined in article 41 (2) of the Constitution and that the right cannot be limited except in the circumstances provided for under Article 24 (1) of the Constitution. It is further the respondent's case that sections 78 (1) (f) and 81 (3) of the Labour Relations Act do not meet the standards contemplated under Article 24 (2) and are thus invalid in terms of Article 2 (4) of the Constitution.

It is the respondents submissions that the 1st respondent is established by workers of Kenya as a labour centre to protect the socio-economic

rights of all workers in Kenya and to seek social and economic justice for members. That by issuing the strike notice the 1st respondent was acting in furtherance of the interests of its members.

The respondents further submit that Article 20 (3) binds all organs and persons:-

(3) In applying a provision of the Bill of Rights, a court shall—

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

The respondents relied on the case of **TSC V. KNUT (2015) eKLR**.

Determination

I have carefully considered the pleadings and submissions of the parties. I have also considered the authorities cited by the parties. It is my opinion that the parties have not addressed the real issue in contention in the petition which is the validity of the strike notice.

Strike is defined in the Labour Relations Act as:-

“Cessation of work by employees acting in combination, or a concerted refusal or a refusal under a common understanding of employees to continue to work, for the purpose of compelling their employer or an employers’ organization of which their employer is a member, to accede to any demand in respect of a trade dispute.”

Blacks’ Law Dictionary, Ninth Edition also defines a strike as:

“An organised cessation or slow down of work by employees to compel the employer to meet the employees’ demands; a concerted refusal by employees to work for their employer, or to work at their customary rate of speed, until the employer grants the concessions that they seek.”

Article 41 (2) (d) of the Constitution provides that every worker shall have the right to go on strike. The right can however only be exercised within the legal meaning of a strike. As defined in Blacks’ Law Dictionary and the Labour Relations Act, a strike can only be legal where the elements in the definition are present. These include the following:-

1. There must be an employer/employee relationship;
2. There must have been a lawful demand(s) made by the employees to the employer;
3. There must have been discussions or attempts made to discuss the demand(s) of the employees;
4. There must have been a disagreement between the employer and the employee;
5. The strike must be aimed at the employer conceding to the demands of the employees.

In the present case, the demand made by the 1st respondent is contained in the notice of industrial action as the revocation of new National Hospital Insurance Fund rates effected from 1st April 2015. There is no mention of the employees on whose behalf the notice is made or the employers against whom the notice is given. There is no employment relationship between the 1st respondent and the National Hospital Insurance Fund against whose decision the strike notice was given.

The 1st respondent does not refer to any meetings held with the National Hospital Insurance Fund or with the petitioners which had resulted in a disagreement to warrant the 1st respondent calling its members out on strike. It is also instructive that the strike notice refers to a “general strike” which is not defined in either the constitution or the Labour Relations Act.

The notice of strike is copied to the cabinet secretaries in the Ministry of Devolution, Health, Education, Transport and Infrastructure, Head of Public Service and Council of Governors. It is therefore presumed that the employees on whose behalf the strike notice was issued are those working in those ministries. No evidence was produced by the 1st respondent to prove any dispute with the cabinet secretaries in these ministries, or any meetings held with them to attempt to resolve the strike.

The 7 day strike notice given by the 1st respondent is as provided for in Section 76 of the Labour Relations Act which provides as follows:-

76. “A person may participate in a strike or lock-out if—

a) A 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 lock-out 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."*

As was stated in **Teachers Service Commission V. Kenya National Union of Teachers [2015] eKLR** "*the Constitution under Article 41 (2) (d) recognises the right of a worker to go on strike as one of the fair labour practices. However, the Constitution is silent on how this right is to be exercised. This is left to the provisions of section 76 of the Labour Relations Act since the Constitution has never concerned itself with procedural issues. The contention therefore that in exercising the right to strike under Article 41 (2) (d) a party can ignore the procedural provisions contained in section 76 of the Labour Relations Act many not in all cases be correct.*"

In the present case, the 1st respondent filed **Nairobi High Court Petition No. 61 of 2015** over the same subject matter and the court had declined to suspend the Gazette notice that is the subject of the strike notice. The ruling was delivered on 15th June 2015 and the strike notice issued on 19th June 2015, just 4 days later. It is evident from the strike notice that the 1st respondent was dissatisfied with the ruling and opted for the strike notice in a bid to achieve through the strike notice that which it was unable to achieve in court.

The proper action to take in such circumstances was to appeal against the court decision. By issuing the strike notice, the 1st respondent was in actual fact protesting against the court order. I would therefore agree with the petitioners that this was an abuse of court process. It was also an abuse of the law, by attempting to achieve the same results through multiple processes within the law. The 1st respondent was aware at the time of issuing the strike notice that the court had already declined to suspend the new NHIF rates which it was attempting to suspend through the strike notice. This was also during the pendency of petition No. 61 of 2015 over the same subject matter.

Conclusion

In conclusion therefore, I find that the notice of industrial action dated 19th June 2015 addressed to the Cabinet Secretary Ministry of labour, Social Security and services was unlawful as there was neither an employment relationship or a dispute between the 1st respondent and the targeted employers, within the meaning of Section 2 as read with Section 76 of the Labour Relations Act and declare accordingly. The Petition therefore succeeds.

I hereby issue an order of prohibitory injunction restraining the 1st respondents, its officials and or members from engaging in, participating in the strike called by the notice dated 19th June 2015.

There shall be no orders for costs.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 23rd DAY OF FEBRUARY 2018

MAUREEN ONYANGO

JUDGE