



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 257 OF 2018

INTER-PUBLIC UNIVERSITIES' COUNCILS

CONSULTATIVE FORUM OF FEDERATION

OF KENYA EMPLOYERS.....CLAIMANT/APPLICANT

VERSUS

UNIVERSITIES' ACADEMIC STAFF UNION.....RESPONDENT

AND

MINISTRY OF EDUCATION.....1ST INTERESTED PARTY

NATIONAL TREASURY2ND INTERESTED PARTY

MINISTRY OF LABOUR.....3RD INTERESTED PARTY

ATTORNEY GENERAL.....4TH INTERESTED PARTY

SALARIES AND REMUNERATION

COMMISSION.....5TH INTERESTED PARTY

RULING

Introduction

1. The applicant is an employers' organization whose members are 31 Public Universities in Kenya. The Respondent is a trade union, which represents the Academic Staff from the said 31 universities in Kenya. The 2 parties have a recognition agreement and have in the past negotiated and concluded Collective Bargaining Agreements. The said negotiations, conclusion and implementation of the said CBAs have however not been without a measure of acrimony which occasionally has ended up in strikes by the Respondents' members. The said strikes have in turn ended up paralysing learning in the said Universities and delaying finalization of courses for the students. Aware of the devastating effects the said strikes, the Claimant and the Respondent signed a commitment dated 13.3.2017 to conclude the 2017-2021 CBA. The Respondent presented her CBA proposal in the same month of March 2017 but the Claimant did not present her counter proposal and resorted to postponing the deadline for the said presentation.

2. In the meanwhile, on 9.12.2017 the parties concluded the CBA for 2013- 2017 and agreed to commence negotiations of the 2017- 2021 on 18.12.2017 and sign the CBA by 31.1.2018. However, the Claimant again never presented any counter proposal during the several meetings called to negotiating the 2017-2021 CBA prompting the Respondent to serve the strike Notice dated 21.2.2018 on the Claimant and the Cabinet Secretary (CS) incharge of Labour.

3. In order to avert the strike, the Chief Industrial Relations office ministry of Labour appointed a conciliator under section 70 of the Labour Relations Act to avert the intended strike and help the contestants to resolve the 2017- 2021 CBA dispute. The conciliator allegedly invited the parties for conciliation on 28.2.2018 but only the Claimant attended. After hearing the Claimant *ex parte*, the Conciliator found that the Claimant had not refused to negotiate the CBA and recommend that the strike be called off and if not the Claimant could go to Court for arbitration.

4. The strike started on 1.3.2018 and the Claimant brought this suit and enjoined the 5 Interest Parties. She also brought the Notice of Motion dated 1.3.2018 seeking the following 6 orders:

1. **THAT** this Honourable Court certifies this Application as urgent and the service of this Application upon the Respondent be dispensed with in the first instance and the application be heard *ex-parte*.

2. **THAT** this Honourable Court be pleased to issue an order restraining the Respondent by themselves, their officials, agents and/or members from taking part in, calling instigating or inciting others to take part in an unprotected strike or any form of industrial action pending the hearing and determination of this application.

3. **THAT** this Honourable Court be pleased to issue an order restraining the Respondent by themselves, their officials, agents and/or members from taking part in, calling, instigating or inciting others to take part in unprotected strike or any form of industrial action pending the hearing and determination of the claim herein.

4. **THAT** this Honourable Court declares the strike called by the Respondent in their notice dated on 21st February, 2018 unlawful and therefore unprotected.

5. **THAT** this Honourable Court do allow the Claimant to serve the Respondent by way of substituted service by way of emails provided, registered post and or advertisement through the Nation daily newspaper.

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

5. The issue for determination herein is whether the strike called by the Respondent on 1.3.2018 vide notice dated 21.2.2018 is unlawful and unprotected. For strike to be protected in Kenya, it must be in compliance with part X of the Labour Relations Act and especially section 76 and 78 of the Act. The said provisions set very crucial irreducible minimum procedural requirements which if not complied with renders the strike unprotected and thereby exposes the workers to serious disciplinary consequences. After considering the material presented to the court and the cited provision of the law, I am of the considered view that the strike forming the subject matter herein is not in compliance with the law and is therefore unprotected.

Applicant's Case

6. M/s Kirwa Advocates prosecuted the application relying on her own Supporting Affidavit filed together with application on 1.3.2018. She urged the court to declare the strike called by the Respondent unprotected and declare it illegal because it is not in compliance with section 78(1) (e) of the Labour Relations Act. According to her, before engaging in any strike, the dispute involved must be referred for conciliation under the Labour Relations Act or CBA between the parties.

7. In addition, the counsel submitted that after receiving service of the strike notice, the Ministry of Labour appointed a conciliator under section 70 of the Act in an effort to avert the strike. The conciliator invited the Respondent and the Claimants for conciliation meeting on 28.2.2018 by his letter dated 26.2.2018. The Claimant attended but the Respondent did not. After the hearing, the conciliator found that the Claimant had not refused to negotiate the CBA and recommended that the strike be called off and in default, the dispute be referred to this Court for arbitration.

8. The counsel urged the Court to take note of the matters that have prevented the Claimant from presenting her counter proposal including the 2017 General Elections and the ensuing Change of Guard in the Government Ministries. She submitted that after receiving the CBA proposal from the Respondent she forwarded to the respective Universities who in turn made their respective proposals and which were forwarded to the Ministry of Education for guidelines after interagency consultations with the other interested parties. However, due to the aforesaid matters, the guild lines were delayed but that did not mean that all was lost. She urged the Court to compel the Respondent to call off the strike and resume negotiations in a conducive environment where there is no pressure of an ongoing strike.

Respondent's Case

9. Mr. Koceyo Advocate opposed the application and relied on the Replying Affidavit sworn by the Respondent's General Secretary Dr. Constatine Wasonga on 6.3.2018. He submitted that the strike was lawful because it is founded on Article 41(1), (2) (a) (b) & (d) and (5) of the Constitution. He submitted that on 13.3.2017 the parties signed commitment to negotiate and conclude the 2017-2021 CBA in which month the Respondent presented her proposed CBA. However ever since the Claimant failed to present any counter proposal to pave way for meaningful negotiation prompting the Respondent to go on strike to force the Claimant to come up with a counter proposal for negotiation and conclusion of the 2017-2021 CBA.

10. In addition to the foregoing, the counsel submitted that the strike was lawful because it is in compliance with section 76(c) of the Labour Relations Act because the union served a 7 days' notice on the Claimant and the C.S Labour on 21.2.2018. He denied that the strike violates section 62 of the Act and contended that it was not possible to file a dispute under section 62 of the Act because, the Claimant had not presented her counter proposal and parties failed to agree on some issues.

11. He concluded by urging the Court to decline the orders sought because the Claimant has come to Court with unclean hands. He observed that the applicant had deposed in her supporting affidavit that she sought advice from the 5th Interested Party (Salaries and Remuneration Commission (SRC)) on the Respondent's proposal but SRC in her Replying affidavit filed on 9.3.2018 denied that the Claimant had sought any advice from her. He urged the Court to uphold the Constitutional rights of the employees and dismiss the application.

1st – 4th Interested Parties Case

12. M/s Chaseyina learned state counsel supported the application by relying on the Replying Affidavits sworn by the Director University Education Mr. James Mwangi Kiburi on behalf of the first Interested Party and by C.S Labour and Social Protection Honourable Ambassador Ukur Yatani on behalf of the third Interested Party. She submitted that the strike is illegal because of the procedure followed before calling for the strike. She urged that after serving the strike notice, the Minister appointed a conciliator who invited the parties for conciliation but the Respondent failed to attend without any reason.

13. The counsel denied that the Claimant had refused to negotiate the CBA or to present her counter proposal. She confirmed that the counter proposals from all the Universities under the Claimant were forwarded to the parent Ministry and the National Treasury but due to the 2017 General Elections and the ensuing change of Guard in the Government departments, the required interagency consultations were not possible and that delayed the presentation of a counter proposal by the Claimant. She urged for the end of the strike in order to create an enabling environment for negotiations noting that the underlying factor in this suit is that both the Claimant and the Respondent are asking the Court to compel each other to return to the negotiation table.

5th Interested Party

14. Mr. Sitienei Advocate supported the application and submitted that there was breach of the statutory procedure before calling for the strike. He noted that the dispute before the conciliator should have been concluded before the strike was invoked. In addition, he urged that the Claimant could not present her counter proposal because it has to await advice from the National Treasury and the SRC. Finally he argued that the strike should be ended because the discussion between the parties herein require a conducive environment free from the undue pressure that come from industrial action.

Analysis and Determination

15. After considering the pleadings, Affidavits and submissions presented to me by the Claimant on 1.3.2018, when the matter came under certificate of urgency, I declined to grant the interim orders sought because the main issue for determination in both the application and the main suit is **"whether the strike called by the Respondent vide the strike notice dated 21.2.2018 is unprotected and therefore illegal"**. Strike is unprotected if it is prohibited or it is not in compliance with the provisions of the law.

16. The Respondent has contended that the strike is lawful because it was not called in respect of any dispute but because the Claimant had refused to present her counter proposal to pave the way to meaningful negotiations and conclusion of the CBA. According to her, it is only after a counter proposal is tabled by the Claimant and a dispute arises from contested issues, that conciliation becomes necessary under section 62 of the Act. She cited Article 41(1), (2) (a) (b) & (d) and (5) of the Constitution and section 76 (c) of the Act as the legal basis upon which the strike was called.

17. Article 41 (1), (2) (a) (b) (d) & (5) of the constitution provides as follows:

"(1) Every person has right to fair labour practices.

(2) Every worker has the right to-

(a) to fair remuneration;

(b) to reasonable working conditions

(d) to go on strike.

(5) Every trade union... has a right to engage in collective bargaining."

18. Section 76 (c) of the Act on the other hand provides that:

"76. A person may participate in a strike or lockout if-

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

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

(ii) the employer... in the case of a lockout."

19. The Claimant and the Interested Parties are however unanimous that there is trade dispute involved in the strike and the strike is unprotected and illegal because it does not comply with section 78(1) of the Act. The said section provides that:

" 78 (1) No person shall take part in a strike or lock-out or any conduct in contemplation of a strike or lockout if:-

(e) The trade dispute was not referred for conciliation in terms of-

(i) this Act; or

(ii) a collective agreement providing for conciliation;”

20. No Judicial precedents were referred by either side of the divide but the answer to the main question herein lies in the provisions of part X of the Labour Relations Act which must be read as whole. The said provisions are in harmony with the constitution and it is through them that the rights to go on strike under Article 41 of the constitution is exercised. The relevant provisions in this case are section 76 and 78(1) (e) of the Act which provides as follows:

"76. A person may participate in strike or lockout if-

(a) The trade dispute that forms the subject matter of strike or lockout 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 private conciliation of disputes; and

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

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

(ii) The employer... in the case of a lockout.”

21. The procedure laid down by the said 76 and 78 (1) (e) of the Act is mandatory and if not complied with the strike is rendered unprotected and participants exposed to the consequences provided by section 80(1) of the Act, which states that:

"80. (1) An employee who takes part in, call, instigates or incites others to take part in a strike that is not in compliance with this Act is deemed to have breached the employee's contract and-

(a) is liable for disciplinary action; and

(b) is not entitled to any payment or any other benefit under the Employment Act during the period the employee participated in the strike.”

22. Although the Respondents alleges that there was no trade dispute capable of being reported for conciliation before calling the strike, the truth of the matter is that there was, and it was expressly cited in the strike notice dated 21.2.2018. The notice listed 3 issues or grievances including failure to negotiate, sign and implement the 2017-2021 CBA; unconstitutional and unlawful violation of the Constitution of Kenya 2010, Article 41(1) (2) (a) and (5); and the blatant violations of the Universities' Workers Fundamental rights and freedoms. The said dispute concerns terms and conditions of employment as contemplated by section 76(b) of the Act.

23. The said trade dispute can be summaries as **“failure and/or refusal by the management to negotiate, sign and implement 2017-2021 CBA”** and it ought to have first gone through conciliation under section 62 of the Act and if not resolved, industrial action under Article 41 of the Constitution and section 76(c) of the Act could be resorted to. In a nutshell, I am of the considered opinion that whereas the Respondent and her members have the Constitutional and statutory rights and freedom to withdraw labour to impel the management to negotiate and conclude a CBA, the said fundamental rights and freedoms are only exercisable within the statutory procedures regulated by the provisions of part X of the Labour Relations Act.

24. After careful consideration of the submissions made by all the parties, and express provision of the law cited herein above I must, and I hereby find that the strike called by the Respondent vide strike notice dated 21.2.2018 and which started on 1.3.2017 is unprotected and prohibited because it was called before first referring the trade dispute involved to conciliation under section 62 of the Labour Relation Act as required by section 76(b) and 78(1) (e) of the Act.

25. In addition to the foregoing failure to comply with section 76(b) and 78(1) (e) of the Act, the Respondent allegedly failure to attend conciliations initiated by the Chief Industrial Relations Officer of the Ministry of Labour, under section 70 of the Act and went on with the strike. The said section provides:

“70. (1) if the Minister is satisfied that it is in the public interest to prevent a dispute from arising or to resolve a dispute, the minister may appoint a conciliator or conciliation committee to attempt to present a dispute or resolve the dispute.

(2) The minister may appoint a conciliator or conciliation committee under subsection (1) –

(i) in respect of a dispute that (1) has not been referred to conciliation; or is unresolved after conciliation....”

26. In this case, a Conciliator was appointed by the Chief Industrial Relations Officer after being satisfied that it was in the Public interest to prevent the strike from occurring. The said decision was reasonable in the circumstances of the dispute involved. The Court takes judicial

notice that the previous strikes have caused a lot of suffering and impacted negatively to the students, their parents and stakeholders who fund University education. The Court also takes judicial notice that the 2017 General Elections and the subsequent change of Guards in Government departments had the potential of delaying the required interagency consultations and collaboration as a result of which the preparation and presentation of the Claimant's CBA counter proposal was also delayed.

27. Mr. Koceyo, learned counsel for the Respondent stated that his client is ready to call off the strike if the Claimant presented her counter proposal to her and this Court. He however insisted that the strike will continue because the Claimant has withheld the counter proposal even to the Court. With due respect to the learned counsel, the said demand should first have been made at the conciliation proceedings either before issuing the strike notice or on 28.2.2018 when the parties were invited for the conciliation.

28. However, I do not take lightly the denial by the Respondent that she was not served with the invitation to attend the conciliation on 28.2.2018. I also take seriously the observation by the learned State Counsel, madam Chaseyina, that both the Claimant and the Respondent are urging the court to order each other to return to the negotiating table. In my view, however there are certain conditions cited by each of them, which must be addressed and met before the negotiations or conciliation resume. The Claimant demands that the strike be called off while the Respondent demands that the Claimant must serve her with her CBA counter proposal. The said demands are both reasonable if meaningful negotiations are to be achieved and consequently I have considered each of them favourably.

Disposition

29. In view of my finding herein above that the strike is not in compliance with the mandatory procedure provided by Part X of the Labour Relations Act and specifically section 76(b) and 78(1) (e) of the Act,

(a) I allow the application in terms of prayer 3, 4, and 5 of the Notice of Motion dated 1.3.2018.

(b) In view of my said doubt that the Respondent may not have been served with the invitation to attend the conciliation on 28.2.2018, I refer this dispute to the C.S. Labour to assist the parties to resolve the 2017- 2021 CBA dispute under section 70 of the Act within 60 days of today. However, the C.S. Labour, should not appoint Mr. G. A. Omondi who had earlier been appointed as the conciliator.

(c) The parties are directed and ordered to act in good faith and do the following without failure:

(i) The Respondent to call off the strike forthwith and the employees to resume work on Monday 19th March 2018 at 08.00 hours.

(ii) The claimant to present to the C.S Labour her counter proposal for the 2017-2021 CBA and serve the respondent within 30 days from the date hereof for use in the conciliation process.

(iii) If respondent complies with the order (i) herein above her members shall not be victimized in any way for participating in the unprotected strike.

(d) Each party shall bear his or her own costs.

(e) The suit will be mentioned on 17th April 2018 to confirm compliance.

Dated, Signed and Delivered in Open Court at Nairobi this 16th day of March, 2018

ONESMUS MAKAU

JUDGE