



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 65 OF 2018

ROBERT NJUNJI KIBUTHU.....1ST CLAIMANT
MULE K. MBUVI.....2ND CLAIMANT
EDWINS OKEYO.....3RD CLAIMANT
HEZEKIAH OMBUKI.....4TH CLAIMANT
CHRISTOPHER OYARO.....5TH CLAIMANT
EDWIN SAINA.....6TH CLAIMANT
JOHN RUTERE.....7TH CLAIMANT
FANUEL MULATI.....8TH CLAIMANT
JULIUS NDEGWA.....9TH CLAIMANT
JUSTUS KASSIMU.....10TH CLAIMANT
NAFTALY ONYANGO.....11TH CLAIMANT
ZACHARY GITHUA.....12TH CLAIMANT
CHARLES NJONJO.....13TH CLAIMANT
RAYMOND MUKELE.....14TH CLAIMANT
BENJAMIN MWALALI.....15TH CLAIMANT
CHACHA N. CHACHA.....16TH CLAIMANT
PAULINE ODHIAMBO.....17TH CLAIMANT
GEORGE NJENGA.....18TH CLAIMANT
PATRICK KIPTOO.....19TH CLAIMANT
VINCENT KINARA.....20TH CLAIMANT
WILLIAM KAMAU.....21ST CLAIMANT
RAYMOND OYORI.....22ND CLAIMANT

BENSON MUKHWANA.....23RD CLAIMANT
PAULINE OPAR.....24TH CLAIMANT
EMILY NYAMWANGA.....25TH CLAIMANT
FAITH MUTUKU.....26TH CLAIMANT
THOMAS MUTHOKA.....27TH CLAIMANT
BENSON SHOLE.....28TH CLAIMANT
JEFWA KAZUNGU.....29TH CLAIMANT
RACHAEL TUMAINI.....30TH CLAIMANT
GEOFFREY MAINGI.....31ST CLAIMANT

VS

COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

RULING

1. This ruling proceeds from an application brought by the Claimants by Notice of Motion under certificate of urgency dated 5th February 2018.

2. By their application the Claimants seek the following orders:

- a. An order of mandatory injunction compelling the Respondent to release the Claimants' salaries and allowances for the months of October 2017, November 2017 and January 2018 and such other subsequent salaries and allowances as and when they fall due pending the hearing and determination of the claim;
- b. An order of mandatory injunction compelling the Respondent to pay the 10th to 25th Claimants their annual increment payments for the month of October 2017 and for subsequent October months pending the hearing and determination of the claim;
- c. An order of mandatory injunction compelling the Respondent to pay the 7th Claimant his annual increment payment for the month of November 2017 and for subsequent November months pending the hearing and determination of the claim;
- d. An order of mandatory injunction compelling the Respondent to pay the Claimants their annual leave allowance for the month of December 2017 and every subsequent December months pending the hearing and determination of the claim.

3. The application, which is supported by the affidavit of the 1st Claimant, Robert Njunji Kibuthu is based on the following grounds:

- a. The Claimants are officers of the Betting Control and Licensing Board (BCLB) seconded to the Respondent by the National Government;
- b. The Respondent is charged with payment of the Claimants' salaries and allowances;
- c. The Respondent has failed to pay the Claimants' salaries and allowances for the months of October 2017, November 2017 and January 2018;
- d. The Claimants have reasonable grounds to believe that the Respondent's failure to pay their salaries and allowances is because of a fall-out between the Respondent and the National Government and/or failure by the Respondent to put in place a mechanism of collecting revenue from betting and gaming activities and businesses within the County of Mombasa and/or following up on the Respondent's share from the revenue collected from such activities and businesses by the National Government;
- e. Unless the orders sought are granted the Respondent may continue paying the Claimants' salaries, allowances and other entitlements, which are the only source of livelihood for the Claimants and their dependants, on an on-and-off basis and/or completely discontinue paying the salaries, allowances and other entitlements occasioning the Claimants to live like paupers and to be financially embarrassed;
- f. If the application is not urgently heard and determined the Claimants may be forced into getting into debts from lenders and resultant dangers of being sued and losing their assets to third parties thereby occasioning them irreparable loss and damage;

g. If the orders sought are not granted the Respondent may continue committing the unlawful acts thereby occasioning the Claimants irreparable loss and damage;

h. It is fair and in the best interest of justice that the orders sought are granted.

4. Despite due service, the Respondent did not file any response.

5. The single issue for determination in this application is whether the Claimants have made out a case for grant of a mandatory injunction at the interlocutory stage. In *Nation Media Group & 2 others v John Harun Mwau[2014] eKLR*, the Court of Appeal restated the well-known principle that an interlocutory mandatory injunction will only issue in special circumstances.

6. Mr. Kabebe, Counsel for the Claimants submitted that the Claimants had gone without salaries for a period of three (3) months. Counsel added that at a meeting held on 15th December 2017, it had emerged that the stoppage of the Claimants' salaries had been caused by a stand-off between the National Government and the Respondent.

7. In support of their case, the Claimants produced a letter dated 13th November 2017, from the Mombasa County Secretary to the Director, Betting Control and Licensing Board taking issue with the remittance of revenue from betting and gambling activities to the National Government. The letter states in part:

“It has been brought to the attention of the County that millions of shillings collected as revenue from these activities end up being remitted to the National Government in contravention of the law.

Thus it is unfair and unjust to expect the County to pay salaries to staff who remit the much needed revenue to the National Government.

This is to inform you that we have forthwith stopped paying salary to all the Betting and Control staff devolved to the county until this matter is resolved.”

8. In his affidavit in support of the application, the 1st Claimant, Robert Njunji Kibuthu depones that the Claimants, being enforcement officers, do not bear the responsibility for revenue collection. The Claimants' employment status has not been disputed. What emerges is that they are being used as a bait in a simmering dispute between the National Government and the County Government. This is unacceptable.

9. The Respondent cannot pursue remittance of revenue by engaging in the illegal action of withholding salaries due to public servants who have performed and continue to perform their duties. Under Part IV of the Employment Act, 2007 employee salaries are protected and can only be interfered with either by the employee's consent or as otherwise authorized by law.

10. The continued withholding of the Claimants' salaries and allowances is a grave violation of their rights as employees and the Court is persuaded that a proper case for an interlocutory mandatory injunction has been made.

11. I therefore direct the Respondent to immediately release all the withheld salaries and allowances to the Claimants and to continue paying such salaries and allowances as they fall due, pending the hearing and determination of the claim herein.

12. The other prayers will be canvassed at the main hearing.

13. The Respondent will pay the costs of this application.

14. These are the orders of the Court.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 8TH DAY OF MARCH 2018

LINNET NDOLO

JUDGE

Appearance:

Mr. Kabebe for the Claimants

No appearance for the Respondent