



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 408 OF 2018

UNIVERSITY OF NAIROBI.....CLAIMANT

VERSUS

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL

INSTITUTIONS AND HOSPITAL WORKERS.....RESPONDENT

AND

NATIONAL TREASURY.....1ST INTERESTED PARTY

MINISTRY OF LABOUR.....2ND INTERESTED PARTY

MINISTRY OF EDUCATION.....3RD INTERESTED PARTY

SALARIES AND REMUNERATION

COMMISSION.....4TH INTERESTED PARTY

RULING

Introduction

1. The applicant is a public university and a member of the Inter public University council consultative forum (IUCCF) of the Federation of Kenya Employers (FKE). The Respondent is a trade union, which represents the non-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 compromising learning in the said Universities and delaying finalization of courses for the students.

2. Aware of the devastating effects the said strikes, the Claimant and the Respondent agreed to negotiate and conclude the 2017-2021 CBA by 28.2.2018. The claimant invited the Respondent for the negotiations on 26.1.2018, 16.2.2018 and 27.2.2018 but despite the respondent presenting her CBA proposal from the start, the Claimant did not present her counter proposal in any of the meetings and resorted to postponing the deadline for the said presentation. As a result the Respondent served the strike Notice dated 27.2.2018 on the Cabinet Secretary (CS) in charge of Labour, C.S Ministry of Education, Vice chancellors of the public Universities, chairperson SRC, General Secretary COTU-K and Executive Director FKE among others.

3. The strike started on 5.3.2018 and 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 assist in resolving the trade dispute cited in the strike notice. The conciliator invited the parties for conciliation on 6.3.2018 but the Claimant did not attend. A second meeting was convened on 13.3.2018 but again the claimant's negotiators did not attend but they sent the technical team. After hearing the Claimant *ex parte*, the Conciliator found that the parties had been negotiating the CBA and observed that the strike called by the respondent did not provide a conducive environment for further negotiations.

4. The strike started on 5.3.2018 and the Claimant brought this suit and enjoined the 4 Interest Parties. She also brought the Notice of Motion dated 23.3.2018 seeking the following 6 orders:

a) **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* during vacation.

b) **THAT** this Honourable Court declares the strike called by the Respondent in their notice dated on 27th February, 2018 unlawful and therefore unprotected.

c) **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.

d) **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.

e) **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.

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

5. The respondent has opposed the application by the replying affidavit sworn by her general secretary Mr. Albert Njeru on 26th March 2018. According to the respondent the applicant has failed to show faith in negotiating and especially by failing to present her counter proposal for the 2017-2021 CBA. As a result, the respondent served seven days strike notice on the CS Labour and copied it to the CS Education, all the Vice Chancellors of the public universities, Salaries and Remuneration Commission (SRC), COTU-Kenya and Federation of Kenya Employers. The strike commenced on 5.3.2018 after which the parties were invited to a conciliation meeting at the Ministry of labour but again the applicant did not show any good will in resolving the dispute during the two conciliation meetings called.

6. The issue for determination herein is whether the strike called by the Respondent on 1.3.2018 vide notice dated 27.2.2018 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. 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

7. M/s Kanyiri prosecuted the application citing several provisions of the law, constitution and ILO conventions upon which the application is premised. She relied on the grounds set out on the body of the motion and the supporting affidavit sworn by Mr. Collins Omondi on 23.3.2018. She submitted that the respondent served the CS Labour with a strike notice on 27.2.2018 citing the reason as "refusal by the management to give a counter proposal and to negotiate, conclude and implement 2017-2021 CBA." The notice was then copied to several persons including the applicant's Vice chancellor. The notice was not copied to the Inter-public Universities' Councils Consultative Forum of Federation of Kenya Employers (IUCCF) who was negotiating with the respondent and as such, the applicant contends that she has *locus standi* to bring this suit.

8. The applicant's counsel submitted that the strike was illegal and unprotected for several grounds. First, the failure to serve the IUCCF was wrong because that was the party they were negotiating with. Second, the strike was in breach of section 76 of the Labour Relations Act because conciliation of the dispute involved in the strike was not done under section 62 of the Act. She submitted that even after receiving the strike notice the CS Labour appointed a conciliator on 28.2.2018 and urged the respondent to stop the strike and give conciliation a chance but the union ignored and commenced the strike on 5.3.2018. Finally, the applicant accused the respondent of lack of good faith and for breach of the recognition Agreement which provides that either party can report a trade dispute to the Chief Industrial Relations Officer and if the same is unresolved, a 21 days strike or lock-out notice can be served.

9. In conclusion, the applicant contended that, as a public institution, whatever negotiations she does on the terms and conditions of employment are subject to the approval by the SRC, Ministry of Education and the treasury due to budgeting and provision of funds. She prayed for the application to be allowed and the strike be stopped because it is contrary to the law and the ILO convention 98.

Respondent's case

10. Mr. Maina for respondent opposed the application. He admitted that there is recognition agreement dating back to 1963 between the claimant and the respondent but submitted that the 21 days' notice provided therein was inconsistent with the new labour laws. He further admitted that there have been negotiations for CBA initiated by the IUCCF on 19.1.2018 but she contended that the IUCCF has not presented her counter proposal during all the meetings convened. Mr. Maina further submitted that the failure to present counter proposal by the claimant has created a trade dispute and under Article 41(2) (d) of the constitution, the respondent served a strike notice. He further submitted that after serving the strike notice, the CS labour appointed a conciliator to resolve the dispute but the management failed to attend the conciliatory meetings on 6.3.2018 and 13.3.2018.

11. It was further submitted that the failure to attend the conciliation meetings by the IUCCF meant she was not keen on negotiating the CBA. The counsel contended that the only dispute involved in the strike is Basic salary and house allowance and the applicant lacks capacity to directly engage the union on the same. In his view, it is only the IUCCF under the FKE that has the capacity to negotiate salary and house allowance on behalf of all the public universities.

Interested parties' case.

12. M/s Chasiyna learned state counsel, appearing for the first to third interested parties, supported the application. She submitted that the strike notice served was not compliant with section 76, 77, 79 and 62 of the Labour Relations Act. In her view the procedure followed to issue the strike notice was not proper because the negotiations meeting were still on going. She also faulted the union for commencing the strike after the CS Labour had referred the dispute for conciliation. She further urged that although the right to go on strike is recognized under Article 41 of the constitution, article 24 (1) of the constitution limits the said right so that it is to be exercised subject to other people's rights, in this case the innocent students. She therefore prayed for the strike to be declared unprotected.

13. M/s Wafula counsel for the SRC supported the application citing Article 230 and 259 of the constitution. She concluded by urging the court to declare the strike as unprotected and ask the parties to abide by the law.

Applicant's Rejoinder

14. M/s Kanyiri observed that the respondent had admitted that the negotiations were initiated by the management. She therefore maintained that asking for more time to present a counter proposal was not equal to refusing to negotiate. She further observed that as at the time the conciliation meeting started the strike had already started. She denied that the recognition agreement was in conflict with the statute on the length of the strike notice and contended that the agreement between the parties was superior to the statute, which only provides for basis minimums that the parties should comply with. She maintained that the strike is illegal and unprotected.

Analysis and Determination

15. After considering the pleadings, Affidavits and submissions presented to me there is no doubt that the main issue for determination in both the application and the main suit are the same, namely, ***"whether the strike called by the Respondent vide the strike notice dated 27.2.2018 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 called after the Claimant refused to present her counter proposal to pave the way to meaningful negotiations and conclusion of the 2017-2021 CBA. She cited Article 41 (2) (d) of the Constitution as the legal basis upon which the strike was called. The said Article 41 (2) (d) of the constitution provides as follows:

"(2) Every worker has the right to-

(d) to go on strike."

17. The Claimant and the Interested Parties are however unanimous that the strike is unprotected and illegal because it does not comply with section 76 and 78 of the Act. The said provisions prescribe a mandatory procedure to be followed before calling for a protected strike or lock-out. Section 76 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."

18. Section 78 on the other hand 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;”

19. The procedure laid down by the said section 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.”

20. In view of the said statutory provision, it is clear that the strike notice dated 27.2.2018 was served before the dispute cited therein was taken through conciliation as required by section 76 and 78 of the Act and that default has rendered the on-going strike to be unprotected. The question that arises is whether from the nature of the dispute and the history of the claimant’s conduct in resolving the same, disentitled her to any relief under section 77 of the Act. The said section provides thus:

“77(1) A party to a dispute that has received notice of a strike or lock-out, may apply to the Industrial court to prohibit the strike or lock-out as a matter of urgency if-

(a) The strike or lock-out is prohibited under this part; or

(b) The party that issued the strike or lock-out notice has failed to participate in conciliation in good faith with a view to resolving the dispute.

(2) A party that failed to attend any conciliation meeting may not seek relief under subsection (1)(b).

(3) The Industrial Court may, in granting relief in respect of an application made under subsection (1) (b), direct the parties to engage in further conciliation in good faith with a view to resolving the dispute.”

21. The applicant has been accused of failure to present a counter proposal during the negotiations and further failure to attend conciliation meetings initiated by the ministry of labour. Her *locus standi* has also been objected to on ground that the trade dispute involved is Basic salary and house allowance of which there is an agreement that such issues shall not be negotiated by the individual universities but by the IUCCF under FKE. I am however satisfied that the applicant having been served with a strike notice, she had every right to apply to this court for relief under section 77 of the Act if she felt that the strike was prohibited and unprotected by the law. In her view, which I am in agreement with, the nature of the dispute involved in the strike is secondary to the dispute herein being the legality of the strike.

22. As regards the history of the applicant’s conduct in the negotiations and the conciliation initiated by the ministry, I find that the respondent has not proved on a balance of probability that the applicant was to blame for the stalled negotiations. It is common knowledge that the negotiations were initiated by the IUCCF on behalf of all the public universities, applicant included. It has also been admitted by the interested parties that the failure by the IUCCF to present a counter proposal for purposes of negotiations has been caused by the delay in interagency collaborations between the interested parties themselves due to change of guards after the 2017 general elections. The court takes judicial notice that it is probable that the said general elections which were prolonged by a repeat of the presidential elections may have delayed the interagency collaborations which are key to budgeting and provision of the funds for any newly negotiated salaries and house allowances.

23. On the other hand, I do not think that the applicant failed to attend any conciliation meeting after the strike notice was served. It has been explained that on 6.3.2018, the IUCCF was summoned by the parliament to explain the stalemate. It has however been admitted that on 13.3.2018, the IUCCF was represented at the conciliation meeting by her Technical team. It is therefore not correct for the respondent to allege that the applicant refused or failed to attend conciliation meetings to resolve the trade dispute. In any event, it is clear that the impugned strike had already started before the conciliation meetings started and as contended by the respondent, the correct person involved in the negotiating salary and house allowance was not the applicant but IUCCF. According to the applicant, she has brought this suit because as a key member of the IUCCF and world class university she is bearing the brunt of the current strike.

24. In the upshot, I find that the claimant is not estopped from seeking relief under section 77 of the Act. She will however soon be estopped if she fails to present her counter proposal of the CBA and participate in conciliation or negotiations. The national government is now fully constituted and the 2017 general election is now history.

Disposition

25. In view of my finding herein above that the applicant has the *locus standi* to seek relief under section 77 of the Labour Relations Act, and that the strike is not in compliance with the mandatory procedure provided by section 76 and 78(1) (e) of the Act,

(a) I allow the application in terms of prayer 2, 4, 5 and 6 of the Notice of Motion dated 23rd March, 2018.

(b) Under section 77 of the Act, I refer the dispute cited in the strike notice to the C.S. Labour to assist the parties to resolve it through conciliation within 60 days from the date hereof. The trade dispute is “refusal by the management to give counter proposal, negotiate, conclude and implement the 2017-2021 CBA”.

(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 9th April 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 21 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 a date to be agreed to confirm compliance.

Dated, Signed and Delivered in Open Court at Nairobi this 6th day of April, 2018

ONESMUS MAKAU

JUDGE