



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 409 OF 2018

UNIVERSITY OF NAIROBI.....CLAIMANT

VERSUS

KENYA UNIVERSITIES STAFF UNION.....RESPONDENT

AND

NATIONAL TREASURY.....1ST INTERESTED PARTY

MINISTRY OF LABOUR2ND 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 on 18.7.2017 to negotiate and conclude the 2017-2021 CBA by March 2018 before the close of budgeting cycle. The respondent presenting her CBA proposal on 1.8.2017, but the Claimant did not present her counter proposal in any of the meetings convened for the negotiations but resorted to postponing the deadline for the said presentation. As a result, the Respondent served the strike Notice dated 23.3.2018 on the Chair persons of all the public universities, and copied to the Cabinet Secretary (CS) in charge of Labour, C.S Ministry of Education, and Chairman IUCCF among others.

3. The strike started on 2.3.2018 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 23rd 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.

4. The respondent has opposed the application by the replying affidavit sworn by her general secretary Dr. Charles G. Mukhwaya on 27th March 2018. She objects to the application on ground that the applicants lacks standing to sue in a dispute involving salary and house allowance because under the Recognition agreement dated 30.9.2006 between the IUCCF and the respondent, the individual public universities surrendered their power to engage the union on the said two items. In addition, she contends that the applicant has failed to show good faith in negotiations by failing to present her counter proposal for the 2017-2021 CBA in the several meetings she has herself convened. As a result, the respondent served seven days strike notice on the relevant persons with a view to fast ruck productive and meaningful negotiations. The respondent maintained that the strike is lawful and no orders should be granted to the applicant as prayed.

5. The issue for determination herein is whether the strike called by the Respondent on 2.3.2018 vide notice dated 23.2.2018 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

6. 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 applicant among other public universities with a strike notice dated 23.2.2018 citing the reason as “failure to negotiate, conclude and implement 2017-2021 Collective Bargaining Agreement.” The notice was copied to several persons including the CS labour and other persons including 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.

7. The applicant's counsel submitted that the strike was illegal and unprotected because of several grounds and the claimant has every right to challenge its legality. First, the failure to serve the IUCCF was wrong because that was the party they were negotiating with. Second, the strike was offends section 76, 77 and 79 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 the court has already directed the lecturers who were also on strike to resume work and it will be difficult for lectures to go on while the respondent is on strike. Finally, the counsel submitted that the respondent has failed to act in good faith and has breached

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. She maintained that the applicant has at all material times wanted and willing to negotiate the CBA but the union walked away to serve an illegal strike notice.

8. 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 submitted that the delay in presenting a counter proposal was due to the delay by the other players to give their approval. 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

9. Mr. Onyony learned counsel for respondent opposed the application. He admitted that there is recognition agreement dating back to 2006 between the claimant and the respondent by which the applicant surrendered her right to engage the respondent on the issue of basic salary and house allowance to the IUCCF. Consequently, the counsel submitted that the applicant lacks standing to bring this suit because it relates to salary and house allowance.

10. In addition, the counsel submitted that the orders sought in the application are not tenable because they are the same orders sought in the main suit and they have to await trial at a full hearing. He contended that entertaining the application herein is likely to undermine Article 41(2) (d) of the constitution. He urged the court to follow Article 259 of the constitution, which requires that in interpreting the constitution, the court shall do so in manner that promotes the purpose, values and the principles provided by the constitution. He denied that the Labour Relations Act limits full enjoyment of any right under the constitution. Finally, the counsel submitted that the Act limits the right to strike only in relation to essential services and not the services rendered by the respondent.

11. In conclusion, the counsel submitted that the applicant has come to equity with unclean hands and she should be denied the orders sought. He contended that the failure by the applicant to present a counter offer to the CBA proposal is a sign of lack of good faith in negotiating the CBA. He further contended that the interested parties who have delayed the negotiations are aware of the repercussions of the strike and maintained that they should also know that poor terms of service for the workers is denial of human dignity. He prayed for the dismissal of the application with costs.

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 negotiation meeting were still on going and the dispute involved had not been referred 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. She submitted that labour relations are tripartite and in this case it involves public university which draw funds from the national government and there are procedures that are necessary before negotiations are concluded. She therefore prayed for the strike to be declared unprotected and the parties directed to resume negotiations.

13. M/s Wafula counsel for the SRC supported the application and relied on Article 24(e) and 43(f) of the Constitution to urge the court to balance the rights of the parties. She concluded by urging me to declare the strike as unprotected and ensure that the parties follow the law.

Applicant's Rejoinder

14. M/s Kanyiri submitted that the applicant is not suing in respect of the CBA negotiations but to challenge the legality of the strike. She maintained that under section 77 (1) (b) of the Act, a party can move the court under certificate of urgency. She denied that the orders sought by the application are final

and contended that the orders are in the interim. She contended that there are other reliefs sought by the suit including asking the court to refer the dispute for conciliation. 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 23.2.2018 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 there is trade dispute involved in the strike and 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 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 23.2.2018 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, disqualifies her from 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 issue shall not be negotiated by the individual universities but by the IUCCF under FKE. I am however satisfied that, having been served with a strike notice, the applicant 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 that case, the nature of the dispute involved in the strike is secondary to the issue herein, that is, the legality of the ongoing strike. In the upshot, I find that the claimant is not estopped from seeking relief under section 77 of the Act.

22. As regards the history of the applicant's conduct in the negotiations, 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. There are several letters annexed as exhibits written by the applicant inviting the respondent for negotiations. 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 due to change of guards after the 2017 general elections.

23. 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. However, the government is now fully constituted and the said general elections is history. The government can now present a counterproposal and participate in conciliation or negotiations in order to resolve the dispute involved in the strike.

Disposition

24. 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 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 through IUCCF 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