



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 42 OF 2018

DR. SAMUEL NDUATI

DR. REUEL MAINA

DR. FRANICS THUKU.....CLAIMANT

VERSUS

CABINET SECRETARY, MINISTRY OF HEALTH.....1ST RESPONDENT

CHAIRMAN OF THE COUNCIL OF GOVERNORS.....2ND RESPONDENT

PUBLIC SERVICE COMMISSION.....3RD RESPONDENT

KENYA MEDICAL PRACTITIONERS & DENTISTS BOARD.....4TH RESPONDENT

THE CABINET SECRETARY, MINISTRY OF INTERIOR

& COORDINATION OF NATIONAL GOVERNMENT.....5TH RESPONDENT

RULING

Introduction

1. The Petitioners brought this Petition on 23.5.2018 simultaneously with Notice of Motion dated 22.5.2018 under Certificate of Urgency seeking conservatory orders to stay the decision by the Government of Kenya to hire and/or employ and/or recruit foreign doctors to work in Kenya, and in particular doctors from Cuba.
2. The matter was first placed before Radido J on 24.5.2018 at Sarova Woodlands, Nakuru where the Court was on a retreat and all what the Judge did was to order that it be served for inter parties hearing today.
3. When the matter was called the petitioner's counsel was ready to proceed although he had not been served with any response to the motion and the petition. The 4th Respondent's counsel had filed response to the motion and was ready to proceed and sought for leave to serve the petitioners. However, all the other respondents and the interested parties were not ready to proceed and sought leave to file their responses to the motion and the petition. The petitioners' counsel agreed but sought conservatory orders staying the impugned Government decision and/or action.
4. It was urged for the petitioners that the matter is urgent because the Cuban doctors were expected in country soon contrary to the provisions of the constitution, statute law and the Public Service Code of Regulations. He further urged that the law and policy is clear that non- citizens should not be employed in any position where citizens possess the competence to work. He further urged that there are Kenyan doctors who have the qualification to work in the positions being given to Cuba doctors and they have not declined the appointment because there has not been any job advertisement.
5. The respondents have unanimously opposed the request for conservatory orders and contended that the decision to be stayed has already been made and implemented. They have urged that the interim orders sought are the same ones sought in the main suit. They contended that no *prima facie* case has been made out, no irreparable harm has been demonstrated, and the balance of convenience favours the defence which has made the decision in the public interest. They urged that the Cuban doctors are being hired as specialist to mitigate the shortage of

medical specialists in the counties in line with article 43 of the constitution.

6. They have further contended that the petitioners have come to Court with unclean hands by making false allegations about their employment status. They have further accused the petitioners of delaying service of the Court pleading until yesterday.

7. The respondents further feared that the orders sought are too generalized and they have the potential of negatively affecting other foreign doctors not from Cuba, who are already serving in private medical facilities.

8. The Interested Parties who had not been served with any papers by the petitioners and the respondents did not make submissions on the interim orders sought. However the Court allowed Professor Kiama Wangai (counsel for Petitioners in petition 46 of 2018) to make his submissions. Professor Wangai merely supported the application for conservatory orders and urged the Court not to allow recruitment process of foreign doctors from Cuba against express provisions of the law. He urged that if the order is declined the foreign doctors will be here next week and the case for the Petitioners will become moot.

9. The issues for determination is whether in the circumstances of the case, conservatory order should issue staying the decision to hire and/or employ and/or recruit foreign doctors, and in particular doctors from Cuba to work in Kenya Public medical facilities pending the inter parties hearing of the application herein.

10. The Court finds:

(a) That there is no dispute that the Respondents have decided and have admittedly, recruited doctors from Cuba to work in Kenya Medical facilities.

(b) That the said doctors are allegedly, specialist in certain fields of medicine which, allegedly are lacking in the upcountry counties.

(c) That the said doctors are not yet in the country to take up their positions.

(d) That the Public Service Commission of Kenya, which is crucial in approving appointment of non-citizens under the Public service Code of Regulations endorsed under section 17 of Public Service (Values and Principles) Act No. 1 of 2015, is not a party to this suit.

(e) That the Court has not yet been availed with sufficient material from all the responding parties to enable it make an informed decision on whether or not the law has been breached.

11. Consequently, I withhold the requested conservatory order of stay and instead make the following directions:

(a) The Notice of Motion dated 22.5.2018 be heard inter parties on Wednesday 6.6.2018 at 9.00 a.m.

(b) The respondents and Interested Parties have upto close of business 4.6.2018 to file responses to the motion and petition.

(c) The petitioners will have up to close of business 5.6.2018 to file and serve any supplementary reply to the responses by the defence.

(d) The petition No. 46 of 2018 is consolidated with this file and the petitioner therein directed to serve the Application and the petition to all the parties in this file.

(e) The directions in a, b and c herein above shall apply *Mutatis Mutandis* to Petition 46 of 2018.

12. It is so ordered.

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of May, 201

ONESMUS N. MAKAU

JUDGE