REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 67 OF 2017

(Before Hon. Justice Mathews N. Nduma)

THE FEDERATION OF WOMEN LAWYERS (FIDA) KENYA.....PETITIONER

VERSUS

THE KENYA NATIONAL UNION OF NURSES.....1ST RESPONDENT

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

THE SALARIES AND RENUMERATION COMMISSION...3RD RESPONDENT

MINISTRY OF HEALTH.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

JUDGMENT

1. The Petitioner instituted these proceedings in their own interest as the Petitioner and on behalf of all other women, children and the general citizens of Kenya as provided for under Article 22 of the Constitution.

2. The Petitioner is claiming that rights and fundamental freedoms of the citizens in the Constitution and more specifically the Bill of Rights have been denied, violated, infringed and are threatened.

3. The 1st Respondent called an impromptu strike of its members on the 5th June, 2017 without issuing the mandatory notice of the strike and the members of the public majority of whom are users of public health facilities were caught unawares. That the strike went on for many days without a solution at hand.

4. That it is matter of judicial notice that most of the users of the public health institutions are poor citizens who cannot afford to access services in private health sector causing them immense suffering, indignity and loss of life in some cases.

5. That the health sector was still recovering from the 100 days strike by the Doctors which was called off in March, when the 1st Respondent impromptu called on the Nurses to proceed on strike. The poor citizens have endured too much pain and suffering as a consequence of these prolonged strikes in the public health sector. This has violated and threatened their right to life and health which are necessary for the enjoyment of all other rights.

6. Section 76 provides that a person may participate in a strike if:-

> *"(a) 76(c) seven days written notice of the strike has been given to the other parties and to the Minister by the authorized representative of the trade union.*
>
> *(b) 78(e) the trade dispute was not referred to conciliation and (f) the employer and employees are engaged in an essential service.*

7. The labour Relations Act section 81 provides:-

(1) Essential services to mean a service the interruption of which would probably endanger the life of a person or health of the population or any part of the population.

(2) There shall be no strike or lockout in an essential service.

(3) Any trade dispute in a service that is listed as or is declared to be an essential service may be adjudicated upon by the industrial court.

(4) A collective agreement may provide that any service may be deemed to be an essential service.

8. The fourth Schedule to the Act lists hospitals as essential service.

9. Article 43 provides:-

(1) Every person has the right to the highest attainable standard of health, which includes the right to health care services including reproductive health care;

(2) A person shall not be denied emergency medical treatment.

10. Article 259 of the Constitution requires that the Constitution of the Republic of Kenya is interpreted in a manner that:

(a) Promotes its purposes, values and principles;

(b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) Permits the development of the law; and

(d) Contributes to good governance.

11. The Petitioner avers that in blatant breach of the foregoing provisions of the law the 1st Respondent called a strike without the statutory notice while negotiations were ongoing for a collective bargaining agreement for its members. That further its members and employer offer essential services, the sudden withdrawal of which violated and continues to threaten the right to life of a substantial population of the Country.

12. The 2nd Respondent is a duty bearer to ensure provision of health services being a devolved function for counties and has contributed to the violations by failing to take timely measures to avert by taking decisive steps on the proposed Nurses Collective Bargaining Agreement (CBA) or taking measures to end the Nurses strike since 5th June, 2017.

13. The 3rd Respondent in failing to issue a timely advice and letter of no objection or otherwise to the proposed Nurses' CBA contributed to the violations to the right to life and access to the essential services of health in public facilities.

14. The 4th Respondent is the Ministry of Health and a duty bearer for right to life and right to access health services and responsible for the continued strike and withdraw of essential services by failing to issue necessary policy guidelines to avert the prolonging of the strike by Nurses. The court should take judicial notice that the Nurses and Doctors serving on public hospital were also on strike in 2016 and early 2017 and that the current Nurses' negotiations are traceable to an earlier CBA for Nurses signed with the 4th Respondent in 2014.

15. The 5th Respondent is the Attorney General of Kenya whose duties includes to provide legal advice to the government. The 5th Respondent ought to have advised the government on the necessary legislative amendments in this case to align the provisions of essential services under the Labour Relations Act to the constitutional limitation of rights and freedoms as founded/directed in the decision of **Petition No. 70 of 2014. 2017, Okiya Omtatah Okoiti v The Hon. Attorney General and Others.**

16. The International Covenant on Economic, Social and Cultural Rights ***Article 12 provides as follows***:-

1. The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the State Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

17. The General Comment No. 14 of the right to health under the ICESCR recognizes health as a fundamental human right indispensable for the exercise of other human rights where every human being is entitled to the enjoyment of the highest attainable standard of health conducive to life and dignity.

18. The Petitioner therefore humbly pray for:-

(i) **A DECLARATION** that Section 80 of the Labour Relations Act on essential services is a necessary limitation of the right to strike of the nurses in order to protect a higher right to life of the patients and to safeguard against suffering and death during strikes and lockouts by medical sectors employees.

(ii) **A DECLARATION** that health services are essential service and that nurses and Doctors have a right to strike and the right to life is sacred and that all the trade unions in the health sector must put in measures for continued provision of medical services by a percentage of its membership before issuance of a strike notice.

(iii) An **ORDER OF MANDAMUS** compelling parties to complete and sign the Collective Bargaining Agreement for nurses and have it filed in this court within 7 days of the Order.

(iv) An **ORDER MANDAMUS** directed at the 5th Respondent to draft the necessary legislation to address strikes in essential services and especially the health sector in order to ensure that the sector is not crippled by strikes in the future and table the bill before Parliament within 90 days.

(v) Costs of this Petition be granted to the Petitioner.

(vi) Any other order that the court may deem fit to grant.

Submissions by the Petitioner

19. The Petitioner in the very lengthy submissions filed on 2nd October, 2017, captures the issues set out in the petition itself and summarizes the issues for determination as follows:-

(i) Whether the nurses services are essential services necessary for the protection of the higher right to life and whether the issue is res-judicata.

(ii) Whether there is justification to regulate through legislation the right to strike by the trade unions in the health services pursuant to Article 24 of the constitution. For example to provide for emergency services and stipulate minimum services to be provided during the strikes.

(iii) Whether there is justification for legislation to address provision of essential services and the right to strike by health sector unions.

(iv) The court supervision of the completion and signing of the Nurses CBA (Prayers 3).

20. The Petitioner prays the court to find as prayed.

21. The 2nd Respondent **(The Council of Governors)** entered appearance on the 23rd day of August 2017 and filed it's replying affidavit on even date. The same was sworn by Jacqueline Mogeni (the Chief Executive Officer of the 2nd Respondent) on the 22nd day of August 2017.

Submissions 2nd Respondent

22. In its replying affidavit and written submissions, the 2nd Respondent submits that the following issues crystallize for determination as follows:-

a) Whether the 2nd Respondent had been properly enjoined in this matter.

b) Whether the 2nd Respondent has the capacity to enter into a Collective Bargaining Agreement and sign the same on behalf of the 47 county governments with the members of the 1st Respondent.

c) Whether the instant matter is *Sub judice*.

a) Whether the 2nd Respondent has been properly enjoined in this matter.

23. The 2nd Respondent is a statutory body established under Section 19 of the Intergovernmental Relations Act No. 2 of 2012 hereinafter referred to as (the Act) with its functions set out in section 20 of the act include to provide for a forum for amongst others; consultation

among county governments and considering matters of common interest to County Governments.

24. Further the Fourth Schedule of the Constitution has delineated functions between the National Government and County Governments. The functions of county health services has been assigned to the County Governments and consequently, the 2nd respondent is not a duty bearer in the provision of health services in the Counties.

25. That Article 235 of the Constitution provides inter alia that;

> ***235. (1) A county government is responsible, within a framework of uniform norms and standards prescribed by an act of parliament, for-***
>
> ***a) establishing and abolishing offices in it's public service.***
>
> ***b) appointing persons to hold or act in those offices, and confirming appointments.***

26. Pursuant to this it is the 2nd Respondent's submission that the County Governments, through the County Public Service Boards hereinafter (CPSBs) established vide section 59 of the County governments Act, have the authority to employ workers in line with their core functions. Therefore, County Governments are the employers of the members of the 1st Respondent. The 2nd Respondent's mandate is to coordinate the activities of the 47 county governments to ensure a harmonized approach to the implementation of devolved functions but does not employ nurses and therefore does not take any administrative function against members of the 1st Respondent. As such it is the 2nd Respondent's submission that it has no authority to sign CBAs on behalf of the 47 County Governments.

Whether the 2nd Respondent has the capacity nor the mandate to enter into a Collective Bargaining Agreement and sign the same on behalf of the 47 county governments with the members of the 1st respondent

27. It is the 2nd respondent's submission that a Collective Bargaining Agreement hereinafter (CBA) can only be entered into by the employer, group of employers or an employer's organization and a recognized trade union.

28. In the case of **Okiya Omtatah Okoiti v Attorney General & 5 others Petition No. 70 of 2014 (Authority No.1 on the 2nd Respondent's list of Authorities)** it was stated at paragraph 54 by Justice Mathews N. Nduma that;

> *"It is common cause that the Health Sector has been devolved to the Counties and most health workers including doctors, nurses and various cadre of medical officers are employees of the County Governments except certain aspects of the service to do with discipline of health employees which are still retained by the Public Service Commission."*

29. The upshot of the above is that the 2nd Respondent cannot be compelled to complete and sign a CBA with the 1st Respondent since the legally mandate body to do the same is the respective County Public Service Board (CPSB) which is the employer of staff in the counties.

30. In the aforementioned case of **Okiya Omtatah Okoiti v Attorney General & 5 others Petition No. 70 of 2014** (Authority No. 1 on the 2nd Respondent's list of Authorities) it was stated at paragraphs 64 to 66 by Justice Mathews N. Nduma that;

> *"it is in the interest of good labour relations, and harmony in this sector that a collective bargaining agreement(s) be concluded with the respective employer(s) of the employees in the Health Sector.*
>
> *Since the health employees should enjoy uniform terms across the counties, it is useful that a common collective bargaining agreement do cover health workers across all the counties. It may be futile to conclude a collective agreement between the Union and the National Government if indeed the employer of the Health Workers is the County Government in line with the devolved government.*
>
> *A joint negotiations mechanism vide the Council of governors may be a more useful platform for the purpose."*

31. In effect the 2nd Respondent states that it is not proper party to this suit by virtue of the provisions of Section 56 of the County Governments Act No. 17 of 2012. In light of the above a similar position was applied with respect to the doctors wherein their CBAs were signed as between each CPSB of each County Government and the Kenya Medical Practitioners, Pharmacists and Dentists Union, the same was registered in court on the 18th day of September 2017. The role of the 2nd Respondent was limited to coordinating the negotiations and they ensured that the Return to Work Formula was signed.

32. In view of section 20 of the Intergovernmental Relations Act No. 2 of 2012 the 2nd Respondent only plays a coordinating role amongst counties. The 2nd Respondent has to this end taken decisive and timely measures to end the strike. Indeed through the concerted efforts of the 2nd Respondent it ensured that a negotiated agreement was entered into on the 16th day of December 2016 to bring to an end the strike that had been previously called by the 1st Respondent. A copy of the negotiated agreement has been annexed in the 2nd Respondent's replying affidavit sworn on 22nd day of August 2017, the same has been marked as JM-1.

33. In the same vein the 2nd Respondent has gone a step further and instituted court proceedings to determine the legality of previous strikes held by the 1st Respondent and has managed to get orders suspending such strikes. A copy of the interim orders granted to the 2nd

Respondent is annexed as JM-2 on 2nd Respondents replying affidavit.

34. Despite the foregoing the 2nd Respondent has taken an extra mile and written severally to the 1st Respondent inviting then to consultative meetings for the purpose of achieving an amicable resolution of the matter at hand. Copies of the correspondence to this effect are attached to the 2nd Respondent's relying affidavit filed in court on the 23rd day of August 2017.

Whether the instant matter is sub judice

35. The 2nd Respondent submits that the petition is *subjudice* in view of the fact that there is pending litigation on the subject matter filed in court being Employment and Labour Relations Court No.1141 of 2017 between Kenya National Union of Nurses vs Council of Governors. The above stated matter deals with the issue of the ongoing strike by the 1st Respondent's members and the signing of the CBA. The matter is still pending determination before this Honourable court.

36. Lastly it will suffice to state that the issue of the legality of the ongoing strike has been heard and determined by this Honourable court in Employment and Labour Relations Cause **No.1069 of 2017 between John K. Biiy vs Seth Panyako and 6 others.**

In the instant matter, the court on the 1st day of September 2017 declared the ongoing strike as illegal as such the 2nd Respondent submits that the instant petition has been overtaken by events as it seeks for orders necessary to stop an action which has been declared illegal.

37. In view of the foregoing reasons the 2nd Respondent submits that the petitioner has failed to demonstrate a violation of it's rights by 2nd Respondent and urge this court to dismiss the petitioner's petition dated the 31st day of July 2017 and amended on the 16th day of August 2017 with costs.

Submissions by the 4th, 5th & 6th Respondents

38. The Petition was brought under articles 20, 21, 22(1), (2), 23(3), 26(1), 43(1) and 165(5) of the Constitution, Sections 76(c), and 78(e) to 81 of the Labour Relations Act and the Employment and Labour Relations Act.

39. The subject matter of the dispute as set out in the Petition is the lawfulness or otherwise of the strikes by nurses being an essential service, the adequacy of statutory dispute resolution mechanisms.

40. The issues that arise from the Petition can be structured as follows:-

1. Whether section 81 of the Labour Relations Act No. 14 of 2007 of the Laws of Kenya adequately provides governance for essential services;

2. Whether the issue of the Collective bargaining agreement for nurses has not already been addressed and is before another Court forum therefore *subjudice;*

3. Whether the Attorney General should be compelled to enact a legal and policy framework for resolving labour disputes in essential services without disrupting service delivery.

4. Whether while negotiating the Collective Bargaining Agreement the 3rd Respondent was involved in the process as per the provision of the 3rd Respondent's Salaries And Remuneration Commission (Remuneration And Benefits Of State And Public Officers) Regulations, 2013.

Whether section 81 of the Labour Relations Act No. 14 of 2007 of the Laws of Kenya adequately provides governance for essential services;

41. The petitioner seeks a declaration that section 80 of the Labour Relations Act on essential services is a necessary limitation of the right to strike of the nurses in order to protect a higher right to life of the patients and to safeguard against suffering and death during strikes and lockouts by medical sector employees.

42. Section 81 of the Labour Relations Act No.14 of 2007 defines essential services as services the interruption of which would probably endanger the life of a person or health of the population or any part of the population.

43. Section 81 sub-section (2) of the Labour Relations act provides that:

"*The minister, after consultation with the Board –*

(a) Shall from time to time, amend the list of essential services contained in the Fourth Schedule; and

(b) May declare any other service an "essential service" for the purpose of this section if a strike or lock-out is so prolonged as to endanger the life, person or health of the population or any part of the population."

44. At Section 81 sub-section (3), the act provides that there shall be no strikes and lock-outs in an essential service. Sub-section (4) further provides that, any trade dispute in a service that is listed as or is declared to be an essential service may be adjudicated upon by the Industrial Court. Sub-section (5) also provides that a collective agreement may provide that any service may be deemed to be an essential service.

45. Section 78(1)(f) also provides that no person may take part in a strike if that person is engaged in an essential service.

46. It is our humble submission that the Labour Relations Act properly governs and provides for essential services. The Petitioner's application is therefore baseless as the law which is sought to be established already exists.

47. The committee of experts on the application of conventions and recommendations of the International Labour Organization ("ILO") recommends that the right to strike should only be restricted in relation to public servants exercising authority in the name of the State and in relation to genuinely essential services.

48. In the ILO Principles Concerning the Right to Strike, recommendations are made on the Compensatory guarantees for workers deprived of the right to strike and it provides;

> "*When a country's legislation deprives public servants who exercise authority in the name of the State or workers in essential services of the right to strike, the Committee on Freedom of Association has stated that the workers who thus lose an essential means of defending their interests should be afforded appropriate guarantees to compensate for this restriction (ILO, 1996d, para. 546)*
>
> *In this connection, the Committee has stated that a prohibition to strike in such circumstances should be "accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented" (ibid., para. 547). The Committee on Freedom of Association has stated that it is essential that "all the members of the bodies entrusted with such functions should not only be strictly impartial but, if the confidence of both sides, on which the successful outcome even of compulsory arbitration really depends, is to be gained and maintained, they should also appear to be impartial both to the employers and to the workers concerned" (ibid., para. 549). The Committee of Experts has adopted a similar approach in stating that:*
>
> "*If the right to strike is subject to restrictions or a prohibition, workers who are thus deprived of an essential means of defending their socio-economic and occupational interests should be afforded compensatory guarantees, for example conciliation and mediation procedures leading, in the event of a deadlock, to arbitration machinery seen to be reliable by the parties concerned. It is essential that the latter be able to participate in determining and implementing the procedure, which should furthermore provide sufficient guarantees of impartiality and rapidity; arbitration awards should be binding on both parties and once issued should be implemented rapidly and completely (ILO, 1994a, para.164)."*

Whether the issue of the Collective bargaining agreement for nurses has not already been addressed and is before another Court forum therefore *subjudice*;

49. The 4th, 5th & 6th Respondens submit that the Salaries and Remuneration commission would have been the best party to address this issue and it is very important that they were properly served to attend court and submit on the same.

50. However, from an understanding of the issues surrounding the issue of the Nurse's strike and the Collective Bargain Agreement are issues before the Court in Employment and Labour Relations Cause No. 1069 of 2017 and already decided in cause No.2450 "B'' of 2016 in which although there is a Collective Bargaining Agreement was done, the law was not followed and the Salaries and Remuneration Commission had made recommendations for changes which are yet to be made.

51. The Petitioner can therefore not compel the Salaries and Remuneration Commission to consent to approve the Collective Bargaining Agreement which the commission found not to be sustainable. The Collective Bargaining Agreement is still being negotiated which makes the issue of the Collective Bargaining Agreement *subjudice.*

52. In the case of **Kenya Planters Co-operative Union Limited v Kenya Co-operative Coffee Millers Limited & another {2016} eKLR**, the court held that –

> "*Finally, it is obvious to this Court that this petition is sub-*judice. *That principle is defined in Section 6 of the Civil Procedure Act as follows:- '' No court shall proceed with the trial of any suit or proceeding on in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed" emphasis added. The term 'sub-judice' is defined in BLACK's LAW DICTIONARY 9TH EDITION as: "Before the Court or Judge for determination" A matter which is still pending in Court un-decided or still under consideration is therefore sub-judice and that is precisely the position with regard to KERUGOYA ENVIRONMENT AND LAND COURT CIVIL APPEAL NO. 60 OF 2014. I hold the view that a Constitutional Petition is emenable to the sub-judice rule just like any other civil proceeding and that explains the insertion of the words "or proceeding" in Section 6 of the Civil Procedure Act. I am therefore satisfied that this Constitutional Petition is sub-judice in view of the pendency of the appeal at this Court in which substantially the same issues have been raised. While this Court affirms the petitioner's right to approach it to enforce a Constitutional right, it must also be made clear that this Court has a duty to ensure that its process is not abused. This petition is clearly an abuse of the process of this court and the law enjoins me to make appropriate orders to bring such process to an end. Ultimately therefore and upon considering all the issues raised herein, I am satisfied that this Petition and the Notice of Motion accompanying it amounts to an abuse of the process of this court and must therefore be struck out which I hereby do."*

Whether the Attorney General should be compelled to enact a legal and policy framework for resolving labour disputes in essential services without disrupting service delivery*;*

53. The 4th, 5th & 6th Respondents submit that this Honourable Court lacks the requisite jurisdiction to deal with the issue of policy making which is purely a discretionary function of the Executive.

54. Making of policy if purely a function of the Executive while the role of making law is that of the parliament and the judiciary by virtue of the Doctrine of separation of power cannot interfere with the mandate of other arms of the Government. Various Courts both locally and in other jurisdictions have made decisions on this issue.

55. The Supreme Court in **Speaker of Senate & another –vs- Attorney General & 4 others [2013] eKLR** held that:-

> *"I am persuaded that the Court's jurisdiction to render an advisory opinion in a reference of this nature that directly questions internal workings of the legislature, in the current instance a legislative process, should not be exercised as it will encroach on separation of powers between the legislative and judicial arm of government. Moreover, even if the courts were to intervene, which I do not think they should in the current instance, they ought to satisfy themselves that formal and informal dispute resolution mechanism have first been fully exhausted."*

56. Further, in **Republic –vs- Transition Authority & another Ex parte Kenya Medical Practitioners, Pharmacists & Dentists Union (KMPDU) & 2 others [2013] eKLR**, the Court held that:-

> *"To the contrary in the Fourth Schedule, Part 1 No.28 to the Constitution it is clear that the Health Policy remains a function of the National Government. The inadequacies of provision of health services in this country is a matter of national concern and it is the obligation of the National Government to ensure that every person's right to the highest attainable standard of health as stipulated under Article 43 of the Constitution is attained…. The fact that Health services are devolved does not discharge the National Government from its obligation to ensure that its constitutional obligations are fulfilled. In our view, under Article 1(3)(b) of the constitution, there is only one state organ known as the Executive with structures at national level and in the county governments.*
>
> *Accordingly, we do not accept the contention that devolution of Health services ipso facto ought to necessarily lead to loss of jobs or disadvantageous terms of employment, salaries, Remuneration, pensions and gratuities which terms in our view ought to be determined by the Salaries and Remuneration commission."*

57. The Court in **Okiya Omtatah Okoiti & another –vs- Attorney General & 6 others [2014]eKLR**, the Court held that:-

> *"That provision requires no more than a literal interpretation and in addition, this Court's jurisdiction is limited to interpretation of the law and does not include either the enactment of policy or the law as that is the mandate of parliament for national legislation and county assemblies for county legislation as well as the national and county executives in the case of policies."*

58. The Supreme Court of India in **Asif Hameed & others –vs- Stae of Jammu & Kashmir & others (1989) AIR 1899, 1989 SCR (3) 19,** the Court observed that the exercise of powers by the Legislature and Executive is subject to judicial restraint. However, the court's exercise of such powers can only be subject to the self-imposed discipline of judicial restraint. The Court further observed that (at paragraphs 3 and 4):-

> *"When a State action is challenged, the function of the court is to examine the action in accordance with Law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the constitution and if not, the court must strike down the action. While doing so the court must remain within its self-imposed limits. The court sits in judgment on the action of a coordinate branch of the Government. While exercising power of judicial review of administrative action, the court is not an appellate authority. The constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the constitution lies within the sphere of legislature of executive, provided these authorities do not transgress their constitutional limits or statutory powers."*

59. In **US –vs- Butler 297 US 1 (1936)** in which the US supreme court observed that:-

> *"When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power to judgment. This court neither approves nor condemns any legislative policy.*
>
> *Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and having done that, its duty ends."*

60. It is submitted that the Court cannot issue the Orders sought compelling the Attorney General to enact a legal and policy framework. The Petitioner has further failed to appreciate the existing policy in place and the reason that the process is ongoing does not mean that the process is not working.

61. The Respondents further submit that this issue is *resjudicata* for the reason that the issue of enacting policy was dealt with in **Petition No. 70 of 2014, Okiah Omtata Okoti –vs- The Hon**. **Attorney General and 5 others**, a matter in which the petitioner herein who claims to

be acting for public interest should have joined as a party and had the issues raised herein addressed.

Whether while negotiating the Collective Bargaining Agreement the 3rd Respondent was involved in the process as per the provision of the 3rd Respondent's Salaries And Remuneration Commission (Remuneration And Benefits Of State And Public Officers) Regulations, 2013

62. The Petitioner seeks that an order of mandamus compelling the 1st Respondent and the 2nd Respondent acting on behalf of the 47 countries Public Service Boards to take necessary steps to complete and sign the Collective Bargaining Agreement for nurses and have it filed in this Court within 7 days of the Order.

63. The Respondent humbly submits that this Honourable Court cannot dictate the parties to sign or consent to a Collective Bargaining Agreement. The process of negotiating and agreeing to a Collective Bargaining Agreement is provided for under the law at section 57(1) of the Labour Relations Act No. 14 of 2007 which provides that:-

> *"An employer, group of employers' organization that has recognized a trade union in accordance with the provisions of this Part shall conclude a collective agreement with the recognized trade union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement."*

64. It is important to note however that where the employer is a Government institution, the Constitution of Kenya 2010 at Article 230, establishes the Salaries and Remuneration commission. The Commission is established under Chapter 12 of the Constitution of Kenya 2010 under Public Finance. The functions of the commission are provided for under Article 230 sub-article (4) as:

> a) Set and regularly review the remuneration and benefits of all State Officers; and,
>
> b) Advice the national and County Governments on the remuneration and benefits of all other public officers.

65. And why has such a commission established one would ask? The Respondent submits that the commission is necessary as provided for under Article 230 sub-article (5)(a) of the Constitution which provides that:

> *"The need to ensure that the total public compensation bill is fiscally sustainable;"*

66. This explains why at Rule 18 of the Salaries And Remuneration Commission (Remuneration And Benefits Of State And Public Officers) Regulations, 2013

> a) The Commission shall not negotiate with a trade union when determining, reviewing or advising on remuneration and benefits of State or public officers;
>
> b) The management of a public service organization with unionisable employees shall seek the advice of the Commission before the commencement of any collective bargaining process with the respective union on the sustainability of the proposal of the union; and,
>
> c) Where the collective bargaining process referred to in paragraph (2) is successful, the management shall, before the signing of the agreement, confirm the fiscal sustainability of the negotiated package with the commission.

67. The above stated procedure is the correct process under the law. The Petitioner needs to find out whether the Nurses followed the said process since such petitions cannot be used to compel the Government to take action where due process was not followed.

68. In the case of **Kenya National Union of Nurses v Moi Teaching and Referral Hospital Board & 2 others [2015]eKLR** on the issue of advice and consultation with the Salaries and Remuneration commission being mandatory to a public institution that hires staff, the learned Hon. Radido J. held that:-

> *"In so far as the partners here ignored the advice of the 1st interested party, and in view of the principle of **stare decis,** I have no option but to dismiss the application here.*
>
> *The order which commends itself here is to direct the parties to go back to the negotiating table and reach a mutually agreed deal on the outstanding issues after putting into consideration the 1st interested parties advise."*

69. The Respondents submit that it is only proper to let the parties concerned in negotiating the Collective Bargaining Agreement allowed to follow due process rather than have numerous applications filed in court over the same issues in an attempt to shop for forum.

70. In light of the 4th, 5th and 6th Respondents' submissions the Petition ought to be dismissed as there is no justifiable cause of action for determination by this Honourable Court. The strike by the 1st Respondent is illegal in the light of the provisions of the Labour Relations Act No. 14 of 2007. The Petitioner has also failed in demonstrating that the 4th, 5th and 6th Respondents have failed in policy making and the law. The Collective bargaining Agreement which the Petitioner seeks to have the Respondents consent to without the advice of the 3rd Respondent violates mandatory provisions of the Constitution. Further, the Orders sought cannot be issued in the circumstances as the crucial parties including Parliament and other essential services declared as such under the law are not parties. Issuing of Orders will amount to a miscarriage of justice.

Determination

71. Is the matter subjudice?

The term subjudice is defined by the Black's Law dictionary to mean:-

> "*Before the court or judge for determination*"

72. It has been submitted by the Respondents that the Petition before court is subjudice in view of the fact that there is pending litigation on the subject matter filed in court being Employment and Labour Relations court No. 1141 of 2017 between Kenya National Union of Nurses vs Council of Governors. That the said matter deals with the issue of the ongoing strike by the 1st Respondent's members and the signing of the Collective Bargaining Agreement. That in view of this, this matter be either dismissed or stayed to await the outcome in cause no. 1141 of 2017.

73. The key consideration is whether or not the petition is the same matter or the one said to be pending under cause no. 1141 of 2017. That is to say,

(i) Is the cause of action in this petition the one in cause no. 1141 of 2017.

(ii) Does the dispute involve the same parties as in this petition.

(iii) Will the determination of the issues in cause no. 1141 of 2017 determine all the issues in this petition.

74. The burden of proof on a balance of probabilities is on he/she who alleges.

75. The Respondents have failed in the court's view to discharge this onus. The parties in this petition are different from those raised in cause no. 1141 of 2017. That suit mainly concerned stoppage of a strike action by the Kenya National Union of Nurses which is not an issue in the present petition. The petitioner herein was not a party in that suit and the issues raised in this petition go beyond the issues raised in cause no. 1141 of 2017.

76. Is the matter res judicata?

77. The Respondents have also submitted that the issues for determination were conclusively dealt with in **petition no. 70 of 2014 Okiya Omtatah Okoiti vs Hon. Attorney General & 5 others**.

78. Res judicata is discussed by Black's Law dictionary as "an affirmative defense barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits and (3) the involvement of the same parties or parties in privity with the original parties."

79. The 1st, 2nd, 3rd and 6th Respondents in Petition No. 70 of 2014 are also Respondents in this suit.

80. The Petitioner in Petition No. 70 of 2014, who is different from the present petitioner, sought a declaration that a strike notice by members of the 1st Respondent was illegal. A declaration be made that there is need for the state to enact a legal and policy frame work to serve the rights of workers in essential services and to ensure the amicable resolution of labour disputes without disrupting service delivery and for the court to issue a mandamus compelling the Respondents to implement this declaration.

81. The court held that the limitations to a strike by essential service under sections 76 and 78(1)(a)(b)(c)(d)(e) & (h) are adequate regulatory and prohibitory provisions to the right to go on strike provided under Article 41(2) (d) of the constitution of Kenya 2010. However, the court found that section 78(1)(f) and section 81(3) of the Labour Relations Act, 2007 derogate from the core content of the right to strike provided under article 41(2)(d) of the constitution. The court fell short of declaring the provisions unconstitutional and therefore null and void but directed the Legislature to revisit the law with a view to remove the apparent conflict between the constitutional provision and the statutory law.

82. The court held further that the employees in the essential service only need to conclude a collective bargaining agreement which provides an effective frame work for expedient dispute resolution where the employer delayed in concluding a Collective Bargaining agreement. The court further found the Labour Relations Act, 2007 provided sufficient dispute resolution mechanisms which include mandatory conciliation before the matter is escalated for adjudication in court.

83. The court dismissed the cross petition but made an advisory opinion to the Respondents that a joint negotiations mechanisms vide the council of governors be established to provide uniformity in the negotiations and conclusion of Collective Bargaining Agreements by all 47 Countries.

84. The Petition and the cross petition were dismissed. Are these, the same issues sought to be heard and determined in the present petition?

85. The Issue as to whether the nurses services are essential services necessary for the protection of the higher right to life was heard and determined in Petition No. 70 of 2014, as discussed above. The court specifically found that-

(i) Workers in Kenya have a right to go on strike as provided under Article 41(2)(d) of the Constitution.

(ii) The right to go on strike is adequately limited under section 76 of the Labour Relations Act, 2007. However, the limitation on the right to call a strike in the essential service (which the nursing services are, under section 78(1)(f) and section 81(3) is unconstitutional as it derogates from the core content of the right to strike under Article 41(2)(d) of the Constitution of Kenya 2010. This issue is res-judicata.

86. The court also determined that the regulation through legislation of the right to strike by the trade union in the health services pursuant to article 24 of the Constitution was adequately done under section 76 and 78(1) (a) (b) (c) (d) (e) & (h) of the Labour Relations Act, 2007.

87. The court notes the failure by the parties to employ these mechanisms adequately to prevent the many strikes in the health sector in the immediate past and even as the suit was going on.

88. The court however finds that it had adequately addressed the issue in petition 70 of 2014 and the matter was resjudicata. Indeed, the court specifically found that, additional measures to ensure timely dispute resolution and determination of terms and conditions of service be taken by the parties and made part of a mandatory negotiated frame work in the next Collective Bargaining Agreement, instead of the measures being imposed through legislation.

89. The court finds that it covered this issue adequately in petition no. 70 of 2014, and there was no necessity of further orders in this respect.

90. In terms of section 57(1) of the Labour Relations Act, 2007 an employer and a Union that have a recognition agreement just like the 47 counties already have a recognition agreement with the Kenya National Union of Nurses, are mandated by use of the word "shall" under the section to "*conclude a collective agreement with the recognized trade union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement.*"

91. The procedure for such negotiations is set out in the recognition agreement that precedes collective bargaining, the relevant constitutional and statutory regulatory provisions applicable to the Public Sector in the case of the parties herein and more important is that the procedure and mechanisms employed may be enhanced from time to time in future Collective Bargaining Agreements.

92. The court would fall to folly if it were to decree mandatory methods of negotiating and conclusion of Collective Bargaining Agreements. **To this extent, the court finds that it adequately dealt with the matter in petition 70 of 2014, and need not make any further orders in this respect.**

93. **In conclusion, the court is of the considered view and finding that it need not compel the Attorney General and the Legislature to enact legislation to address the essential services sector in any different manner than it did in petition 70.**

94. In **Asif Hameed & others vs State of Jammu & Kashmir & Others (1989) AIR 1899, 1989 SCR (3)19**, the supreme court of India observed –

> "*The constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the constitution lies within the sphere of Legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers.*"

95. In the present petition there are serious concerns in the frequent and sustained interruption of the provision of the health services in the entire country. These interruptions, which are often life threatening and have led to many unnecessary loss of life are a great cause of concern to all Kenyans and Institutions like the petitioner herein whose pivotal constituency, Women of Kenya, are at the sharpest end of the dagger that is unleashed on the populace whenever the health sector downs its tools.

96. These matters, need to be adequately addressed albeit by the appropriate organs, being, the Executive and Legislature in the first instance and only by the courts in the event of specific transgressions that require specific and appropriate judicial redress. Mandating Legislation is not one such appropriate redress in view of the previous decision of the court in petition 70 of 2014.

97. Accordingly, the petition fails, with no order as to costs.

Dated and Signed in Kisumu this 7th day of June, 2018

MATHEWS N. NDUMA

JUDGE

Delivered and signed in Nairobi this 19th day of June, 2018

MAUREEN ONYANGO

JUDGE

Appearances

M/s. Keli for Petitioner

Mr. Murungi for 1st Respondent

M/s. Eva Sawe for 2nd Respondent

M/s. Lorine Shitubi & Soita for 4th, 5th & 6th Respondents

Anne Njung'e – Court Clerk