



REPUBLIC OF KENYA



Biiy v Panyako & 5 others; Ministry of Health & another (Interested Parties) (Environment & Land Case 1069 of 2017) [2018] KEELRC 1570 (KLR) (11 June 2018) (Ruling)

John K. Biiy v Seth Panyako & 7 others [2018] eKLR

Neutral citation: [2018] KEELRC 1570 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ENVIRONMENT & LAND CASE 1069 OF 2017

HS WASILWA, J

JUNE 11, 2018

BETWEEN

JOHN K. BIIY CLAIMANT

AND

SETH PANYAKO 1ST RESPONDENT

MAURICE OPETU 2ND RESPONDENT

ASHA ALI IDO 3RD RESPONDENT

JOSEPH NGWASI 4TH RESPONDENT

AGNES MUNDERU 5TH RESPONDENT

KENYA NATIONAL UNION OF NURSES 6TH RESPONDENT

AND

MINISTRY OF HEALTH INTERESTED PARTY

THE COUNCIL OF GOVERNORS INTERESTED PARTY

RULING

1. The Application before Court is one for review filed by the 6th Respondent in respect of this Court's Ruling dated 1/9/2017. This Application was filed on 5/12/2017 under Certificate of Urgency by the 6th Respondent herein through a Notice of Motion brought under Rules 33(1) (a) and (b) of the Employment & Labour Relations Court (Procedure) Rules 2016 laws of Kenya.
2. The Applicant filed this Application seeking orders that:-



1. This application be and is hereby certified as extremely urgent and service thereof be dispensed with in the first instance.
 2. Pending the hearing of this Application this Honourable Court be pleased to issue an ex-parte order staying the execution of the Ruling of Hon. Lady Justice Hellen Wasilwa's in Cause No. 1069 of 2017 delivered on 1st September 2017.
 3. Upon the hearing of this Application the hearing of this Application this Honourable Court be pleased to issue an order setting aside the entire Ruling of Hon. Lady Justice Hellen Wasilwa's in Cause No.1069 of 2017 delivered on 1st September, 2017.
 4. Upon the hearing of this Application this Honourable Court be pleased to issue an order expunging the names of the 1st to 6th Respondents from the Court records.
 5. Upon the hearing of this Application this Honourable Court be pleased to issue an order expunging the Ruling of Hon. Lady Justice Hellen Wasilwa's in Cause No. 1069 of 2017 delivered on 1st September, 2017 in its entirety from the Court records as sustaining the same will set a bad judicial precedent.
 6. Costs of this Application be in the cause.
3. The Application is grounded on the supporting affidavit of the 6th Respondent herein and on the following grounds:-
1. That, the Court erred in law and fact in its ruling as stated in paragraph 38 which states inter-alia:-

“It is not clear whether the National Governing Council and National Executive Committee of the 6th Respondent sat to decide on whether to call a strike or Not. However if that was done the claimant was not part of it and this renders any such decision illegal”.
 2. That, further to the above paragraph in finding that the ended strike was called in the absence of the claimant is false as the strike was issued through a National Governing Council held at Tom Mboya on 9th -12th November 2016 where a twenty one (21) day strike Notice was issued in a meeting that was chaired by the claimant (Refer to annexure Marked SP-2 a copy of the said minutes of the NGC of 9th -12th November 2016 in the Supporting Affidavit).
 3. That, further to paragraph 38 the last sentence which states that “ However if that was not done the claimant was not part of it and this renders any decision “illegal” is an error in law and fact. This is grounded on the provision of Chapter IX of the 6th Respondent's Constitution annexed as JKB2 on page 018 of the Claimant's Application dated 9th June, 2017 which states Inter-alia:-
 - (1) National Chairperson

The National Chairman shall preside over all meetings and meetings, at which he is present, enforce observations of *the constitution* and custom pertaining to his/ her office. In the case of an equality vote at any meeting he/she shall have, in addition to his/ her normal vote a deciding vote.



4. That the National Chair's presence in any meeting as provided for in the Union constitution is discretionary and not mandatory as meetings can proceed his absence notwithstanding hence the court should review its finding and set aside the entire ruling.
5. That, further to assign an absolute power to the office of the Chairperson imputes the provisions and mandate of offices established by the Labour Relation Act 2007 i.e General Secretary, the Treasurer and the Trustee by elevating the Chair/Claimant as if he is above all other offices when that particular office is not an office established by law but a creation of the union constitution with specific limited duties is an error in law and fact that the court ought to correct by setting aside her ruling.
6. That, further according to the 6th Respondent a meeting can only be Null and Void under the following conditions:- (Refer to annexure Marked SP-2 copy of the Applicant Union's Constitution).
 - a) When it does not meet the quorum as provided for in the Union Constitution Chapter VII Clause 5 which states inter alia:-

the quorum of the national executive council shall be two third (2/3) of the members entitled to attend and vote thereto.
 - b) If the meeting is convened by a person other than the General Secretary or a person appointed by the General Secretary as provided for in :-
 - i. The Union Constitution Chapter VII Clause (3) which states inter alia:-

“The national executive council shall meet at least once in every six months or when it is necessary at such time, place and date as shall be decided upon by the General Secretary who shall be the convener”.
 - ii. The Union Constitution Chapter IX Clause (3) which states inter alia:-

“The General Secretary shall issue notices of all meetings and elections. He/ she shall prepare the agenda of all meetings, attend all annual meetings, National Governing Council meetings and meetings of the National Executive Council and record the minutes and shall perform such other duties as prescribed by the National Executive Council...” It is therefore mandatory for the General Secretary to attend all meetings and not the Chairperson.
 - iii. Union Constitution Chapter IX Clause 2 states inter-alia:-
 - 2) Deputy/Assistant National chairperson:

“They shall at all meetings and meetings in the absence of the national chairperson and whilst so performing such duties, shall have same privileges as national chairperson. If for any reason the national chairperson, deputy/ assistant national chairperson are all absent, the officials attending such meeting or meeting shall have the right to appoint a chairperson from the members present”.



7. It is therefore obvious that the office of the Chairperson is not a preserve of the claimant and the function of that office can be performed by other official i.e. the Deputy Chair or the Assistant Chair or a Chair appointed by the NEC where none of the chairs presents as provided for to the claimant Union claimant.
8. That, this Honourable court has already declared itself on the issue in the application on representation of members as found and held in Cause No. 866 of 2014 by Hon. Lady Justice Honourable Monica Mbaru on the ruling where she found and held as follows:-

Cause No. 866 of 2014 between Jophinus Musundi & 7 others- National Executive Council Committee Members [acting for Kenya National Union of Nurses] versus Seth Panyako as follows:-

Paragraph 5 pg. 2

“At the time of filing the suit KNUN National Chairman signed the claim and he is an incompetent person in the meaning of Rule 7(a) of the Industrial court procedure rules. The authorized persons for a trade union are not the chairperson. That there are records from the office of Registrar of Trade Unions that confirm who the KNUN officials are and only the General Secretary can sue and the authorized person to execute documents for and on behalf of the Union”

Paragraph 16 pg. 4

“The drafters of the law and equally by the same getting the requisite approval by parliament must have made considerations to the facts that trade unions have for a long time flourished while engaged in the social dialogue. Such dialogue can only be commenced by an authorized officer of the union and to leave it open to all officials as it were would defeat the very rationale of having the position of the General Secretary in taking the responsibility to commence and conclude such dialogue. Therefore looking at the authority granted to this office of General Secretary, much responsibility and duty to act for the benefit of the union is indeed quite high and heavy.....”

d) The *Labour Relations Act* 2007 Section 2(e) which states inter alia:

(2). In this Act unless the context otherwise requires-

“Authorized representative” means

- a) The General Secretary of a trade union
- b) An employer or the chief executive officer of an employer.
- c) the secretary of a group of employers.



- d) the chief executive or an association secretary of an employers' organization; or
- e) any person appointed in writing by an authorized representative to perform the functions of the authorized representative.

iv. The finding in the ruling of this Honourable court by Lady Justice Monica Mbaru in cause No.866 of 2014 in paragraph 15 found and held as follows:-

“To run the affairs of a trade union there is an authorized officer in law or a person so authorized by the authorized officer. This is the nature of Trade Unions so as not to defeat the purpose of such organization. Even where a party has a claim against such an entity as a trade union, such a party can lodge an individual claim as of right but when making such a claim under the entity of the union, then by operation of the Law, the authorized officer has to act in that regard”.

9. That, it is clear that an action can only be illegal if it offends the mandatory provisions of the law as the action is forbidden by the law. The Black's law Dictionary, Deluxe Ninth Edition, Bryan A. Garner Editor in Chief, define illegal as follows:

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Illegal, Forbidden by law; unlawful, <illegal, dumping>< an illegal drug>.

Illegality, (17c) an act that is not authorized by law.

2. the state of not being legally authorized.

10. That, further to the above provisions the Claimant or the Court did not illustrate any tint of law forbidding the applicant from holding any meeting in the absence of the Claimant hence the court's finding is an error in law and fact.

11. That, further to the finding of the court in paragraph 38, the court erred in law by finding that if a meeting was not attended by the chair a decision arrived at in such meeting is rendered illegal, within the mandatory provisions already stated by the Applicant in relation to the 6th Respondent Constitution and the Labour Relations Act 2007 and in specific the constitution of Kenya Article 41(4) which states inter alia:-

Every trade union and every employers' organization has the right-

- a. to determine its own administration, programmes and activities
- b. to organize; and



- c. to form and join a federation.
12. That, the Applicant has determined her administrative structure through her registered constitution and for the court to issue orders in violation of the 6th Respondent Constitution is in contravention of *the Constitution* of Kenya Articles 41(4) hence such finding should not hold and ought to be set aside by this Honourable Court.
 13. That, the finding that the strike Notice was not issued as provided for in law was erroneous as the strike resumption Notice was issued to the employer and duly acknowledged by the employer (Refer to annexure marked sp-4a & 4b is the copy of the strike resumption Notice and the acknowledgement letter of the Public Service Consultative Forum respectively on the Supportive Affidavit).
 14. That furthers the finding in paragraph 40 that the strike of 14th November 2016 is not true because the 6th Claimant did not commence any strike on 14th November 2016. The 6th Respondent is aware of the strike that commenced on 5th December 2016.
 15. That, further the finding in paragraph 40 that the purported strike of 14th November 2016 was called off is erroneous in law as the only strike known by the 6th Respondent commenced on 5th December 2016 and was suspended on 14th December 2017.
 16. That, the Negotiated Agreement entered between the National Government and County Government stated that the matter was settled under the certain terms as the agreement stated inter alia:-

“Whereas the KNUN issued a twenty (21) day strike notice on 1st November, 2016;

Whereas the industrial action by members of KNUN commenced on Monday 5th December, 2016 ; and

Whereas the negotiation aimed at unlocking the industrial action have been ongoing.

Now the parties resolve and agree as follows:

1. That all the county governments will execute the requisite Recognition Agreement of the Kenya National Union Of Nurses (KNUN) by the respective County Secretary and the chairperson of the County Public Service Board on Wednesday 14th December, 2016 at the Council Of Governors officers at Delta House, Westlands Area of Nairobi City County.
2. That this agreement will form part and be incorporated in the comprehensive harmonized CBA when signed and registered in court.
3. That cognizant of the vital role played by collective Bargaining Agreement (CBA) in fostering harmony between Employees and Employers, the parties have agreed to formulate a CBA for the period 2017-2021 within 2(two) months effective the 1st January 2017, but in any case not later than the 2nd March 2017.



4. That the Government of Kenya has agreed to offer to all nurses monthly increase[Nursing Service Allowance] as follows:
 - . Job group [G-L] Kes. 20,000.00
 - . Job group [M and above] Kes. 15,000.00
 5. That the foregoing monthly increase will be paid in two tranches in the ratio of 60:40 with the first tranche of 60% being payable effective 1st January, 2017 and second tranche of 40% effective 1st July, 2017.
 6. That the KNUN suspends the strike and all nurses to resume duties immediately.
 7. That all parties agree that there shall be no victimization or disciplinary action against any of the members, who took part in the industrial action that commenced on 5th December, 2016”.
17. That, the implication of a suspended strike is that it can resume if the terms agreed leading to suspension are violated by the parties Black’s Law Dictionary defines words Suspend, and Suspension as follows:-
 - (a) Suspend (pg 1584) ...to interrupt; postpone; defer, the fire alarm suspended the prosecutor’s opening statement.
 2. To temporarily keep (a person) from performing a function, occupying an office, holding a job, or exercising a right or privileged,
 - (b) Suspension (pg 1584)the act of temporarily delaying interrupting, or terminating something, suspension of business operations, suspension of a statute.
 18. That, there was a clear time frame upon which the issues in the agreement had set out and the most important one was conclusions of the CBA in sixty days hence the strike was suspended for sixty days and could commence if any party breached the terms of settlement. The finding of the court was therefore erroneous in the said paragraph 40 and should be set aside.
 19. That, the court should find and hold that the claimant failed to disclose these material facts and hence the orders were granted under material non disclosure hence Null and Void ab initio.
 20. That, the 6th Respondent denounce the purported consent entered between the Counsels of the Council of Governors and the 6th Respondent lawyers as it was out of the instruction of the 6th Respondent as provided for in the agreement as stated in paragraph 16 above.
 21. That, the finding in paragraph 42 are erroneous in law as the court ought to have considered the definition of the word suspended those were the terms “the matter settled based on the terms and conditions in the Negotiated Agreement, it is obvious that the strike was suspended not called off.
 22. That, the content of paragraph 43 are erroneous as indeed a strike resumption Notice was issued to the employer.
 23. That, the contents of paragraph 44 are erroneous as the 6th respondent issued a strike Resumption Notice of Twelve (12) days way above 7 days as provided for in the law. The Notice



was in compliance with the law and the constitution of Kenya Article 41 2(d) which states inter alia:-

41(2) Every worker has the right to

- a) fair remuneration
- b) to reasonable working conditions
- c) to form, join or participate in the activities and programmes of a trade union; and
- d) to go on strike.

24. That, the contents of paragraph 44 are erroneous as the 6th respondent issued a strike Resumption Notice of Twelve (12) days way above 7 days as provided for in the law. The Notice was in compliance with the law and the Constitution of Kenya the Labour Relation Act 2007 Section 76 (c) which states inter alia:-

76. A person may participate in a strike or lock-out if-

- (c) seven days written notice of the strike or lock-out has been given to other parties and to the minister by the authorized representative of -
 - i. the trade union, in the case of a strike;
 - ii. the employer, group of employers or employers or employers' organization, in the case of a lock-out.

25. That, the orders as granted in paragraph 1 and 2 has been fully canvassed herein in the proceeding paragraphs but order No.3 where the court ordered as follows has not been addressed :-

“ That the Honorable court be pleased to issue an order that the claimant be reinstated into the Negotiating team of the CBA between the 6th respondent and 1st and 2nd Interested parties pending the hearing and determination of this claim”.

26. That, the above cited order was an error in law and fact in light of the provisions of the Union Constitution Chapter IX Clause (3) which states Inter- alia:

The Secretary General.....“He/she shall be the Spokesperson of the union on all matters and he shall appoint persons to represent the union on all matters and he shall appoint persons to represent the Union on National, Regional & International bodies and committees.”

27. That, from the content of the above provisions of the Union Constitution it follows that the court has impugned the internal administrative structures of the 6th Respondent by taking over the mandate of appointing members of the union to sit on committees hence that is an error in law and fact.

28. That, further no evidence has been presented before this Honourable court by the Claimant to indicate that he had at anytime been appointed a member of the CBA negotiating committee by the 6th Respondent in the CBA negotiations.



29. That, the court erred in law and in fact in finding that all agreements entered between the union in the absence of the claimant are illegal as such finding was not grounded on any law or fact and it sets a very dangerous precedence of unprecedented magnitude and should not be allowed to stand.
30. That, further to the content paragraph 31 the court erred in law and fact in stating that “I have considered the submissions and averments’ of all the parties” because the 1st Respondent was not served with the pleading Notices, affidavits and submissions hence he did not put on record any response nor submission.
31. That, in relation to the above paragraph it is evident that the 1st Respondent was condemned unheard clearly in contravention of the constitution of Kenya Article 50 (2)(J) which states inter alia:-
- (2) Every accused person has the right to fair trial, which includes the right-
- (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.
32. That, the court should allow the union intend structures to operate without undue and unlawful intervention and should only intervene when such instruments and process within the law and the Union Constitution have been exhausted administratively.
33. That, the parties in the suits offends the mandatory provisions of the provisions of the labour Relations Act 2007 Section 21 which states Inter alia:-
- A trade union, employer’s organization or federation shall be registered as a body corporate-
- a. with perpetual succession and a common seal.
- b. with the capacity in its own to-
- i. sue and be sued; and
- ii. enter into contracts; and
- c. hold, purchase or otherwise acquire and dispose of movable and immovable property.
34. That, from the foregoing it is clear that there are no legal nor factual grounds that the claimant considered to institute against individuals by the virtue of them being union officials. The individuals cannot represent the union in their personal capacity hence their names should be expunged from the suit as it is only the General Secretary who is authorized to represent the union in court as provided for in the Labour Relations Act 2007, section 2(a) and 73 (3) and of the Laws of Kenya.
- 2(a). In this Act. Unless the context otherwise requires-
- “authorized representative” means
- (a) The general secretary of a trade union.



- (3) A Trade dispute may only be referred to the Industrial Court by the authorized representative of an employer, group of employers, employers' organization or trade union
4. The main contention of the Applicants is that this Court acted in error of the law and facts in stating that the Claimant Respondent as Chairman of the 6th Respondent, his presence was mandatory in the National Executive Council meeting. The Applicants referred Court to Appendix SP-2 the Union Constitution at Chapter VII Clause 5 which states that the quorum of the National Executive Council shall be 2/3rds of the members entitled to attend and vote thereto.
5. That Chapter IX Clause (3) also states that it is the General Secretary who issues notices to all meetings and elections. They also referred Court to Chapter IX Clause 2 which provides for position of Deputy/ Assistant Chairperson who shall in the absence of the Chairman perform duties of the Chairman.
6. The Applicants therefore submit that the function of Chairman can be performed by other officials i.e Deputy Chair or Assistant Chair of a Chair appointed by the National Executive Council where none of the Chairs are provides.
7. Another contention by the Applicant is that the strike called by the Union was issued illegally.
8. Under Rule 33 of the Employment and Labour Relations Court) Procedure Rules 2016, this Court has powers to review its orders or judgement in the following circumstances:-
- 1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling:-
 - a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
 - b) on account of some mistake or error apparent on the face of the record;
 - c) if the judgment or ruling requires clarification; or
 - d) for any other sufficient reason.
9. The Respondents/Claimants opposed this Application. The Claimant filed a Replying Affidavit on 20/12/2017. They contend that the Application offends the provisions of Rule 33 of [Employment Act](#) as there is no discovery of any new and important matter or evidence to warrant review of orders of 1/9/2017. They contend that the Application is an appeal disguised as an Application and they want Court to dismiss it.
10. The 2nd Interested Party also opposed this Application vide their replying affidavit filed in Court on 12.2.2018 on same grounds as those set out by the Claimant.
11. The Parties also filed their submissions herein which I have considered. This is an Application for Review. Thus provisions of Rule 33 of the Employment & Labour Relations Court (Procedure) Rules 2016 apply. The area for consideration by Court is whether to grant orders for review are well enumerated. These concerns:-
- “Error on the face of the record; where there is discovery of a new and important matter or evidence which after the exercise of due diligence was not within the knowledge of that



person or could not be produced by that person at the time when the decree was passed and lastly where the judgment requires classification”.

12. Vide my ruling of 1/9/2017, I addressed myself to 3 issues:-
 1. The strike issue which strike I declared illegal and ordered the Respondents to call it off.
 2. An order concerning the running of health care services in the County which I injuncted the Respondents from interfering with.
 3. An order directing that Claimant be reinstated into the negotiating table of the Collective Bargaining Agreement between 6th Respondent and 1st and 2nd Interested Parties.
13. The Applicants seek review on this ruling on matter concerning a strike which issue has already been overtaken by events and the strike was called off. There is nothing to review on this issue.
14. On the issue of whether the Claimant sat or did not sit on the National Executive Council that called for the strike or not that issue remains spend because this Court has already pronounced itself on the matter.
15. In this Court’s view, the Application for review has no merit. It is like an appeal disguised as an Application and I dismiss it accordingly.
16. Costs in the cause.

DATED AND DELIVERED IN OPEN COURT THIS 11TH DAY OF JUNE, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Jaoko for 1st Respondent – Present

Lawi for 2nd Interested Party – Present

