REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT ELDORET

CAUSE NO.233 OF 2018

PETER MUTAI

ROBERT KIBET

AND 135 OTHERS.....CLAIMANTS

VERSUS

PUBLIC SERVICE BOARD,

ELGEYO MARAKWET COUNTY.....1ST RESPONDENT

ELGEYO MARAKWET COUNTY

EXECUTIVE COMMITTEE FINANCE ..... 2ND RESPONDENT

ELGEYO MARAKWET COUNTY EXECUTIVE

COMMITTEE HEALTH & SANITATION.....3RD RESPONDENT

AND

KENYA NATIONAL UNION OF NURSES.....INTERESTED PARTY

RULING

1. The claimants, Peter Mutai, Robert Kibet and 135 others by application and Notice of Motion filed on 3rd July, 2018 are seeking for orders that;

1) …

2) The 1st and 2nd claimants Peter Mutai and Robert Kibet be granted leave to sign all the documents and affidavits on behalf of all the claimants;

3) Pending hearing and determination of this application, the respondent be ordered to pay the claimants their allowances arrears for the months of August, September, October, 2017 being arrears for Commuter allowance, Nursing Service allowances and health workers allowances amounting to Kshs.20,433,000/-

4) That pending hearing and determination of this application and claim herein the respondents be ordered to pay the claimants the allowance arrears for the months of August, September, and October, 2017 being arrears for Commuter Allowance, Nursing Service allowance and Health Workers Allowance.

5) Costs of this application be borne by the respondents.

2. The application is supported by the affidavit of the 1st and 2nd claimants and on the ground that in June, 2017 all the nurses in Kenya including the claimants went on industrial strike demanding increment of salaries, allowances and improvement of work conditions. In view of ending the strike, a consultative meeting was held with the Council of Governors on 2nd November, 2017 together with the national government and the interested party herein. Following such meeting it was agreed that within 30 days of the signing of the agreement to

cease the industrial action a collective bargaining agreement (CBA) would be concluded all disciplinary cases against members of the interested party be withdrawn; all withheld salaries be paid by end of November, 2017 and not later than 31st December, 2017; all cases filed with the court be withdrawn save for petition No.1998 of 2017 on the grading structures of nurses; and the interested party to call off the strike and direct its members to resume duty immediately and not later than 3rd November, 2017.

3. The interested party called off the strike and its members reported back to work as agreed. The agreement of 2nd November, 2017 was to be complied with on or before 31st December, 2017 but the respondents have blatantly and dishonestly refused and or declined to fully cooperate and abide the same.

4. Other grounds in support of the application are that the respondents have acted discriminatively and paid a few nurses in various stations within Elgey marakwet their salaries and allowances as agreed on 2nd November, 2017 leaving the claimants herein. The reasons for the manifest discrimination is not explained.

5. On 8th January 2018 the County Executive Committee member of Health and Sanitation, Elgeyo Marakwet County did a letter to all nurses through the county nursing officer covenanting that the process of paying the outstanding salaries and allowances due would be paid with the January, 2018 salary. This was not done. There was no payment since. The respondents have failed to make payments as agreed. The due salaries and allowances are outstanding. Such dues amount to Kshs.20, 433,000.00.

6. In the affidavit of Peter Kimutai, he avers that the claimants are presently employed by the respondents in various hospitals and health facilities within the respondents. The claimant went on strike seeking better work conditions and following agreement between the interested party, Council of governors and the national government, work resumed on the understanding and agreement that due salaries and allowances would be paid on or before 31st December, 2017 which the respondents have failed to pay. Efforts by the interested party branch to seek the payments have not been honoured. Such outstanding payments amounting to Kshs.20, 433,000.00 should be paid as agreed and for the respondents to stop discriminatory practice of paying some nurses in exclusion of the claimants.

7. In reply, the 1st respondent filed Replying Affidavit sworn by Francesca Jelagat Bartoo the secretary of the 1st respondent Board and avers that in May, 2017 the interested party called for a nationwide strike which crippled health services in the country. The claimants herein withdrew their services from the respondents and the 135 claimants kept away from work. The strike lasted 3 months.

8. In a ruling of 1st September, 2017 in ELRC Cause No.1069 of 2017 the court declared the strike to have been illegal.

9. While the strike was on-going, some members of the interested party driven by their call of duty ignored the strike and continued work at their stations. The 3rd respondent had no reasons to withhold their salaries and allowances upon rendering service to the public. Such payment of salaries for work done is not discriminatory.

10. On the agreement of 2nd November, 2017 the condition that there would be no victimisation was understood by the respondent to mean that no employee would be unfairly disciplined for taking part in the industrial action.

11. The allowances sought are paid upon being incurred. The commuter allowance is paid as a fair compensation for commuter expenses incurred by the claimants and being on strike the claimant did not attend work to incur such costs. Extraneous allowance is paid as a fair compensation for work under nonconventional hours but the claimant did not work to justify the payment. Nursing service allowance is a special allowance negotiated by nurses to cover the mental anguish as a result of working in the hospital environment and the claimants being on strike did not earn the same. It is therefore not just and equitable for the claimants to claim for commuter allowances when they did not commute or undertake any work in the respondent health facilities.

12. Ms Bartoo also avers that upon the determination of the strike the counties and in particular the Public Service Board negotiated with their nurses in separate entities on the basis that the Council of Governors has no legal status to bind the county governments and the County Public Service Boards operates as a separate and distinct body and not bound by the consultative agreement of 2nd November, 2017.

13. The claimants are seeking to unjustly enrich themselves for service not rendered. The claims made are against public service policy for the claimants to have benefits arising from an illegality. Following an illegal strike, to pay the claimants would be to put an unfair burden on the citizens. To pay as claimed would violate the respondent's resident rights.

14. Ms Bartoo also avers that the orders sought cannot issue in the interim as they are similar to the prayers set out in the Memorandum of Claim. The matter should go for full trial before the orders sought can be considered on their merits.

15. The 3rd respondent in reply filed Replying affidavit sworn by Kiprono Chepkok, the County Executive of 3rd respondent and who avers that following a strike called by the interested party in May, 2017 health services were paralysed countrywide inducing within the respondents. The matter went to court and in **Cause No.1069 of 2017** the court declared the strike illegal. During such strike the claimants remained out of work and cannot claim for commuter, extraneous and nursing allowances for work not done or after failing to attend at work where such dues are payable. A few nurses and members of the interested party remained at work and the 3rd respondent cannot thus withhold their salaries and allowances and by paying the same, such is not discriminatory. The orders sought by the claimants should not issue on the basis that they failed to attend work and the court has since declared their actions illegal and thus cannot benefit from an illegality or sanitise their actions through the orders sought as herein.

16. On the first orders sought by the applicants and seeking to have Peter Mutai and Robert Kibet granted leave to sign documents and affidavits on behalf of all the claimants, such should readily be allowed by the court noting the cause of action is the same and the claims and orders sought relate to the same issues for all the claimants. However, in this regard it is imperative for the claimants to take into account the

motions and provisions of Rule 9 of the Employment and Labour Relations Court (Procedure) Rules, 2016 in addressing the Memorandum of Claim.

17. Leave is thus granted in terms of prayer two (2) of the Notice of Motion. The condition given is that the claimants should address themselves to Rule 9 of the Court Rules by setting out the particulars of each claimant and the specific orders sought for each where there is a difference in the nature of claims made. By setting out a chronology of orders for each claimant, the respondent will be at ease in making the necessary responses in terms of Rule 13.

18. With regard to the payment of due commuter, extraneous Nursing service and health workers allowances amounting to Kshs.20, 433,000.00, the 1st and 2nd claimants in the Memorandum of Claim assert that following a consultative meeting between the interested party, Council of Governors and national government there was an agreement to call off an industrial action undertaken by members of the interested party countrywide. Out of such agreement, various matters were addressed among them the payment of commuter, extraneous and nursing service allowances to interested party members.

19. Inherently, the subject agreement was between the interested party and other parties outside of these proceedings. To these proceedings, only the interested party is enjoined.

20. The above put into account, taking cognisance of the response made by the respondents and particularly matters relating to **Cause No.1069 of 2017** and in which suit the industrial action leading to the agreement of the interested party and others was declared illegal, to grant the orders sought by the claimants at this stage would be to deny the court crucial and material evidence of facts leading to the claims now outlined by the claimants noting the facts and disclosure of **Cause No.1069 of 2017 (Nairobi)** by the respondents.

21.It would serve justice for all parties to conclude exchange of pleadings by the respondents being served with requisite summons and to file their defences thereof for the court to be seized with all material facts before addressing the core of the dispute and issuing final orders. To move on the affidavits now filed by each party and make orders as sought would be to deal with the main at the interlocutory stage and thus deny the respondents and the interested party a fair chance to be heard in their defences herein.

22. As noted above, the claimants now granted leave as prayed under Order (2) of the Notice of Motion, once addressed, the respondents shall file their responses and the matter heard on priority basis noting the number of claimants involved and fundamentally the claimants serving in an essential service, the matters between the parties warrant an expedited hearing.

Accordingly, save as allowed in terms of order two (2) of the Notice of Motion, application dated 2nd July, 2018 is declined at this stage. Costs in the cause.

Delivered in open court at Eldoret this 26th day of September, 2018.

M. MBARU JUDGE

In the presence of:

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