



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 13 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

THE COUNTY GOVERNMENT OF KAKAMEGA1ST CLAIMANT

KAKAMEGA COUNTY PUBLIC SERVICE BOARD2ND CLAIMANT

-VERSUS-

KENYA NATIONAL UNION OF NURSES1ST RESPONDENT

SETH PANYAKO2ND RESPONDENT

J U D G E M E N T

By their Memorandum of Claim filed on 21st January 2016 the 2 Claimants, the County Government of Kakamega and Kakamega County Public Service Board seek orders as follows -

1. THAT this application be certified as urgent and ipso facto be heard ex-parte in the first instance.
2. THAT pending the hearing inter parties of this application, atemporary injunction be granted restraining the Respondents and all health workers employed by the Claimants from engaging or taking part in any conduct, activity or meetings in contemplation of or towards preparation for a strike in Kakamega County pursuant to a strike notice given by the Respondents on 11th and 13th January, 2016 respectively.
3. THAT pending the hearing and determination of this suit, an injunction be granted restraining the Respondents and all health workers employed by the Claimants from engaging or taking part in any conduct, activity or meetings in contemplation of or towards preparation for a strike in Kakamega County pursuant to a strike notice given by the Respondents on 11th and 13th January 2016 respectively.
4. THAT pending the hearing of this application inter-parties, atemporary injunction be granted restraining all the health workers employed by the Claimants from taking part of participating in a strike in Kakamega County intended to commence on 1st February, 2016 pursuant to a strike notice given by the Respondents on 11th and 13th January, 2016 respectively.
5. THAT pending the hearing and determination of this suit, injunction be granted restraining all the health workers employed by the Claimant from taking part or participating in a strike in Kakamega County intended to commence on 1st February 2016 pursuant to a strike notice given by the Respondents on 11th and 13th January 2016 respectively.
6. THAT pending the hearing inter parties of this application, the 2nd Respondent be restrained by a

temporary injunction from making unauthorized visits to and/or invading health facilities in Kakamega county and holding meetings with health workers during official working hours in unauthorized venues to drum up support for the contemplated strike or otherwise, without first obtaining the consent and permission of the Claimants heads of the health facilities.

7. THAT pending the hearing and determination of this suit, the 2nd Respondent be restrained by a temporary injunction from making unauthorized visits to and/or invading health facilities in Kakamega county and holding meetings with health workers during official working hours in unauthorized venues to drum up support for the contemplated strike or otherwise, without first obtaining the consent and permission of the Claimants heads of the health facilities.

8. THAT the Respondents do bear the costs of this application.

Simultaneously with the Memorandum of Claim the Claimants filed a notice of motion seeking temporary injunction restraining the Respondents from calling all health workers employed by the Claimants out on strike pending the hearing of the Claim.

The court heard the motion ex-parte on 22nd January, 2016 and granted the interim orders.

The Respondents (Kenya National Union Of Nurses the 1st Respondent and Seth Panyako (the 2nd Respondent) filed a notice of preliminary objection on 21st January, 2016 seeking the striking out of the suit on grounds that the orders sought are unconstitutional and contravene the Labour Relations Act and the Industrial Court Act, that the claim did not disclose a prima facie case and further that it is frivolous, vexatious and an abuse of court process.

The Respondents also filed grounds of opposition to the Claimant's notice of motion on grounds that the Claimants did not meet the threshold for grant of interlocutory injunction, that the actions of the Respondents are protected by the Constitution and that the parties have not exhausted the conciliation process, among other grounds.

On 29th January 2016 the Respondents filed a counterclaim seeking the following orders -

- (i) A declaration that the Strike notice issued on 11th January, 2016 and amended on 13th January, 2016 is Constitutional.
- (ii) A declaration that health workers in the County Government of Kakamega has a constitutional right to go on Strike and that the Strike is not prohibited under the Constitution.
- (iii) An order directing the 2nd Claimant to immediately promote all deserving health staff in accordance with the Public Service Commission guidelines dated 11th August, 2015, effective from when such promotions were due.
- (iv) An order directing the 2nd Claimant to immediately re-designate health staff in accordance with their professional qualifications in accordance with Public Service Commission guidelines dated 11th August, 2015.
- (v) An order directing the 2nd Claimant to remit health staff pension funds to the authorized County Pension Fund (CPF) Scheme from the date of their employment.
- (vi) An order compelling the 2nd Claimant to purchase and provide sufficient medical equipments in all health facilities in order to improve efficiency and quality of services.
- (vii) A declaration that the only entity that can be sued or sue on behalf of County Governments on employment and Labour Relations disputes are the respective County Public Service Boards.

(viii) An order directing the 2nd Respondent to revoke the show cause letter issued to Mr. Renson Bulanya.

(ix) Costs of this suit and the expenses in defense of motion.

(x) Any other order or relief the honourable court may deem fit and just.

The 2nd Respondent also filed a replying affidavit in which he reiterated the issues raised in the counter-claim and grounds of opposition.

When parties appeared before court on 7th March 2016, the Respondent withdrew the notice of preliminary objection and parties agreed to argue the case by way of written submissions. The parties thereafter filed and exchanged written submissions.

Claimants Case

The Claimants submitted that it became necessary to file the instant suit following two strike notices issued on 8th and 11th January 2016 by the Respondents threatening strike action by all health workers of Kakamega County from 1st February 2016, unless the issues raised in the two strike notices were addressed. The Claimants submitted that in their view the contemplated strike action was illegal by virtue of section 81(3) of the Labour Relations Act which prohibits strike action in essential services.

The Claimants further submitted that the Respondents do not have locus standi to engage in collective bargaining as the recognition agreement signed by the Respondents was with the Public Service Commission of Kenya and not with the Claimants. The Claimants argue that the constitutional shift in governance in Kenya devolves health services to the County Governments and Article 86(1) sets out the functions and powers of County Government to include providing health services. It is argued that the transfer of functions including health services to the Claimants was concluded vide Legal Notice No.146 of 2013 so that the Public Service Commission with whom the Respondents signed recognition agreement is no longer the employer of the Claimants' employees engaged in health services and the recognition agreement therefore is not binding on the claimants.

The Claimants relied on the case of *UASIN GISHU v KENYA NATIONAL UNION OF NURSES* [2014] eKLR in which the court held that the County of UASIN GISHU could only be an interested party in the suit as the recognition agreement was signed with the Public Service Commission.

The Claimants further relied on the case of *DAVID BARASA v BRITISH PEACE SUPPORT TEAM (E.A) & ANOTHER* [2016]eKLR in which the court held that the principal employer who seconds an employee remains the employer at all material times and not the agency to which the employee is seconded. It was submitted that nurses have not been seconded to the County Governments but their services were transferred to County Governments.

The Claimant further relied on the decision in the case of *COMMUNICATION WORKERS UNION V SAFARICOM LIMITED* [2014] eKLR in which the court stated that a trade union must have a recognition agreement before it can engage in collective bargaining with an employer.

The Claimant further relied on the decision in the case of *OKIYA OMUTATA v ATTORNEY GENERAL & 5 OTHERS* in which the court observed that it may be futile to conclude a collective bargaining agreement with the National Government if indeed the employer of health workers is the County Government in line with the devolved government.

It is submitted that the courts' observations in the above cases confirm that the Claimants are the employers of health workers in Kakamega County.

Respondents Case

The Respondents submitted that the 1st Respondent has locus standi to represent health workers pursuant to a recognition agreement it signed with a Public Service Commission which is the employer of all health workers in the employment of the Claimants.

The Respondents submitted that the right to strike cannot be limited and only the right to strike of persons serving under the Kenya Defence Forces can be limited by virtue of Article 24(5) (d) of the Constitution. The Respondents relied on the Judgment in ELRC PETITION NO. 70 OF 2014 **OKIYA OMTATAH OKOITI v THE ATTORNEY GENERAL & 5 OTHERS** in which the court stated that section 78(1) (f) and 81(3) of the Labour Relations Act, 2007 do not meet the legal standards under Article 24(2)(c) as read with Article 41(2) of the Constitution.

The Respondents further submitted that the strike notice was constitutional and a good practice, although the constitution does not address the procedure for going on strike. The Respondents further submitted that the Claimant is not entitled to the prayers sought and that the Respondents are entitled to all the prayers in the counter-claim.

Determination

I have considered the pleadings and the written submissions of the parties. From the very outset I must point out that the submissions filed by the parties appear to be at cross purposes, with the Claimants ignoring the issues raised by the Respondents and concentrating only on their issues and the Respondents addressing their issues and ignoring the issues in the Claimants' application and memorandum of claim.

The Memorandum of claim herein seeks two prayers: A declaration that the strike notice given to the Respondents on 11th January 2016 and amended on 13th January 2016 and the strike by health workers contemplated to take place in Kakamega County with effect from 1st February, 2016 are illegal; and secondly, an order prohibiting and restraining the Respondents from calling their members out on strike, an order prohibiting and restraining the Respondents and health workers in Kakamega County from taking part in the strike and/or engaging in conduct or activities in contemplation of the strike in respect of which the Respondents have given a strike notice. The third prayer is for costs of the suit.

As i have already stated, the Respondents did not respond to the Memorandum of Claim. Instead they filed a counter-claim which the claimants too did not respond to. The submissions by both parties reflect the said position. The Claimants submitted on the issues in the Memorandum of Claim while the Respondents filed written submissions on the counter-claim and on the notice of motion, even though the court dispensed with the motion by the orders made on 28th January, 2016 by consent of the parties when they agreed to proceed directly with the hearing of the main claim.

The court however notes that the issues raised in the claim and those raised in the counter-claim are two sides of the same coin. The issues in the counter-claim relate to grievances of the union that caused it to issue the strike notice, which is the subject of the claim. The court further takes cognisance of the fact that the orders made by the court on 28th January 2016 which were by consent of the parties, effectively resolved the issue of the strike and that parties were directed to go back to the conciliation proceedings that were pending before the County Labour Officer Kakamega, Mr. Abuto.

Mr. Abuto subsequently prepared his report in which he made the following findings and recommendations -

FINDINGS

- i) The County government of Kakamega through the County Secretary of Head of County Public Service if not willing, to sit down and negotiate freely in good faith with the General Secretary of KNUN or its representatives.*
- ii) There seems to be a leadership squabble between the Kakamega branch of KNUN and the General Secretary of KNUN.*

iii) The County Government of Kakamega seems to be using the branch Officials of KNUN to scuttle the conciliation process as the Officials are Pro- the County government and see no need of the whole process.

iv) It is also evident that the County Government of Kakamega is more willing to sit down with the branch Officials whom they claim are bonafide elected Officials hence negotiate with them rather than the Chief Executive Officer of the Union (General Secretary).

v) The issues in dispute was reported by the General Secretary KNUN to the cabinet Secretary for Labour as required by section 62 1(a) and (b) of the Labour Relations Act (2007) laws of Kenya.

vi) The issues in dispute are of economic nature (economic dispute) and needs to be settled amicably otherwise it might lead to an industrial unrest in the future.

vii) The strike notice that had been issued by KNUN General Secretary was not in the best interest of Industrial Peace as the conciliation process had not been exhausted.

RECOMMENDATIONS

This trade dispute has not been resolved after conciliation owing to the adamancy of the 1st and 2nd claimants' who have taken defined and hard stance without any legal backing but rather they have opted to the misinterpretation of the law. In view of the above, and given the submissions and findings, I urge the honourable court to make the County Government of Kakamega to adhere and comply with the issues in dispute in totality.

The effect of the findings of the County Labour Officer, the conciliator considered together with the submissions made on behalf of the Claimants is that the Claimants are not willing to negotiate a collective bargaining agreement with the Respondents because there is no recognition agreement between them, and that the recognition agreement signed between the 1st Respondent and the Public Service Commission on 26th June, 2013 is not binding upon the Claimants.

The issues for determination are therefore in my opinion the following -

- 1) Whether the Claimants are entitled to the orders sought in the statement of claim;
- 2) Whether there is a valid recognition agreement between the Claimants and the 1st Respondent; and,
- 3) Whether the 1st Respondent is entitled to the prayers in the Counter-Claim.

The first issue, that is, whether or not the Claimants are entitled to the orders sought in the statement of claim have already been addressed partially hereinabove. The strike against which the Claimants sought prohibition and restraining orders was called off by the Respondents upon receiving the ex-parte court orders granted to the Claimants on 21st January, 2016.

The second prayer in the statement of claim is that the court declares the strike illegal on the basis that both sections 78(1) and 81(3) prohibit strikes in hospital services which is an essential service under the Fourth Schedule of the Labour Relations Act.

The 1st Respondent however argues that there is an absolute right to strike as guaranteed by Article 41(2) (d) of the Constitution. According to the Respondents only the Kenya Defence Forces and the National Police Service have limited rights to strike by virtue of Article 24(5) of the Constitution.

Article 24(1) provides for limitation of rights and fundamental freedoms. The Article provides as follows

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Limitation of rights and fundamental freedoms.

24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

(4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

(5) Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service—

(a) Article 31—Privacy;

(b) Article 36—Freedom of association;

(c) Article 37—Assembly, demonstration, picketing and petition;

(d) Article 41—Labour relations;

(e) Article 43—Economic and social rights; and

(f) Article 49—Rights of arrested persons.

Article 24(2)(a) applies to **a provision in legislation enacted or amended on or after the effective date of**

the Constitution and therefore does not affect the provisions of the Labour Relations Act which was enacted in 2007 before the effective date, and has not been amended after the effective date. The tests in Article 24(1) and (2) are however relevant to the interpretation of sections 78 and 81 of the Labour Relations Act pursuant to Article 20 of the Constitution which provides that-

20. (1) *The Bill of Rights applies to all law and binds all State organs and all persons.*

(2) ***Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.***

(3) ***In applying a provision of the Bill of Rights, a court shall—***

(a) ***develop the law to the extent that it does not give effect to a right or fundamental freedom; and***

(b) ***adopt the interpretation that most favours the enforcement of a right or fundamental freedom.***

(4) ***In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—***

(a) ***the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and***

(b) ***the spirit, purport and objects of the Bill of Rights.***

(5) ***In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles—***

(a) ***it is the responsibility of the State to show that the resources are not available;***

(b) ***in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and***

(c) ***the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion. [Emphasis added]***

The tests to be applied according to Article 24 are the nature of the right, purpose of limitation, extent of the limitation, prejudice to rights and fundamental freedoms of others, clarity and specificity of provisions limiting the rights and derogation from the core or essential content of the right.

The nature and purpose of declaring certain services as essential services is expressly and elaborately defined and explained in the Labour Relations Act as follows -

81. Essential services

(1) ***In this Part “essential services” means 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) ***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.

(3) There shall be no strike or lock-out in an essential service.

(4) 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.

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

It is my opinion that the limitations under section 81 of the Labour Relations Act meet the tests set under Article 24(1). Withdrawal of Hospital Services derogate on the **right to life** under Article 26, the right to **the highest attainable standard of health** under Article 43(1) (a) and the right to **emergency medical treatment** under article 43(2). I think it is not a disputed fact that the withdrawal of medical services is very likely to, and in fact does, lead to loss of life to people who need medical services. The right to life is in a wider sense part of the right to **human dignity** under Article 28. The withdrawal of health services may therefore lead to cruel, inhuman or degrading treatment of patients and their relatives who do not have the resources to get treatment at private medical facilities and who have to suffer death or watch their loved ones die without medical attention. Freedom from cruelty, inhuman or degrading treatment are part of the rights under Article 25 that cannot be limited or derogated.

From the foregoing the right to strike is inferior to the rights and freedoms that would be denied or derogated by the exercise thereof by workers in the health services sector. To this extent, the limitation thereof is justifiable under Article 24.

Article 24 however provides for another test, that of "**the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.**"

ILO Conventions No.87 and 98 provide for freedom of association, protection of the right to organise and the right to collective bargaining, and form the juridical basis upon which the right to strike is derived. Both conventions do not directly refer to the right to strike. It has however long been agreed that the right to strike is an integral and indispensable component of the right to collective bargaining and that where such right is restricted, there must be safeguards to ensure that workers can continue to participate in meaningful collective bargaining.

The subject of strikes in essential services has been the subject of several decisions in this court. In **Petition No. 70 of 2014 OKIYA OMTATAH OKOITI v THE ATTORNEY GENERAL & 5 OTHERS** Nduma J held that -

"These provisions derogate from the core content of the right to strike provided under Article 41(2) (d) of the Constitution and the legislature should revisit the law with a view to remove the apparent conflict between the Constitutional provision and the statutory law.

In view of the above, the court holds that 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 delays conclusion of a collective bargaining agreement, otherwise, the Labour Relations Act, 2007, provides sufficient dispute resolution mechanisms which include, mandatory conciliation before the matter is escalated for adjudication in court.[Emphasis added]

In that case the court declined to grant the petitioner's prayers for the following orders-

(a) A declaration be and is hereby issued that the impugned pending strike by members of the 6th Respondent is illegal.

(b) That a declaration be and is hereby issued that there is need for the state to enact a legal and policy framework to secure the rights of workers in essential services, and to ensure the amicable resolution of Labour disputes without disrupting service delivery.

(c) That the Honourable Court do issue and hereby issues a mandatory order ordering the 1st, 2nd, 3rd, 4th and 5th Respondents to enact a comprehensive legal and policy framework resolving Labour disputes for essential services without disrupting service delivery.

In **KENYA FERRY SERVICES LIMITED v DOCK WORKERS UNION (FERRY BRANCH [2015]eKLR**, Rika J stated as follows -

46. *The right to strike is a fundamental element in stable collective bargaining. Employees promote and protect their economic and social interest, and resolve labour disputes, through strike action. As is argued on the issue of wage determination however, the right to strike transcends the interests of the involved Employer and Employee. **Strike action, particularly in essential services sectors, have ramifications for the Public and the National Economy. The right to strike is therefore balanced against the fundamental rights of others. It is argued that the right of non-strikers, that is to say Employees who may feel they should continue to work during the strike, must be protected. Similarly the fundamental right of the Public to essential services must be protected.***

47. *The search for this balance is seen in laws such as Section 81 of the Labour Relations Act 2007, which under the 4th Schedule lists ferry services as an essential service. Essential service is defined in the Act to mean service the interruption of which would probably endanger the life of a Person, or the health of the population or any part of the population. Subsection 3 states there shall be no strike in essential service. Disputes arising in this sector are to be adjudicated by the Court. This position has been explained by the Industrial Court of Kenya in several of its recent interventions during strikes affecting the public sector, such in Industrial Court at Nairobi, Petition Number 23 of 2013 between Teachers Service Commission v Kenya National Teachers Union*

48. *Generally, the right to strike is recognized under Article 41 [2] [d] of the Constitution. The right to engage in collective bargaining is recognized under Article 41 [5]. The Industrial Court has ruled that the limitation of the right to strike under Section 81[3] of the Labour Relations Act is justifiable under Article 24 [1] of the Constitution of Kenya.*

49. *This Court thinks in determining whether the limitation imposed on the right to strike is a reasonable limitation, there is need to look at the right to strike as part of the collective bargaining process. Employees principally resort to strike action to unlock an impasse in the collective bargaining and negotiation process. Unless the strike action is called for other reasons, rather than the furtherance of collective bargaining, the Court should be slow in upholding limitation. The right to strike is a bedfellow of the right to bargain collectively. The nature of the right to strike is fundamental to the whole institution of collective bargaining. These are two inseparable fundamental rights involved, and which are recognized by the ILO under Convention 87 and 98, as the staple of stable labour relations. If the Court simply looks at the service as essential, and declares the strike illegal, it will have misperceived the nature of the right of strike, and freedom of association, and the right to collectively bargain, contrary to Article 24 [1].*

50. *The only specific rights or fundamental freedoms which by legislation may be limited are those relating to persons serving in the Kenya Defence Forces or the National Police Service, under Article 24 [5]. The Claimant would have to persuade the Court that to justify limitation the requirements of Article 24 [1] have been met. It is insufficient to cite Section 81 [3] and Schedule 4 of the Labour Relations Act 2007, to argue the case for permanent injunction restraining the Employees from engaging in strike. It is questionable if the list of essential services, prepared by the Minister and the National Labour Board, meets the requirements of Article 24 of the Constitution of Kenya. Recent practice particularly among the Health Workers has been to engage in unprotected strikes. It has not helped that health service is an essential service. Perhaps the*

feeling is that there is no sufficient consultation when the list of essential services is prepared.

In petition No. 75 of 2015 between Abuodha J stated as follows -

In Industrial relations matters, the workers' ultimate arsenal in bargaining terms and conditions of service is the right to go on strike while the employer has the right to a lock out. These rights are primary and are recognized both by the constitution and ILO Conventions and where parties to a trade dispute have constantly and consistently engaged and either of them has categorically stated its position without any room for compromise, the issuance of a strike or a lock-out notice becomes superfluous.

In the OKIYA OMTATAH Petition the court expressed concern on the prohibition of strikes in essential services under section 78(1)(f) and section 81(3) of Labour Relations Act and underscored the necessity of legislative intervention to remove the apparent conflict between those sections and Article 41(2) of the Constitution.

Beyond our borders, in the Republic of South Africa where the right to strike is protected under section 23(2)(c) of the Constitution of the Republic of South Africa, 108 of 1996. The Labour Relations Act of the Republic of South Africa makes provisions similar to our Labour Relations Act with respect to prohibiting strikes in essential services. The Act however makes further provisions for unions and employers acting individually or through their respective organisations, to negotiate a minimum service agreement setting out minimum services that must be undertaken during a strike in an essential service for protection of life,, property and security during a strike in an essential service. Once such an agreement is reached it is registered with the Essential Services Committee which then exempts the parties from the provisions of the Labour Relations Act relating to strikes in essential services.

Section 23 of the Republic of South Africa provides as follows:

23 Labour relations

(1) Everyone has the right to fair labour practices.

(2) Every worker has the right—

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike.

(3) Every employer has the right—

(a) to form and join an employers' organisation; and

(b) to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right—

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent

that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36(1).

The ILO Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations, the two committees of the ILO established to supervise the application of ILO standards has expressed opinion that the right to strike, though fundamental and instrumental to protect economic and social interests of employees, is not absolute. The Committees recognise that a minimum level of services may be compulsory in the event of a strike when personal safety, accident prevention and the protection of equipment and instruments are at issue.

In an ILO publication, ILO PRINCIPLES CONCERNING THE RIGHT TO STRIKE by Bernard GERNIGON, Alberto ODERO and Horacio GUIDO INTERNATIONAL LABOUR OFFICE GENEVA, International Labour Organization 1998 ISBN 9 2-2-111627-, the following is stated with respect to strikes in essential services-

Essential services in the strict sense of the term

Over time, the supervisory bodies of the ILO have brought greater precision to the concept of essential services in the strict sense of the term (for which strike action may be prohibited). In 1983, the Committee of Experts defined such services as those “the interruption of which would endanger the life, personal safety or health of the whole or part of the population”(ILO, 1983b,para. 214). This definition was adopted by the Committee on Freedom of Association shortly afterwards.

Clearly, what is meant by essential services in the strict sense of the term “depends to a large extent on the particular circumstances prevailing in a country”; likewise, there can be no doubt that “a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population”(ILO, 1996d, para. 541). The Committee on Freedom of Association has none the less given its opinion in a general manner on the essential or non-essential nature of a series of specific services. Thus, the Committee has considered to be essential services in the strict sense, where the right to strike may be subject to major restrictions or even prohibitions, to be : the hospital sector ; electricity services ; water supply services ; the telephone service ; air traffic control (ibid., para. 544).

Compensatory guarantees for workers deprived of the right to strike

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 out-come 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”

I have had the advantage of reading several Recognition Agreements including the sample recognition agreement under the Industrial Relations Charter. There is provision for minimum service during a strike even in non-essential services. The recognition agreement signed by the 1st Respondent with the Public Service Commission provides at Clause 7 that:

That the union shall undertake in an event of industrial actions that may disrupt nursing services to ensure that critical areas continue to operate for the purpose of saving/preserving life for those patients who are on life support systems or in labour.

It is the opinion of this court that parties negotiating in essential services ought to take advantage of the provisions of section 78(1)(a) and (b) of the Labour Relations Act and build into the recognition and collective bargaining machinery the manner in which deadlocks during collective bargaining in essential services should be managed so that the public interests likely to be affected by strikes in essential services are protected while at the same time not compromising the rights of employees who are the beneficiaries of such negotiations. Where parties fail to do so as in the instant case, it is the opinion of this court that the position in section 78(1)(f) and 81(3) will apply, that is, that strikes in essential services are prohibited.

The foregoing notwithstanding, I do not think it is conscionable to grant orders prayed for by the claimants in this suit. As is stated in the report of the County Labour Officer, the Claimants refused to participate in conciliation which were ongoing at the time this suit was filed even after this court directed the parties to do so on 28th January, 2016. The Claimants thus did not come to court with clean hands and have disobeyed this court's order to engage in conciliation. Conciliation can only succeed if both parties are willing to engage in good faith. In the circumstances the claimants who have not exhibited good faith cannot benefit from any equitable remedy of this court.

Whether there is a valid recognition agreement between the Claimants and the 1st Respondent

Under the Constitution of Kenya 2010 which created the devolved system of government, certain functions were to be transferred from the national government to County Governments upon establishment thereof. Among these functions is County Health Services. The employees engaged in such functions that were devolved were transferred from the Public Service Commission to the County Public Service Boards. The Claimants thus inherited staff including nurses who were already members of the 1st Respondent. Under section 138 of the County Governments Act, the terms of service of an officer transferred from National Government to County Government is protected. The section provides as follows -

138. Arrangements for public servants

(1) Any public officer appointed by the Public Service Commission in exercise of its constitutional powers and functions before the coming to effect of this Act and is serving in a county on the date of the constitution of that county government shall be deemed to be in the service of the county government on secondment from national government with their terms of service as at that date and—

(a) the officer's terms of service including remuneration, allowances and pension or other benefits shall not be altered to the officer's disadvantage; and

(b) the officer shall not be removed from the service except in accordance with the terms and conditions applicable to the officer as at the date immediately before the establishment of the county government or in accordance with the law applicable to the officer at the time of commencement of the proceedings for the removal; and

(c) the officer's terms and conditions of service may be altered to office's advantage.

(2) Every public officer holding or acting in a public office to which the Commission had appointed

the officer as at the date of the establishment of the county government shall discharge those duties in relation to the relevant functions of the county government or national government, as the case may be.

(3) The body responsible for the transition to county governments shall in consultation with the Public Service Commission and relevant ministries facilitate the redeployment, transfers and secondment of staff to the national and county governments.

(4) The provision under subsection (2) shall not preclude—

(a) the County Public Service Board or other lawful authority from promoting or appointing the officer to another public office in the county; or

(b) re-deployment by the relevant lawful authority.

(5) The period of secondment under subsection (1) shall cease upon the transfer of a public officer from the national government to a county government or upon the release of an officer by the county government to the national government.

(6) Appointment of a public officer by the Commission includes appointment of a public officer on powers delegated by the Commission.

The Claimants inherited the 1st Respondent's members together with the union that represented them when they were under the Public Service Commission. The Claimants were therefore expected to continue remitting union dues to the 1st Respondent pursuant to the check-off forms submitted to the Public Service Commission and respect the terms of the recognition agreement or any other agreements signed between the Public Service Commission and the 1st Respondent for the benefit or in the interest of the nurses that it inherited.

The recognition agreement signed between the Public Service Commission and the 1st Respondent is therefore binding on the Claimants to this extent. Should the Claimants wish to sign another recognition agreement specific to itself it is free to do so but without derogating from the terms thereof. It is the opinion of this court that the employees were not expected to register afresh as members of the 1st Respondent, but remained members and moved to the claimants with such membership. Indeed the Public Service Commission was aware of the issue of union relationships that were already in place and by letter dated 5th October, 2015 outlined the proposed structure of engagements with Unions covering employees in the Republic Service in a document titled INSTITUTIONAL FRAMEWORK FOR COLLECTIVE BARGAINING WITH PUBLIC SERVICE UNIONS. A copy of the letter and the framework document is annexed as Exhibit "SP4" to the Replying Affidavit of SETH PANYAKO sworn on 26th February, 2016.

The 1st Claimant may in the alternative elect to sign a fresh recognition agreement with the 1st Respondent who is the only union registered to represent nurses working in Kenya. Such agreements should succeed the existing agreement so that there is no vacuum or conflict with the agreement signed between the 1st Respondent and the Public Service Commission.

It is important to point out for avoidance of doubt that the signing of a new recognition agreement would not be creating a new relationship between the parties and the absence of such recognition agreement does not affect the already existing relationship transferred from the Public Service Commission to the claimants.

The final issue is whether the Respondents are entitled to the prayers in the Counter-Claim.

As I pointed out earlier in this judgment, the Respondents did not respond to the statements of claim and neither did the Claimants respond to the Counter-Claim. Having not responded to the claim the Counter-Claim is irregularly before the court as it constitutes a fresh claim that should be filed on its own. The

court is also alive to the fact that the issues in the counterclaim were pending before the conciliator at the time the counterclaim was filed and are therefore not properly before the court by virtue of the provisions of section 69 of the Labour Relations Act. In light of the foregoing the Respondents are directed to file a fresh claim should they still wish to pursue the prayers sought in the counterclaim.

Conclusion

Having found that the Claimants did not come to court with clean hands and further that the Claimants have defied the orders of this court made on 28th January, 2016, I hold that they are not entitled to the prayers seeking a declaration that the strike called by the Respondents by letters dated 11th and 13th January 2016 are illegal. However as I have already stated, such strike is unprotected by virtue of section 78(1) and 81 of the Labour Relations Act.

I further find that the prayers seeking orders prohibiting and restraining the said strikes have been overtaken by events following the calling off of the strike in compliance with the orders of court made on 21st January, 2016.

On the 2nd issue for determination, I find that there is a valid recognition agreement between the Claimant and the 1st Respondent, the Claimants having inherited the recognition agreement signed between the 1st Respondent and the Public Service Commission.

With respect to the 3rd issue I find that the Counter Claim is irregularly before this court.

The result is that both the Claim and Counterclaim are dismissed. Each party shall bear its costs.

DATED SIGNED AND DELIVERED THIS 26TH DAY OF JANUARY, 2017

MAUREEN ONYANGO

JUDGE