



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2486 OF 2016

(incorporating NRB ELRC NO 2429 OF 2016, NYERI ELRC CASE

NO 240 OF 2016 AND NYERI ELRC PETITION NO. 8 OF 2016.)

THE COUNCIL OF COUNTY GOVERNORS.....CLAIMANT

VERSUS

KENYA MEDICAL PRACTITIONERS PHARMACISTS

AND DENTISTS UNION.....1ST RESPONDENT /APPLICANT

SAMUEL OROKO OBEGI.....2ND RESPONDENT/APPLICANT

TITUS ONDORO.....3RD RESPONDENT/APPLICANT

ALLAN OCHANJI4TH RESPONDENT/APPLICANT

FREDRICK OUMA OLUGA.....5TH RESPONDENT/APPLICANT

HAMISI MWACHONDA CHIBANZI.....6TH RESPONDENT/APPLICANT

DAISY KORIR.....7TH RESPONDENT/APPLICANT

EVERLYNE CHEGE8TH RESPONDENT/APPLICANT

(CONSOLIDATED WITH CIVIL SUIT NO. 2479 OF 2016)

MOI TEACHING AND REFERRAL HOSPITAL.....CLAIMANT

VERSUS

KENYA MEDICAL PRACTITIONERS PHARMACISTS

AND DENTISTS UNION.....RESPONDENT

(In Court on 13th February 2017, Before the Hon. Lady Justice Hellen Wasilwa

RULING

BACKGROUND

1. The matter first came before Court on 1st December, 2016 and was placed before my Learned brother Justice Abuodha where the Claimant sought for Orders that:

- 1. The Honourable Court be pleased to certify the application as extremely urgent and that it be heard ex parte at the first instance on priority basis.*
- 2. Pending hearing and determination inter partes of this application, an Order be issued restraining the Defendant/Respondent by themselves, their members, agents, employees or proxies from calling, convening, proceeding with, or engaging in any strike or withdrawal of Labour as per the notice dated 14th November or from engaging in any related adverse actions.*
- 3. Pending the hearing and determination inter partes of the main suit herein, an Order be issued restraining the Defendant/Respondent by themselves, their members, agents. Employees or proxies from calling or engaging in any assemblies, gatherings, mass rallies or any related adverse actions in furtherance of the notice by the Respondent dated 14th November, 2016.*
- 4. The Honourable Court do issue a declaration that the notice dated 14th November, 2016, calling for a strike by the Respondent and its members upon the lapse of the said notice is unlawful and that any resultant strike is an unprotected strike.*
- 5. The Honourable Court be pleased to direct that the dispute be subjected to an all-inclusive process of negotiations to resolve any outstanding issues arising from the collective bargaining agreement dated 27th June, 2013, in such a manner and within such timelines as this Honourable Court will direct.*
- 6. Pending the hearing and determination of the Claim, an Order be issued restraining the Defendant/Respondent by themselves, their members, agents, employees or proxies from calling or engaging in any unlawful assemblies, gatherings, mass rallies or any related adverse actions.*
- 7. This Honourable court be pleased to grant any other Orders as it deems just and expedient.*
- 8. Any further relief that the Honourable Court may deem just to grant.*
- 9. The Costs be provided for.*

2. The Application was premised on the grounds that:

- 1. The Constitution of Kenya 2010 introduced a new system of governance in Kenya through devolution of power to forty seven (47) County Governments each headed by a Governor, with its own legislative assembly, alongside the national government and its own public service board.*
- 2. That Article 186 and the Fourth schedule of the Constitution sets out the functions of the respective levels of Government and places County Health Services within the mandate of County Governments.*
- 3. That to coordinate the functions of the Counties and converge on issues of common interest, the intergovernmental Relations Act No. 2 of 2012 established a council that brings together the 47 Governors and that is known as the Council of Governors, the Plaintiff/Applicant herein.*
- 4. That the Defendant/Respondent represents members who before the coming into force and implementation of the 2010 Constitution, were employees of the Public Service Commission.*

5. That after the 28th March, 2016, when the County Governments officially commenced operations with the swearing in of Governors, members of the Defendant/Applicant ceased being members of the employees of the Public Service Commission and became employees of the County Government reporting to the County Public Service Board of each County Government.

6. That on the 14th November, 2016, the Defendant/Respondent issued a twenty one (21) day strike notice addressed to the head of public service.

7. That the Respondent has further threatened to proceed with the strike and paralyze the public health system and to ground emergency services at public health facilities across the Country.

8. That the Strike notice is with respect to a collective bargaining agreement entered into on the 27th June, 2013, between Ministry of health and the Respondent.

9. That despite the Council of Governors and County Governments having been in place by June 27th 2013, they were neither involved nor informed of the negotiations towards a collective bargaining agreement eventually executed on 27th June, 2013, and yet the same was with respect to employees of counties.

10. That despite express constitutional provisions relating to the mandate of the Salaries and remuneration commission the defendant/Respondent together with the Ministry of Health hastily executed the Collective Bargaining Agreement on 27th June, 2013, with no regard to the constitution and the mandate of the Salaries and remuneration Commission (SRC).

11. Further and in addition to the above, the Court of Appeal in Kenya has since reaffirmed the centrality of the SRC in the determination of the remuneration and benefits of all public servants in a decision that is unchallenged to date.

12. The Plaintiff/Applicant wishes to bring to this Honourable Court's attention the fact that following a stakeholders meeting held on the 27th November 2016, at Laico hotel regarding the collective bargaining agreement dated 27th June, 2013, it was agreed among others as follows:-

i. That the already signed collective bargaining agreement was incapable of being registered in its current form without reviewing it to ensure inclusivity.

ii. That the collective bargaining agreement ought to recognize changes occasioned by the devolved governance structure and the necessity of incorporating the County Governments as an employer of doctors at the County level.

iii. That the Respondent engaged the Claimant herein with a view to having recognition agreements between the Respondent and County Governments.

iv. That the Respondent incorporates County Governments in the Collective Bargaining Agreement as an employer.

v. That Key factors in the Collective Bargaining Agreement be delineated in terms of legal, policy and administrative and that the various actors address their specific mandates with respect thereto.

vi. That the Collective Bargaining Agreement be fully aligned to the existing laws and regulations to ensure that it does not contravene the constitution, and prevailing laws including the Salaries and Remuneration Commission Regulations.

13. The Plaintiff/Applicant states that the Respondent ought to have taken leadership with respect to adherence to the resolutions passed during the said meeting but has failed to take any

substantive steps to ensure adherence thereto.

14. That the said collective Bargaining agreement could not be adopted by the Industrial Court due to outstanding contentious issues including the participation and inclusivity of all interested parties under the 2010 constitution including the Plaintiff/Applicant and this is the position pronounced by this Honourable Court in October, 2016.

15. The Defendant/Respondent is frustrated by the failure to and inability to adopt and implement the collective bargaining agreement of 27th June, 2016.

16. That the Plaintiff/Respondent is a major stakeholder to the terms of the provisions of the collective bargaining agreement dated 27th June, 2013, on behalf of its members who are mandated to manage county health services.

17. The members of the Defendant/Respondent are paid their salaries and remuneration by each respective County Government which is responsible for the budgeting and finances of the County.

18. That a decision to increase wages is dependent on budgetary projections, plans and allocations to County Governments, the budget cycle is stipulated by law.

19. That the Defendant/Respondent has not exhausted all available mechanism for negotiations and for collective bargaining as is provided for by law.

20. That the threatened strike action is illegal and a contravention of the Labour Relations Act which prohibits strikes or lockouts of employees engaged in an essential service, which essential service is described in section 81 as one where if interrupted would endanger the lives of a people.

21. That the right to strike is limited by law and in the totality of facts and law in this case, this right does not arise.

22. That the threatened strike, if not stopped, is likely to lead to massive loss of lives which lives cannot be adequately compensated by an award of damages.

23. That the balance of convenience is in favour of the Plaintiff/Applicant's case.

3. The following Orders were granted by Hon. J. Abuodha upon hearing the Applicants:

1. That the same be and is hereby certified as urgent.

2. That the strike notice issued on 14th November, 2016, be and is hereby suspended for 30 days.

3. That this Honorable Court hereby directs that the dispute be subjected to inclusive process of negotiations to resolve any outstanding issues arising from the collective bargaining agreement dated 27th June, 2016, in such manner and within such timelines as the Honourable Court will direct.

4. This Order was served upon the Respondents, the Kenya Medical Practitioners, Pharmacists and Dentists Unions as per the Courts directive to serve through substituted service on 7.12.2016. The Respondents' officials named in the application were also issued with summons to attend Court on 13th December, 2016, at 9 am. In answer to the Court summons, the 1st Respondent's officials attended Court on 13th December, 2016 in the presence of their Counsel.

5. Directions were given in regard to the filing of pleadings and consolidation of this cause with Cause

with Cause 2479/2016 was allowed. The import of the Court Order of 1.12.2016, was also explained to the Respondents and its officials present in Court. The Court categorically implored the Respondent and its officials to cease strike action immediately and give dialogue a chance as directed by the Court on 1.12.2016. This Cause was now listed for 19/12/2016.

6. As at 19/12/2016, when the Cause came up for mention for further directions, the 1st Respondents officials were absent in Court but their Counsel was present. He informed Court that the strike action had not ceased as directed but that they had filed a Preliminary Objection which they wished to argue. Counsel also informed Court that they could not have obeyed the Court order because the strike had already commenced. The Court found that the 1st Respondent and its officials were all guilty of contempt of the Court's Orders of 1.12.2016.

7. Warrants of Arrest were subsequently issued against the Contemnors which were to be enforced by the OCS Kilimani Police Station. The matter was subsequently slated for mention for further directions on 12th January, 2017 on which date they were sentenced to a one month suspended sentence effective 26th January, 2017.

8. The Respondents then proceed to file another application dated 9th January, 2017, wherein they sought the following Orders:

- 1. That the matter be certified urgent and be heard ex parte in the 1st instance.**
- 2. That execution of the Court Order of 20th December, 2016, be stayed pending hearing and determination of the instant application.**
- 3. There be a stay of the ruling and Orders of 20th December, 2016, directing the Applicants to appear for sentencing for contempt of Court Orders pending hearing of the Respondents application filed in the Court of Appeal on the 28th December, 2016.**
- 4. The Honorable Court directs that the costs of the application do abide in the appeal.**

9. The Application was premised on the grounds that:

- i. The Applicants intend to appeal against the entire ruling and Orders of the Honourable Lady Justice Hellen Wasilwa delivered on 20th December, 2016, and have already filed a Notice of Appeal dated the 21st December, 2016 in accordance with Rue 75 of the Court of Appeal Rules, 2010.**
- ii. The Applicants have already requested for certified copies of the Order and proceedings for purposes of lodging the record of appeal.**
- iii. The Applicants have an arguable Appeal with high chances of success which raise issues of significant importance on the relationship between the Applicants and the Respondents as relates to the devolved system of government.**
- iv. The Applicants on the 16th of December, 2016, raised a Preliminary Objection as to the jurisdiction of the Honourable Court in hearing and determining the Cause No. 2486 od 2016 but the Honourable Lady Justice Hellen Wasilwa proceeded to hear the matter without taking consideration of the Preliminary objection and found the Applicants in contempt of Court Orders of 1st December, 2016.**
- v. If interim stay is not granted the Applicants shall be sentenced and there is real and present danger that unless this Honourable Court stays the Orders of 20th December, 2016, the Applicants shall be sentenced and are likely to be committed to civil jail and arrest warrants are**

going to be executed to the extreme detriment of the Applicants.

vi. If the sentence ensues and execution of the said Order is allowed to proceed and the appeal is eventually heard and allowed, the applicants stand to suffer irreparable damage of having their liberty curtailed up until this application is heard and determined.

vii. If sentencing proceeds the Honourable Court may issue warrants of arrest and the Applicants Union shall be left with no leadership capable of engaging stakeholders in negotiations which are ongoing.

viii. The Applicants intended appeal against the ruling and order of Honourable Lady Justice Hellen Wasilwa will be rendered nugatory if the Orders sought herein are not granted as the Applicants/Appellants have raised valid points of law and fact in the annexed Memorandum of Appeal and the same has overwhelming chances of success.

xi. In the circumstances it is only fair and in the interest of justice that there be a stay of execution of the said Order of Honourable Lady Justice Hellen Wasilwa pending the hearing and determination of the intended appeal otherwise the object of the annexed application will be prejudiced, defeated and the reliefs sought thereunder rendered nugatory.

x. That this application has been made without unreasonable delay.

10. The Application was supported by the affidavit of one Dr. Fredrick Ouma Oluga who is the Secretary General of the Respondent Union wherein they state that on 7th December, 2016, the Claimant's Advocates duly advertised the Orders obtained on the 1st December, 2016, in the daily Newspapers wherein the Applicants became aware of the Orders issued on the 1st December, 2016. The Orders of 1st December, 2016 were issued to suspend a strike notice of 14th November, 2016, and were advertised after the strike had commenced.

11. The Respondent contend that the Orders of 1st December, 2016, were obtained without disclosing material facts to wit:-

(a) The Claimant has no employment contracts with the Respondents members hence there is no employer – employee relationship.

(b) The strike notice of 14th November, 2016, was issued to the head of Public Service and not the Claimant who in any event is not the employer of the Respondents.

(c) The Claimant has no nexus with the Respondents as relates to the Collective Bargaining Agreement and the Claim filed premised on attacking the collective bargaining agreement is misconceived and a non-starter.

12. The Applicants on 19th December, came to Court whereby they raised a Preliminary Objection based on the foregoing grounds but the Court declined to hear them and directed that the ruling on whether the Respondents were in contempt be delivered on 20.12.2016.

13. That the Respondents were found in Contempt and were Ordered to appear before Hon. Lady Justice Monica Mbaru on 22nd December, 2016, for sentencing. Hon J Mbaru however referred the matter back to Hon. Lady Justice Hellen Wasilwa as the trial Court ceased of the contempt proceedings. They contend that the Court ought to have delved on the issue of jurisdiction first and foremost before delving into issues of whether a Court Order had been breached or not.

14. The Respondents alleged that they have filed an Appeal which is in their view meritorious and has high chances of success and unless the Orders sought are granted the Respondents state that they stand to be sentenced and will be denied their liberty and if the intended appeal is allowed the same may be

rendered nugatory.

15. This Court declined to entertain the application before it citing the principle that “*he who comes to equity must come with clean hands*” and could not proceed to hear the pending applications.¹⁵

16. The Respondents further filed an Application dated 24th January, 2017, which is now before the Court for determination. In the said Application they seek for Orders that:

1. The matter be certified urgent and heard ex-parte in the first instance.

2. This Honourable Court be pleased to review its Orders of 12th January, 2017, sentencing the 2nd to 8th Respondents/Applicants to a one month suspended sentence effective 26th January, 2017.

3. Pending Review of its Orders of 12th January, 2017, sentencing the 2nd to 8th Respondents/Applicants to a one month suspended sentence effective 26th January, 2017, this Honourable Court order that the execution of the one month suspended sentence effective 26th January, 2017, be suspended for a further period of two weeks.

4. Pending Review of its Orders of 12th January, 2017, sentencing the 2nd to 8th Respondents/Applicants to a one month suspended sentence effective 26th January, 2017, this Honourable Court order that the 2nd to 8th Respondents/Applicants be released on favourable bail terms to ensure their attendance in Court.

5. This Honourable Court be pleased to order the Claimant/1st Respondent (Council of Governors) and the interested Party/2nd Respondent (the Cabinet Secretary Ministry of Health), not to frustrate further negotiations on the subject matter and promptly call and attend all negotiation meetings.

6. The Court be at liberty to make such further orders as it deems fit and appropriate in the circumstances to meet the ends of justice.

17. The Application is premised on the grounds:

1. That this Honourable Court has powers under section 32 of the Contempt of Court Act 2016 to review its orders at any time.

2. That the 1st to 8th Respondents/Applicants have to their best complied with the directions of this Honourable Court of further engaging with the Claimant/1st Respondent (the Council of Governors) and the Interested Party/2nd Respondent (the Cabinet Secretary Ministry of Health) towards resolving the issues herein.

3. That the 1st to 8th Respondents/Applicants require more time to fully comply with the directions of this Honourable Court of further engaging with the Claimant/1st Respondent (the Council of Governors) and the Interested Party/2nd Respondent (the Cabinet Secretary Ministry of Health) towards resolving the issues herein.

4. That this Honourable Court's Orders of 12th January, 2017, sentencing the 2nd to 8th Respondents/Applicants to a one month suspended sentence effective 26th January, 2017, place the 1st to 8th Respondents/Applicants at an obvious disadvantage during negotiations towards full compliance with the directions of this Honourable Court of further engaging with the Claimant/1st Respondent (the Council of Governors) and the Interested Party/2nd Respondent (the Cabinet Secretary Ministry of Health).

5. The Claimant/1st Respondent (the Council of Governors) and the Interested Party/2nd Respondent (the Cabinet Secretary Ministry of Health) have used their advantage of the pending sentence effective 26th January, 2017, to arm twist and frustrate negotiations between the parties.

6. The 1st to 8th Respondents/Applicants verily believe that an extended negotiation period of a further two weeks strictly guided will ultimately result in an amicable solution to the current impasse.

7. The real and present impending custodial sentence of the 2nd to 8th Respondents/Applicants has further caused untold mental anguish and distress further complicating good faith discussions.

8. It is in the interest of the public and justice that a well balanced bargaining approach be taken by both parties and directed by this Court in order to avoid any possibility of a future dispute by an aggrieved party.

18. The Application is supported by the Affidavit of the 5th Respondent as the Secretary General of the 1st Respondent Union wherein he reiterates the grounds on the face of the Application and prays for the Court to allow the Application for review as drawn.

19. The Application is opposed by the Claimant/1st Respondent, Interested Party/2nd Respondent and the Claimant in Cause No. 2479 of 2016 who have filed their grounds of opposition to the Respondents/Applicants' Application of 24th January, 2017. The 1st Respondent/Claimant states that:

- 1. The Application lacks merit, is calculated to delay due process and is an abuse of the process of this Honourable Court.**
- 2. The Application does not disclose a prima facie case with any likelihood of success.**
- 3. The Application offends the mandatory criteria set for grant of Orders of review.**
- 4. That the balance of convenience militates against the grant of an Order for review of the Court's Order dated 12th January, 2017, in favor of the 1st to 7th Respondents/Applicants.**
- 5. That it is in the interest of justice and fairness that the Respondents/Applicants' Notice of Motion dated 24th January, 2017, be dismissed with costs.**

20. The Interested Party in their grounds of opposition state that:

- 1. That the application does not meet the threshold of a review as set out in section 16 of the Employment and Labour Relations Court Act and the Employment and Labour Relations Court (Procedure) Rules 2016.**
- 2. That the Applicants are barred from review of the Court Orders of 12th January, 2017, by virtue of section 16 of the Employment and Labour Relations Court Act and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016, as they have already preferred an appeal on the Court Orders of 12th January, 2017, at the Court of Appeal being Appeal No. 9 of 2017, filed on 17th January, 2017.**
- 3. The Applicants have not demonstrated why they are still in blatant disobedience of the Court Orders or how the review of the Court Orders will aid in purging the contempt.**
- 4. The Application is an affront to the court and the judicial system as a whole and he who seeks**

justice must come with clean hands.

5. That the Contempt of Court Act of 2016 is inapplicable in this matter as it cannot apply retrospectively.

6. That the application is a ploy to delay justice and defeat the rule of law.

7. That the Court cannot be used to issue unwarranted and coercive orders against the Respondents herein without firm and sound grounds and evidence, the Applicants have not demonstrated how the respondents are frustrating the negotiations process and Court is issuing such adverse Orders will be an exercise in futility.

8. The Application is otherwise misconceived, misplaced and an abuse of the process of the Honorable Court as the Applicants are acting in bad faith, are engaged in forum shopping and the same ought to be dismissed with costs to the Respondents.

21. The Claimant in Cause No. 2479 of 2016 in their grounds of opposition state that:

1. The Application is incompetent, an abuse of the Court process, frivolous and the same ought not be heard.

2. The Respondents have not purged the contempt and therefore they have no audience before the court. In Civil case No. 242 of 2013 Africa Management Communication International Limited vs. Joseph Mathenge Mugo & Others; The learned Justice Mabeya quoting from Chief Justice McKean of the United States observed thus; “since however, the question seems to resolve itself into this, whether you shall bend to the law, or the law shall bend to you, it is our duty to determine that the former shall be the case.”

3. That the Application does not raise or introduce any reasons as to why the Court should exercise its discretion and review the Orders of committal to civil jail and they cited Johnson vs. Grant (1923) SC 789 at 790 Clyde LJ noted:

“The Phrase ‘Contempt of Court’ does not in the least describe the true nature of the class of offence with which we are here concerned... The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice.... It is not the dignity of Court which is offended – a petty and misleading view of the issues involved, it is the fundamental supremacy of the law which is challenged.”

4. That it is the duty of every citizen to obey the Order whether a party feels that the Order is irregular or not and the applicants are bound to obey the Order then challenge it later.

Submissions:

22. The Respondents in submissions state that they have taken steps to try and call of the strike and have annexed to their supporting affidavit minutes of the meeting between the Ministry and the Union whose agenda was to try and comply with the Orders of Hon. Justice J. Abuodha of 1.12.2017. They further state that this was in line with the Court’s Orders to suspend sentence to allow parties to negotiate.

23. They further submit that in negotiations both parties must be involved; it cannot be a one sided issue. It is their submission that during the suspended sentence the Claimant and interested party were unwilling to engage in negotiations despite several meetings being set up for the purpose.

24. The Respondents called for an AGM with a view of getting the mandate to call off the strike as required by the constitution and the vote taken was against calling off the strike. The National Executive Council of the Respondent Union met and still there was no agreement as to calling off the strike. The Respondents submit that they have also presented a petition to the Parliamentary committee for health

who were to have a meeting with SRC on the issue.

25. They submit that if the Respondents go to jail, the Union will be left without leadership for the period of 30 days which will further delay the resolution of the matter. They pray for the Court to give timelines in order to structure negotiations.

26. The Respondent and Interested Party submit that the application does not meet the threshold of the review set out in the Employment and Labour Relations Court Act Section 16 thereof which states:

“The Court shall have power to review its judgments, award, orders or decrees in accordance with the Rules.”

27. Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 provides:

33. (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.

28. That the Applicants have already filed an Appeal against and as such a review of Orders cannot apply. They rely on the case of **William Karani and 47 Others vs. Michael Wamalwa Kijana and 2 Others Nakuru CA 43 and 153 of 1986**, explaining the nature of review stated that:

“Section 80 and Order XLIV (now Order 45 under the Civil Procedure Rules 2010) is a means of airing gross or obvious errors when an appeal is allowed by the Act from a decree or Order but no appeal has been preferred and secondly in cases where no appeal is allowed at all... From the nature of section 80 and Order 44 both procedures cannot be adopted at once. Hence supposing that an appeal is allowed by the Act but has not been preferred, review may be taken, if appropriate. Once an appeal is taken, review is ousted and the matter to be remedied by a review must merge in the appeal.”

29. The 2nd Respondent also relies on the case of **The Board of Governors, Moi High School Kabarak & Another vs. Malcolm Bell Supreme Court Petitions Nos. 6 and 7 of 2013 (unreported)** where it was succinctly alluded that a Court obtains jurisdiction to hear and determine matters from either the Constitution or Legislation or both. Therefore, a Court cannot arrogate to itself Jurisdiction exceeding that which is conferred upon it by Law. It must operate within the Constitutional Limits. Moreover, the inherent power of the Court is meant to prevent its process from being misused in such a way as to diminish its capability to arrive at a just decision of the dispute. Once an Appeal has been preferred the door for seeking the remedy of review is closed.

30. The 2nd Respondent further submits that the Contempt of Court Act No. 46 of 2016 cannot apply as the commencement date for the same is 13th January, 2017, whereas the Applicants were sentenced on 12th January, 2017. They state that the law looks forwards and not backwards as was stated in the case of **Municipality of Mombasa vs. Nyali Limited (1963) E.A. 371.**

31. The 2nd Respondent also contends that they cannot be compelled to attend any negotiations meetings

as it would be beyond the Court's mandate. They rely on the case of **Wamwere vs. Attorney General (2004) 1 KLR**; where the Applicant sought an Order of mandamus, the Court held that the application cannot succeed unless it can be shown that there was wrongdoing on the part of the Respondent.

32. The Claimant, Interested Party and the Claimant in 2479 of 2016 pray for the Application for review to be dismissed with costs.

33. I have considered the averments and submissions of all the parties herein and set down the issues for determination as follows:-

1. Whether this Court has jurisdiction to hear this application for review the Applicants having already preferred an Appeal at the Court of Appeal.

2. If answer to 1 above is yes, whether the Contempt of Court Act 2016 apply to this application.

3. If answer to 2 above is no, which law applies.

4. Whether the Applicants have met the threshold for the grant of the orders sought.

5. Which orders to grant in the circumstances.

34. On the first issue above, this Court draws its jurisdiction from Article 162(2) of the Kenya Constitution 2010 and Section 12 of the Employment & Labour Relations Court Act which states that the Court has jurisdiction to handle any matter relating to employment and labour relations.

35. Under Section 16 of the Employment & Labour Relations Court Act this Court also has jurisdiction to review its own judgments, awards, orders and decrees in accordance with the rules.

36. The rules referred to here are The Employment and Labour Relations Court (Procedure) Rules 2016.

37. Rule 33 of these rules state as follows;

“33. (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.”

38. These rules are couched in similar terms as Order 45 Rule 1 of the Civil Procedure Rule which state as follows:-

“Any person considering himself aggrieved:-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within

his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

39. From these rules, it is apparent that an application for review may be preferred if an appeal is not being considered or where an appeal is not allowed. In the case of the Applicants however, this Court has already been notified that they have filed an Appeal at the Court of Appeal and at the same time filed for review which in my view is tantamount to forum shopping. This was the holding in the CA case of ***William Karani and 47 other (supra)*** where the Court found that once an Appeal has been taken, the review cannot proceed and the issue sought to be remedied by the review must be merged in the Appeal.

40. On the second issue above, the Court has already determined that it has inherent powers to review its own judgments and orders as provided for under the Employment and Labour Relations Court Act 2016 and even the Civil Procedure Act. This inherent power of review was tested and applied in the case of ***High Court Civil Case no 45 of 2008 (Machakos)*** where Hon J Hatari Waweru considered an application for review in a contempt matter and dismissed it as there were no valid reasons to warrant the review. This same power of review is not ousted by the new Contempt of Court Act 2016. However the new COC Act having come in force on the 13th of January 2017 will not apply to this case as the contemnors were sentenced by this Court on 12th January 2017 and the new act cannot apply retrospectively.

41. Under Section 9(3) of Cap 2:-

“if it is enacted in the Act, or in any other written law, that the Act or any provision thereof shall come or be deemed to have come into operation on some other day, the Act or, as the case may be, that provision shall come or be deemed to have come into operation accordingly.”

42. In the case of the COC Act 2016, it came in force as stated therein on the 13th of January 2017 and so cannot apply retrospectively. This also answers issue No. 3 above.

43. Given that I have answered issue No. 1 above in the negative it would be superfluous to go on and answer issue No. 4 above. Nonetheless, I will answer the question by stating that, considering the parameters to be applied in deciding whether to allow a review, the Applicants must demonstrate to Court that there is discovery of a new and important matter which was not in their knowledge before or that there is an error apparent on the face of the record or that the ruling requires some clarification or interpretation or for some sufficient cause.

44. The Applicants have not demonstrated to Court any new and compelling issue or pointed out any mistake or error apparent on the record nor any sufficient cause that would warrant review of this Court's orders.

45. Indeed they have submitted that they are engaging in negotiations as ordered by Court on 1st December 2016 but they have not explained why they chose to obey part only of the Court orders and failed as officials of KMPDU to call off the strike as ordered by the same Court. Indeed they have also fanned their inability to call off the strike which they themselves called on.

46. It is this Court's finding that there is no sufficient reason why the Court should review its order. This Court declines to review its orders sentencing the Applicants to the 1 month jail term and the orders will now crystalize.

47. Those are the orders of this Court.

Read in open Court this 13th day of February, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wachuka for Union in all matters with Chege – Present

Lumallas Eunice for Claimant (Council of Governors) – Present

Lempaa with Victor Kamau for Intended Amicus KNHRC

Miss Mbilo for Interested Party – Present