



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 175 OF 2016

(Before D. K. N. Marete)

KENYA COUNTY GOVERNMENT WORKERS UNION.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF BOMET.....1ST RESPONDENT

BOMET COUNTY PUBLIC SERVICE BOARD.....2ND RESPONDENT

RULING

These are applications by way of an Amended Notice of Motion amended on 24th February, 2017 and another dated 25th May, 2017 respectively as follows;

1. **THAT** this honourable court be pleased to issue an order staying the hearing and determination of the claimant's Notice of Motion Application dated 9th December, 2016 and the main cause till Nairobi Constitutional Petition No.27 of 2016 is heard and determined.
2. **THAT** the claimant herein provide the names, details and/or particulars of the members it claims to represent in this cause to court, the 1st and 2nd Respondents.
3. **THAT** the Salaries and Remuneration Commission (SRC) and Public Service Commission be enjoined as respondents in this cause amend and the Claimant be ordered to amend, file and serve its pleading accordingly.
3. (a). **THAT** in addition, this honourable Court order the Salaries and Remuneration Commission (SRC) and/or the Central Planning and Monitoring Unit to file a report in Court within thirty days of service of the pleadings in this suit or such other time as the Court considers necessary.
4. **THAT** the 1st and 2nd Respondents be given corresponding levee to amend, file and serve their response if necessary.
5. **THAT** this Honourable court be pleased to grant such other or further orders as it shall deem fit and just for the preservation of justice regarding the nature and circumstances of the case.
6. **THAT** costs of this application be provided for by the Claimant.

The application dated 25th May, 2017 comes out as follows;

1. *THAT this honourable court be pleased to issue an order staying the hearing and determination of THE CLAIMANT'S Notice of Motion Application dated 9th December, 2016 and the main cause till Nairobi Constitutional Petition No. 27 of 2016 is heard and determined.*
2. *THAT the Claimant herein provide the names, details and/or particulars of the members it claims to represent in this cause t court, the 1st and 2nd Respondents.*
3. *THAT the Salaries and Remuneration Commission (SRC) 1and the Public Service Commission be enjoined as respondents in this cause amend the Claimant be ordered to amend, file and serve its pleading accordingly.*
4. *THAT the 1st and 2nd Respondents be given corresponding levee to amend, file and serve their response if necessary.*
5. *THAT this Honourable court be pleased to grant such other or further orders as it shall deem fit and just for the preservation of justice regarding the nature and circumstances of the case.*
6. *THAT costs of this application be provided for by the Claimant*

It is grounded as follows;

1. **THAT** *the state of claimant as filed does not adequately set out the particulars of the claimant's members that it claims to represent so as to enable the respondents aptly make a response to the claim.*
2. **THAT** *the Collective bargaining agreement which the claimant has based its claim was h between the (now defunct) local authorities and the claimant.*
3. **THAT** *the Respondents requires the joinder of both the Public Service Commission and the Salaries And Remuneration Commission (SRC) because, employees released to the national government are under the Public Service Commission AND FURTHER, it is the Salaries And Remuneration Commission (SRC) that is legally mandated to determine salaries and other personal emoluments for employees.*
4. **THAT** *in any event some of the seconded officers from the (now defunct) local authorities have been formally absorbed in Bomet County Public service while others have already been released to the national government.*

These applications are resoundingly similar therefore their joinder for purposes of determination.

The respondents in their written submissions dated 21st September, 2014 submit a case for joinder of the Attorney-General of behalf of Inter-Governmental Technical Committee as the 3rd respondent and the Salaries and Remuneration Commission (SRC) as the 4th respondent. They also seek to justify their relevance to the suit by virtue of having taken over from the defunct Transitional Authority – and charged with the preparation and or validation of an inventory of existing assets of now defunct Kericho, Bureti and Bomet local authorities. The SRC is also sought to be enjoined because of its role of setting out the remuneration packages for public servants, including the claimant.

The Claimant/Respondent in her Replying Affidavit sworn on 31st March, 2017 opposes the application and prays that the same be dismissed with costs.

It is her further case and averment that this application is misplaced, an abuse of the process of court and a ploy to derail the proceedings in this cause thereby obstructing the course of justice.

The claimant again aver that this is rightly a matter between the parties as set out in the claim and Respondent/Applicant's request and reference to a joinder of

other parties is unnecessary and unwarranted and not a wish or preference by the claimant. This application must therefore fail for being a side show orchestrated by the Respondent/Applicant to derail and delay a determination of the issues in dispute.

The Claimant/Respondent also faults the application dated 10th May, 2017 for also being misplaced and an abuse of the process of court. She also avers as to the irrelevance of the intended additional parties as this would not relate to an already concluded Collective Bargaining Agreement (CBA). She puts it as hereunder;

13. THAT in regard to the enjoinder of the Intergovernmental Technical Relations Committee I am advised by the Claimant's advocates on record which advice I believe to be true that the Intergovernmental Technical Relations Committee was established to succeed the Transitional Authority and the said committee was established to complete its work within a set period of time, which is to expire on 31st July, 2017.

14. THAT I am advised that the said committees mandate was to advise on the assets and liabilities, vide the Gazettee Notice Number 2701, which is worded in the following words;-

It is notified for the general information of the public that in exercise of the powers conferred by section 12(b) of the Intergovernmental Relations Act, 2012, and pursuant to the resolution of the Intergovernmental Budget and Economic Council made at its meeting held on the 28th September, 2016, the Intergovernmental Relations Technical Committee has established the following institutional structures to facilitate the verification and transfer of the assets and liabilities that belonged to the defunct local authorities,

The Intergovernmental Relations Technical Committee shall refer to the Intergovernmental Budget and Economic Council and the National and County Government Co-ordinating Summit for directions upon the failure by a county Assets and Liabilities Committee to complete the identification, verification and validation of the assets and liabilities of the defunct local authorities or to submit a final report by the 31st July, 2017

Annexed hereto and marked RA-1 is a true copy of the said gazettee notice.

15. THAT I am verily advised by the advocates on record for the Claimant that the said Committee mandate is limited to reviewing the liabilities inherited from the defunct authorities.

16. THAT it is within my knowledge that the claim herein concerns implementation of a Collective Bargaining Agreement, and in particular, the annual salary increments and allowances for the year 2014, and as such, this does not cover the liability contemplated by the formation of the Intergovernmental Technical Relations Committee.

The Claimant/Respondent in her written submission dated 26th June, 2017 distinguishes this cause and constitutional Petition No.27 of 2017 and further that these are distinct and disconnected with non relating to the other.

"That the decision of the Respondents vide letter and/or notice dated 5th January, 2016 releasing seconded staff to the National Government is hereby stayed pending hearing and determination of the petition herein."

And

"That pending hearing and determination of the petition herein the Respondents shall not release seconded staff to the national government and further shall keep the staff on payroll and shall

compute and pay the monthly salaries due to them each and every month.”

On the prayer for stay of proceedings, she submits that this is an exercise of judicial discretion that should be exercised judiciously with a view to meeting the tenets of justice. In reliance to the authority of **Lydia Mathia v Naisula Lesuuda & another (2013) eKLR** where Ouko, J. (as he then was) observed as follows;

“... In my view, in the exercise of judicial discretion the court cannot legitimately look at a matter on one assumption alone favouring one party and ignoring the other party. I am persuaded by Ringera J.’s holding in The Matter of Global Tours and Travels Limited Nairobi High Court Winding Cause Number 43 of 2000 when dealing with an application for stay though not similar to the stay sought in this petition, he stated that “Whether the interests of justice would be best served by the grant or the refusal of the order for stay the law whether or not to grant or the refusal of the order for stay of proceedings ...is a matter of judicial discretion is unlimited save that by virtue of its character as a judicial discretion it should be exercised rationally and not capriciously or whimsically (my emphasis). The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is on what terms it should be granted...”

The fact that there is a pending suit before the Constitutional Court does not any way impede this court from executing its constitutional obligation of determining this petition. More so given the fact that the two petitions may look similar in form, I am persuaded by the decision of Hon Koskei in Anthony Mugambi Wachira vs. Kenya Airports Authority Cause No. 1590 of 2010 an industrial court decision where the presiding judge held that “there will always be an overlap between the jurisdiction of the High Court and the industrial court in respect of the enforcement of fundamental constitutional rights. This was so because Article 165 (3) (b) of the constitution vests power

on the High Court to determine the question whether a fundamental freedom in the of Rights has been denied, violated, infringed or threatened”.

It is also her submission (see paragraph 39 - written submissions dated 21st September, 2017) that the rule on privity of contract, which is applicable in the circumstances of this application only binds parties privy to the contract and no more. Here, the Salaries and Remuneration Commission (SRC) and Intergovernmental Technical Relations Committee have no place or role in the subject matter of this litigation.

This is a straight forward matter. It is visible even by a naked eye. The issues raised in the claim do not necessarily involve the parties sought to be enjoined and included by the respondents. It is also not entirely their responsibility to seek such joinder. The issue of stay of proceedings is also countermanded by a submission that the applicant does not satiate the requisite legal bar for such issue. The application in all aspects remains wanting. I therefore agree and pursue the Claimant/Respondent’s case against both joinder and stay of proceedings.

In the circumstances, I feel inclined to dismiss both applications with costs to the Claimant/Respondent.

Delivered, dated and signed this 17th day of October 2017

D. K. Njagi Marete

JUDGE

Appearances

1. Mr. Mugumya instructed by Rodgers Mugumya & Company Advocates for the Respondent/Applicant.
2. Mr. Koech holding brief for Mr. Moenga instructed by Brian Otieno & Company Advocates for the Claimant/Respondent.