



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PETITION NO. 53 OF 2015

**IN THE MATTER OF: THE CONSTITUTION OF KENYA ARTICLE 2,3
10,22,23,24,41,47,50,232 AND 260**

**IN THE MATTER OF: CONTRAVENTION OF THE STATE CORPORATION ACT CAP 446
SECTION 5,6 AND 27 AND ARTICLE 94 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF: KENYATTA NATIONAL HOSPITAL CITATION BOARD ORDER OF
1987 LEGAL NOTICE NO. 109**

**IN THE MATTER OF: THE CONTRAVENTION OF THE INTERPRETATION AND
GENERAL PROVISIONS ACT CAP 2 SECTIONS 51, 52 LAWS OF KENYA BY MR. JUSTICE
KIMATHI MBUI**

**IN THE MATTER OF: UNLAWFUL AND UNCONSTITUTIONALITY OF THE KENYATTA
NATIONAL HOSPITAL TERMS AND CONDITIONS OF SERVICE**

**IN THE MATTER OF: THE CONTRAVENTION OF THE STATE CORPORATION ACT AND
THE CONSTITUTION**

**IN THE MATTER OF: THE UNLAWFUL AND UNCONSTITUTIONAL INTERDICTION OF
MR. STEPHEN KAABURIA RUTEERE**

BETWEEN

KENYA NATIONAL UNION OF NURSES APPLICANT/PETITIONER

VERSUS

KENYATTA NATIONAL HOSPITAL BOARD 1ST RESPONDENT

THE CABINET SECRETARY MINISTRY OF HEALTH 2ND RESPONDENT

THE NON. ATTORNEY GENERAL 3RD RESPONDENT

MR. JUSTUS KIMATHI MBUI 4TH RESPONDENT

AND

IN THE MATTER OF AN APPLICATION FOR CONTEMPT OF COURT

BETWEEN

KENYA NATIONAL UNION OF NURSES APPLICANT/PETITIONER

KENYATTA NATIONAL HOSPITAL BOARD 1ST RESPONDENT

(To the contempt proceedings)

AND

LILY KOROS 2ND RESPONDENT

(To the contempt proceedings)

JUDGMENT

1. The petition was filed on 25th August 2014 inviting the court to determine the constitutionality of the interdiction of the grievant Mr. Stephen Ruteere.
2. A notice of motion on certificate of urgency was filed together with the petition seeking *inter alia* interim injunctive orders restraining the 1st respondent from summoning Mr. Stephen Ruteere to appear before the disciplinary committee on Tuesday 26th August 2014 or any other date until the matter was heard and determined and that interim orders do issue restraining the respondent from victimizing, intimidating, suspending, dismissing and / or terminating any of its employees' services pending hearing and determination of the application and until a properly constituted and lawful disciplinary committee is put in place in accordance with Kenyatta National Hospital (KNH) citation board order of 1987, legal notice No. 109.
3. The applicant also sought payment of salaries of the grievant Mr. Ruteere from date of interdiction and for the grievant to unconditionally resume duty pending the hearing and determination of the application. The court granted interim orders in terms of prayer 1, 2 and 3 of the notice of motion on 25th August 2014. These orders have become subject of application for contempt of court dated 8th September 2015 and filed on 9th September 2014 which is also due for determination in this judgment by consent of the parties.
4. Notice of preliminary objection to the suit was filed by the 1st and 4th respondents on 11th September 2014 to wit;
5. That the Kenya National Union of Nurses, lacks *locus standi* to institute this suit on behalf of a third party which is not its member and to whom the petitioner has no legal nexus.
6. That the remedies sought against the 4th defendant being of a constitutional nature, cannot issue it being trite law that constitutional remedies may only issue against the state and not private citizen.
7. That the issues in dispute are subject of **Industrial Court Cause No. 756 of 2013, Kenya National Union of Nurses Vs. Kenyatta National Hospital** and the petition is an abuse of the court process.
8. In addition, the 1st and 4th respondents have filed an answer to the petition reiterating the legal objections raised while pleading over on the facts of the petition.

Contested facts of the case

9. Mr Stephen Ruteere was employed by the 1st respondent in the capacity of nursing officer III on 24th December 1998. Mr. Ruteere was elected as shopsteward of the petitioner to represent workers at the KNH as per a letter dated 24th September 2013.

10. That while conducting his duties as a shopsteward, the grievant came into conflict with management of KNH subsequent to which, the grievant was interdicted.

11. That the grievant was being intimidated to prevent him from conducting lawful union activities hence the show cause letters and interdiction letters were unconstituted and unlawful. That these documents are a violation of the convention No. 87 and 98 on the right to organize and collective bargaining and against Article 41 of the constitution of Kenya 2010 and labour relations Act No. 14 of 2007.

12. That the letter of interdiction dated 20th day of December 2013, was in violation of grievant's right to fair labour practices and amounted to harassment on basis of the grievant's union activities.

13. That by the time of coming to court Mr. Ruteere was placed under interdiction for eight months without any further communication from the employer. The grievant had however been summoned to appear before the staff disciplinary and advisory committee (SDAC) to face disciplinary charges levelled against him.

14. That SDAC is not the proper forum for disciplinary hearing, and the 1st respondent ought to constitute a proper disciplinary committee.

15. That the 1st respondent has developed provisions in its code of conduct in The Kenyatta National Hospital terms and conditions of service, May, 1998 that deny or limit the grievant and other employees of the 1st respondent enjoyment of fundamental rights and freedoms in contravention of Article 33 of the constitution of Kenya, 2010.

16. That the conduct of the 1st respondent offends Articles 41 and 50 of the constitution.

17. The various correspondences and documentation is annexed to the petition.

18. The petitioner filed further affidavit on 24th March 2015 in which it is admitted that there is no recognition agreement between 1st respondent and the petitioner. The grievant denies that he was a member of KUDHEIHA, a rival union recognized by the 1st respondent.

19. The grievant denies having committed the alleged misconduct or at all. That the interdiction was effected without any hearing at all.

Response

20. The 1st and 4th respondents rely on the notice of preliminary objection dated 16th September 2014, answer to the petition dated 16th September 2014 and replying affidavit sworn on 16th September 2014 by Justus Kimanathi Mbiu together with annexures thereto.

21. The respondent submits that the petitioner has no *locus standi* to bring this Petition and the court lacks jurisdiction to interdict a lawful disciplinary process by the 1st respondent against its employees. Furthermore, the respondents submit that the interdiction of Mr. Ruteere was fair and procedural as supported by the evidence on record.

22. Mr. Ruteere was accused of inciting the Intensive Care Unit Nurses to join a strike by unionsable members of staff of KNH. On 13th July 2013, the grievant received a letter asking him to show cause

why severe disciplinary action should not be taken against him. The grievant responded in a letter dated 22nd July 2013.

23. KNH responded to the grievant vide a letter dated 14th November 2012 asking the grievant to again show cause why severe disciplinary action should not be taken against him in that, in addition to earlier charges on 24th October 2013, the grievant had written to his advocate, making false accusations against the CEO of KNH on matters pending in court. That the grievant imputed improper motive on the part of the CEO of KNH.

24. The grievant was advised that his representations should reach KNH within seven (7) days from 18th November 2013. The matter was then filed in court on 25th August 2014 before the grievant made further responses to the KNH.

25. Issues for determination

(i) Whether the petitioner has *locus standi* to bring this petition on behalf of the grievant and other employees of the 1st respondent.

(ii) Whether the court has jurisdiction to entertain this matter.

(iii) If the answer to (i) and (ii) is in the affirmative, whether the petitioner has discharged the requisite onus to be entitled to the reliefs sought.

(iv) Whether the 1st and 4th respondents are in contempt of court order dated 13th August 2015.

Issue i

26. It is not in dispute that the petitioner has recruited members in the employment of the 1st respondent. The dispute of recognition between the petitioner and 1st respondent was heard and determined by Marete J. in **Industrial Court Cause No. 756 of 2013** where the court found that the petitioner had not satisfied the pre-requisites of recognition. Indeed the petitioner has readily admitted that it has no recognition agreement and therefore no collective agreement with the 1st respondent.

27. Under Section 54(1) of the Labour Relations Act, No. 14 of 2007 is provided;

“an employee including an employer in the public sector shall recognize a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionsable employees.”

28. This is the threshold that a union must meet to be recognized by an employer. It is the recognition agreement that entitles the union to conduct lawful activities in the premises of the employer including negotiating terms and conditions of all unionsable employees of the employer.

29. The recognition agreements sets out the parameters of engagement between the union and the employer including negotiating, grievance; and disciplinary procedures applicable at the shop floor and to all unionsable employees represented by the union.

30. It follows therefore that a union that is not recognized by a particular employer has no legal mandate to operate in the premises of the employer other than for the purposes of recruiting new members to satisfy the requirements under section 54 of the Act. Such a union cannot represent the unionsable employees of the specific employer in a dispute between the employer and its employees.

31. The 1st respondent has submitted that the petitioner is a busy body and lacks *locus standi* to bring this petition regarding terms and conditions of employment of its employees.

32. The 1st respondent further submits that the unionsable employees of the 1st respondent are represented by KUDHEIHA, a rival union which has not been joined to this suit and this suit therefore must fail on that ground alone.

33. The 1st respondent relies on the case of **Communication Workers Union Vs. Safaricom Limited [2014]eKLR** where the court held that recognition grants a union special status and legal ability to engage the employer on issues regarding unionsable employees. The court stated;

“such is the essence of recognition. This has a firm basis within the law. Even where there is a constitutional right to associate and receive representation the same must be enjoyed within lawful means.”

34. The court further held that a union that has no recognition agreement with the employer lacks *locus standi* to commence a suit on behalf of the employees of the said employer. In this regard the court stated;

“similar to a lawyer, though having a first class honours lacks a certificate of practice as an advocate of the High Court of Kenya such a lawyer though well versed in law and well suited to give legal advice to various citizens, lacks the capacity to stand in court as an advocate representing a client.”

35. In this case, the petitioner is a registered trade union but has admitted it has no recognition agreement with the 1st respondent. The petitioner has not also provided evidence that the grievant Stephen Ruteere is a member of the petitioner. The petitioner has invoked Article 22(1) & (2) of the constitution to assert that it has requisite *locus* to bring the petition which in the main seeks to address the terms and conditions of service provided to all employees of the 1st respondent.

36. With respect to the petitioner, the mandate of unions would be rendered otiose if the courts were to allow third parties who have no recognition agreement to engage employers on terms and conditions of service of their employees.

37. The Labour Relations Act, 2007, would be rendered redundant. This would bring confusion, if not chaos at the work places. The legislature has carefully regulated labour relationship at the shop floor to avoid such eventuality.

38. The court declines the invitation by the petitioner, to find that the statutory relationship vide recognition agreements between employers and unions has been rendered nugatory by the constitution. Rights and freedoms provided in the constitution must be enjoyed within the statutory confines of relevant statutes. For this reason alone, the court finds that the petitioner lacks *locus standi* to bring collective disputes including this petition on behalf of employees of the 1st respondent.

39. This being the case, it is unnecessary to get into other issues except to say in passing that if the petitioner was suited to bring this suit, the court has jurisdiction to hear and determine the same since the subject matter falls within the ambit set out under Article 162(2)(a) of the constitution of Kenya, 2010 as read with section 12 of the Employment and Labour Relations Act, 2011 as amended.

40. The court notes that, the question of the petitioner having a shop steward at the shop floor of the 1st respondent does not arise at all in the absence of a recognition agreement between the petitioner and the 1st respondent.

41. It follows therefore that the various violations alleged under convention 87 and 89 do not arise at all the court having found in **the Industrial Court Cause No. 756 of 2013, Kenya National Union of Nuses Vs. Kenyatta National Hospital & another**, that the petitioner herein did not follow the procedural requirements to obtain recognition from the 1st respondent. It is therefore up to the petitioner to recruit 50 + 1 % of the unionsable employees of KNH to obtain recognition in terms of section 54 of

the Labour Relations Act, 2007. The grievances by Mr. Ruteere and Rachel Kisura constitute typical claims before this Court and may be brought by the grievants in their own names as opposed to collective disputes that require union participation. The grievants suffer no prejudice in this respect other than delayed justice due to reasons of their own making.

42. With regard to the alleged contempt of court, the court having found that the petitioner lacks *locus standi* to bring the suit in the first place, the application cannot stand. Secondly, the court is not satisfied that the petitioner has met the requirements set out by the **Court of Appeal in Civil Application No. 222 of 2007 Christine Wangari Chege –vs- Elizabeth Wanjiru Evans & 11 others [2014]eKLR** which is to say;

43. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon.

44. The application notice and the affidavit or affidavits must be served personally on the respondent unless the court dispenses with service if it considers it just to do so, or the court authorizes an alternative method of service.

45. Leave or permission is not required where the committal proceedings relate to a breach of a judgment, order or undertaking.

46. The orders served personally or as permitted by the court must have a penal notice stipulating consequences to be met in event of default. Consequently the suit is dismissed in its entirety with costs to be met by the petitioner.

Dated and delivered at Nairobi this 22nd day of January 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE