



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAKURU

CAUSE NO. 169 OF 2015

KENYA NATIONAL UNION OF NURSES.....CLAIMANT

v

COUNCIL OF GOVERNORS.....1ST RESPONDENT

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

BARINGO COUNTY PUBLIC SERVICE BOARD.....3RD RESPONDENT

TRANS-NZOIA COUNTY PUBLIC SERVICE BOARD....4TH RESPONDENT

NAROK COUNTY PUBLIC SERVICE BOARD.....5TH RESPONDENT

ATTORNEY GENERAL/MINISTRY OF HEALTH.....6TH RESPONDENT

PUBLIC SERVICE COMMISSION.....7TH RESPONDENT

JUDGMENT

1. The Kenya National Union of Nurses (Union) commenced legal proceedings against the Respondents on 9 June 2015 and the issue in dispute was stated as *refusal to confirm into permanent and pensionable terms of employment of ESP staff on contract*.
2. Filed together with the Memorandum of Claim was a motion under certificate of urgency. The Court certified the motion as urgent and directed that it be served upon the Respondents for *inter partes* hearing on 24 June 2015.
3. Come 24 June 2015, the motion did not proceed because the 1st, 2nd, 6th and 7th Respondents were not ready. Because these Respondents had not filed their responses to the motion, the Court directed that they respond before 10 July 2015.
4. On 10 July 2015, the Court directed that since the orders sought in the motion as worded had been overtaken by events, the Respondents who had not filed their responses should do so before 31 July 2015.
5. When the Cause next came up on 31 July 2015, the Union withdrew the claim against the 3rd Respondent. The Court also directed the parties to attempt an out of court settlement but no settlement

was reached.

6. On 2 November 2015, the parties agreed that the Cause be determined on the basis of the record and submissions (which were to be exchanged).

7. The Court, with the agreement of the parties set the timelines within which to file and exchange the submissions and directed that the submissions be highlighted on 10 December 2015.

8. When the Cause was called out on 10 December 2015, it transpired that the Union and the 5th Respondent had also agreed a settlement which had been filed in Court on 9 December 2015.

9. With the settlements reached with the 3rd and 5th Respondents, it is the 1st, 2nd, 4th, 6th and 7th Respondents who remain as Respondents.

Background

10. There are some undisputed facts and it is in order for the Court to set them out.

11. The National Government through the Ministry of Health/Public Service Commission employed several health professionals through a programme known as the Economic Stimulus Programme (ESP). These staff that included nurses were engaged in phases on contractual agreement terms and this was before the coming into being of the County Governments. The staff had been seconded to health facilities all over the country.

12. When the County Governments came into being, they took over the health function, which function had been devolved through the Constitution of Kenya, 2010.

13. Now, the contracts of the ESP staff expired when the County Governments had effectively taken over the health function and it was not exactly clear what their employment status was.

14. The Union, being concerned fired letters to several Counties seeking to know the way forward in respect of the ESP staff. Some Counties agreed to absorb the staff into their permanent staff establishment while others declined.

15. Discussions were held at various levels.

16. On 24 January 2014, the Cabinet Secretary, Ministry of Health wrote to all Governors in the country requesting that all ESP staff whose contracts had expired should be absorbed into the counties respective regular establishment on permanent and pensionable terms.

17. The Principal Secretary, Ministry of Health followed on the letter with another one dated 7 August 2014 to the same effect, but now addressed to all County Secretaries.

18. On 30 January 2015, the Transition Authority wrote to all County Secretaries requesting for details of all ESP staff in order to have a structured way of addressing the issues. The discussions were to involve the Public Service Commission, the Directorate of Public Service Management, the Ministry of Health, the Council of Governors, the National Treasury and the Presidency.

19. On 11 February 2015, a Consultative Committee on Health Workers met. The Consultative Committee comprised a Technical Committee on Health Workers Issues, Council of Governors, Ministry of Health, Transition Authority, National Treasury, Directorate of Public Service Management and the Public Service Commission.

20. Among the issues addressed and resolved was the issue of ESP staff.

21. According to the minutes of the meeting, it was noted that 16 Counties had not absorbed the ESP staff

after the expiry of their contracts. These Counties were *Bungoma, Embu, Isiolo, Kajiado, Kericho, Meru, Migori, Mombasa, Muranga, Nairobi, Nakuru, Nandi, Nyamira, Nyeri, Trans Nzoia and Uasin Gishu*.

22. The Committee agreed that the Council of Governors would issue a Circular to the Counties to absorb the ESP staff.

23. The Union, concerned about the slow phase of complying with the letters from the Ministry of Health also addressed individual letters to the Respondents herein on 25 February 2015, 26 February 2015, 13 May 2015 and 18 May 2015.

24. It appears that the Union became fatigued and on 9 June 2015, it lodged the present proceedings.

Union's case

25. The Union's case is that the Cabinet Secretary, Ministry of Health directed the Counties to absorb the ESP staff and that this was followed up with a meeting held on 11 February 2015 where it was resolved that the 1st Respondent would issue a Circular to all Counties which had not absorbed the Staff to do so.

26. This was again followed up with a Circular by the 7th Respondent to the 1st Respondent on 17 February 2015, but the 1st Respondent ignored the resolutions of 11 February 2015 and the reminder by the 7th Respondent.

27. According to the Union, the fact that other Counties had absorbed the ESP staff meant that the Counties which had failed were guilty of discrimination in view of section 5 of the Employment Act, 2007.

28. The Union also contended that the failure to absorb the ESP staff was in violation of Articles 27 and 41 of the Constitution and section 138 of the County Governments Act.

1st Respondent's case

29. The Council of Governors was of the view that issues of employment were individual to the ESP staff and the Counties, health being a devolved function and therefore the County Governments were not bound by directives of the Ministry of Health.

30. According to the Council of Governors, such directives run contrary to the Constitution and the Counties could not be compelled to absorb the ESP staff.

31. The 1st Respondent further asserted that the County Governments were not consulted before the Circulars were issued, and therefore the directive was contrary to Article 6 of the Constitution.

32. Further, the Council was of the view that the Union had no recognition agreement with the County Governments, and it further advanced the position that the ESP staff were on secondment from the National Government.

2nd Respondent's case

33. According to the 2nd Respondent, it was the responsibility of the National Government to provide for the remuneration of ESP staff in terms of section 73 of the County Governments Act and that in any case, it had absorbed most of the ESP staff into its permanent establishment (except those found unfit to serve).

34. The 2nd Respondent also urged that it was the only body legally mandated to create offices within its public service and therefore the Circulars issued by the other agencies were only persuasive.

35. It was further asserted that the Cause was premature.

4th Respondent's case

36. On the part of the 4th Respondent, it was contended that the Union had not named the persons it was purporting to act on their behalf.

37. The Respondent advanced the position further by contending that it had no employment contracts with any of the Union's members.

38. The Respondent also contended that it was under no legal obligation to absorb the ESP staff and that pursuant to section 63 of the County Governments Act, it had the mandate to make appointments within its establishment.

6th and 7th Respondents case

39. According to these Respondents, the substance of the claims raised by the Union were against the other Respondents but they admitted that the Circulars referred to by the Union were written as requests and were written on a without prejudice basis.

Evaluation

40. Nearly all the issues raised by the parties herein have been the subject of previous determinations by this Court but differently constituted and these are *Grace N. Makori & Ors v Muranga County Public Service Board* (2015) eKLR, (Ongaya J) and *Kenya National Union of Nurses v Public Service Commission* (2015) eKLR, (Radido J), and lately, the Court of Appeal in *Muranga County Public Service Board v Grace N. Makori & 178 Ors* (2015) eKLR.

41. I do not intend to reinvent the wheel and will therefore address the issues which were not directly in issue in the other cases.

Anonymous members

42. The 4th Respondent advanced an argument that the Union had not listed the names of the persons it was purporting to act on their behalf.

43. The names of the Grievants were set out in the Union's annexure SP-2A in the Memorandum of Claim.

Consultations/Circulars/Directives

44. The Council of Governors is a statutory creature. It participated in the consultations of 11 February 2015 where certain resolutions were reached.

45. It cannot run away or disown resolutions to which it was party to and where it was representing the interests of the Counties.

46. Even if the Circulars from the National Government were of no legal effect because of the doctrine of separation of powers (and I am not ready to accept that position), by participating in the consultations and agreeing to the resolutions, its members must be bound by those resolutions.

47. In fact the Court of Appeal in *Muranga County Public Service Board v Grace N. Makori* (2015) examined the question of alleged unlawful interference and intrusion by the National Government into the affairs of the Counties as regards the ESP staff and came to the conclusion that the letters from the PSC were therefore merely communicating a pre-existing policy of the national government that predated

devolution. It was in no way a dictatorial imposition upon the appellant. Moreover, it is uncontested that the PSC did consult widely with the MOH and the Council of Governors on the absorption of the ESP workers on permanent and pensionable terms at the expiry of their contracts and this was mutually agreed upon and in fact implemented by at least two thirds of the county governments. The appellant's constitutional mandate was therefore not usurped or otherwise violated.

Whether Union has made a case for the orders sought

48. The Court of Appeal in the *Grace N. Makori* case held that this finding leads us inevitably to the conclusion that it having been national government policy accepted, adopted and implemented by itself with regard to the 1st batch of ESP workers; and by the Council of Governors, that ESP workers were to be absorbed into permanent and pensionable terms at the expiry of their contract, the appellant is bound to so absorb them. This flows logically from the need to treat the two respondents in an equal, equitable and non-discriminatory manner vis-à-vis their colleagues who were in the first batch of ESP workers and who were already absorbed....Courts of law should not encourage parties to resile from their obligations freely entered into or lawfully inherited, and so, as in this case, to the detriment of innocent parties.

49. The issues canvassed in the *Grace N. Makori* case were exactly the same ones arising under the instant Cause. Both the facts and the law applicable are the same, and I do not find any reason advanced by the Respondents to allow me to depart from the previous decisions which have been given a legal seal of approval by the Court of Appeal.

50. The Union has amply demonstrated that the orders sought are merited.

Conclusion and Orders

51. Arising from the above the Court finds and holds in favour of the Union and issues orders that

- i. the 1st Respondent ensures that the resolutions arrived at on 11 February 2015 in regard to the absorption of ESP, staff are implemented by all its member Counties.
- ii. the 2nd and 4th Respondents do immediately confirm all ESP staff serving under contract be absorbed into permanent and pensionable terms of employment with effect from 11 February 2015.

52. The other prayers will serve no utilitarian purpose and are declined.

53. The 1st, 2nd and 4th Respondents to meet the Union's costs.

Delivered, dated and signed in Nakuru on this 23rd day of March 2016.

Radido Stephen

Judge

Appearances

For Union	Mr. Omulama, Industrial Relations Officer, Kenya National Union of Nurses
For 1 st Respondent	Mr. Mburu instructed by Manyonge Wanyama & Associates Advocates
For 2 nd Respondent	Mr. Aim instructed by Odhiambo & Odhiambo Advocates
For 3 rd Respondent	Absent

For 4th Respondent Mr. Aim instructed by Sifuna & Sifuna Advocates

For 5th Respondent Mr. Otieno instructed by Havi & Co. Advocates

For 6th & 7th Respondents Mr. Nguyo, Senior Litigation Counsel, Office of the Attorney General

Court Assistant S. Mwangi