



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 20 OF 2016

MOI TEACHING & REFERRAL HOSPITAL

CLAIMANT

v

KENYA NATIONAL UNION OF NURSES

RESPONDENT

RULING

1. On 7 October 2015, the Kenya National Union of Nurses (Union) reported a trade dispute to the Cabinet Secretary, Labour.
2. The Cabinet Secretary accepted the dispute and a Conciliator was appointed.
3. On 14 November 2015, the Conciliator returned a verdict of unresolved dispute as a consequence of which the Union issued a 14 day strike notice to Moi Teaching & Referral Hospital (the employer). The strike was called for 2 February 2016.
4. The strike notice stated some 10 issues in contention (medical cover; medical allowance; confirmation into permanent and pensionable terms; delayed promotions; extraneous allowances; renovation of War Memorial Hospital; amenity ward allowances; unilateral privitisation of War Memorial Hospital; employment of more nurses and disparities in payments).
5. The notice prompted the employer to move Court on 27 January 2016 under certificate of urgency seeking orders

a. (spent)

b. THAT this Honourable Court do hereby issue a temporary order prohibiting the members of the Respondent individually and collectively or its agents from proceeding, participating, inciting or taking part in any way in a strike or go slow at the Claimant's place of work pursuant to a strike notice dated 19/01/2016 and served upon the Claimant on 20/01/16 pending inter-partes hearing of this application (spent).

c. ***THAT this Honourable Court do and hereby issue a permanent prohibitory order declaring the strike called by the Respondent unlawful and unprotected as contained in the strike Notice dated 19/01/2016 and commencing on 2/2/2016.***

d. THAT leave be and is hereby granted to serve the Orders of this Court through the Eldoret Branch officials of the Respondent Union and also by way of substituted service through the Daily Nation newspaper.

e. ...

6. The Union was served and on 29 January 2016, the Court directed that the strike be held in abeyance pending the Union filing its papers. The papers were filed and the motion was urged on

11 February 2016.

7. It is clear that the only real issue in contention at this interlocutory stage is whether prayer (c) as sought ought to be granted.

Background

8. However, before addressing that issue some background would be in order.
9. The employer and the Union executed a recognition agreement on 10 August 2012.
10. The parties thereafter entered into negotiations with a view to concluding a collective bargaining agreement.
11. A Collective Bargaining Agreement was agreed and was presented for registration, but because legal questions as to the validity of the collective bargaining agreement without considering the advice of the Salaries and Remuneration Commission arose, the Court, through a judgment delivered on 18 December 2015 directed the parties back to the drawing board.
12. The directive of the Court was anchored in a judgment by the Court of Appeal in *Teachers Service Commission v Kenya Union of Teachers (KNUT) & Ors* (2015) eKLR, that the advice of the Salaries and Remuneration Commission was mandatory.

The motion

The employer

13. The employer contended that the Conciliator issued a certificate of unresolved dispute prematurely and that it was willing to engage in good faith to have the issues pending resolved.
14. The employer also asserted that it was involved in provision of essential services and therefore by dint of section 78(f) of the Labour Relations Act, the employees were prohibited from going on strike.

The Union

15. The Union on its part opposed the motion on the grounds that the employer had not met the test for grant of injunctive relief as set out in the case of *Giella v Cassman Brown*.
16. It was urged that negotiations had been ongoing since 2012 but the employer had not exhibited good faith.
17. It was also submitted that the parties had participated in several conciliations without any positive agreement.
18. The right to strike, the Union asserted was guaranteed by the Constitution and the issues the subject of the strike notice were not subject to approval by the Salaries and Remuneration Commission but were covered by a Revised Scheme of Service.
19. The Union further urged that the public would not suffer any prejudice as there were other health facilities available to them.

Evaluation

20. The Court is dealing with an interlocutory application.
21. However, the order sought by the employer is couched in the language of a final interdict.
22. Final interdicts are rarely issued at the interlocutory stage. The reasons are many.
23. The Court of Appeal in *Kenya Breweries Ltd & 2 Ors v Washington Okeyo* (2002) eKLR restated the law on grant of mandatory orders at the interlocutory stage as follows

The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4th edition paragraph 948 which reads

A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once,

or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff... a mandatory injunction will be granted on an interlocutory application.

24. I do not see why similar principles ought not to apply in an application for a permanent prohibitory order at the interlocutory stage even in industrial disputes.
25. For me, in labour disputes, what is germane is that the standard a party is expected to meet at the interlocutory stage is the establishment of a *prima facie* case.
26. This threshold is lower than the burden required to succeed at a hearing on the merits which is on a balance of probabilities (where a party should demonstrate a clear right which has been breached or is likely to be breached).
27. Obviously, the employer herein like, employers in causes seeking strikes to be declared illegal or unprotected at the interlocutory stage have a tactical advantage, which in my view is not fair as it compromises equality of arms in such scenarios. I say so on basis of two considerations.
28. First, the grant of the order as sought will inevitably mean that the likelihood of the substantive dispute going to full trial dissipates.
29. Secondly, the right to strike is now guaranteed by the Constitution and the Court ought not to lightly intrude in the power play dynamics between social and economic power when a legal stalemate has been reached, on the basis of establishment of a *prima facie* case.
30. The Court should not easily read implicit restrictions to the right to strike where attempts to resolve issues or grievances of the weaker partner in the employment relationship have hit a brick wall. Such an approach would mean there will be no legal or lawful strike in this country and would adversely impugn a fundamental right available to workers.
31. The right to strike should not be hindered by the Courts unnecessarily.
32. I am also unable to fathom what alternative remedies unions and employees whose right to strike is impeded at the interlocutory stage might have.
33. Nevertheless, at the end of the day, the Court must balance the competing rights between labour and capital considering the public interest.
34. Negotiations that take about 5 years, like appear in the instant case to conclude a collective bargaining agreement, in my view, cannot meet the test of fair labour practice where the failure to reach agreement is on the side of public entities, or even private employers. Such failure or reluctance would not foster industrial peace and is inimical to the good faith principle in collective bargaining.
35. All in all, and considering that the Court is addressing orders sought at the interlocutory stage, the less said the better.
36. The employer has not demonstrated in the present case that it merits the grant of a final interdict at the interlocutory stage as sought. Why the employer sought a final interdict at this stage is of course within its own knowledge.
37. Before concluding an observation on practice and procedure in relation to applications to declare strikes illegal or unprotected.
38. To deal with the challenge of determining legality or lawfulness of strikes, the Court urges the Employment and Labour Relations Court Rules Committee considering providing in the Rules that applications brought pursuant to sections 74, 77 and 79 of the Labour Relations Act be commenced through Originating Summons or Motion to ensure equality of arms.

Conclusion and Orders

39. In my considered opinion, and I so find at this stage, order (c) as sought in the motion dated 27 January 2016 should not be granted as accepting the invitation would be tantamount to grant of a final order using a lower threshold standard wherein clear rights have not been established.
40. But in order to foster good faith negotiations and considering the purpose of establishment of this Court to among others, further and secure good labour relations, the Court would order

(i) the strike be stayed for 45 days to enable parties including the Salaries and Remuneration Commission to conclude negotiations and have a collective bargaining agreement registered.

(ii) the Union be at liberty to proceed with the strike after 45 days should negotiations collapse.

(iii) The Union is also directed to file its Response and any other documents before 8 April 2016 to the Memorandum of Claim to enable the determination of the main Claim on the merits.

(iv) the Cause be mentioned on 6 May 2016 for further directions

41. Because of the ongoing social partnership between the parties, each party is directed to bear own costs.

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

Radido Stephen

Judge

Appearances

For Claimant
Employers

Mr. Ambenge, Senior Executive Officer, Federation of Kenya

For Respondent
Union of Nurses

Mr. Omulama, Industrial Relations Officer, Kenya National

Court Assistant

Nixon