



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
CAUSE NO. 1025 OF 2015
KENYA NATIONAL UNION OF NURSES.....APPLICANT CLAIMANT
Versus
CABINET SECRETARY MINISTRY OF
DEVOLUTION AND PLANNING.....1ST RESPONDENT
COUNCIL OF GOVERNORS.....2ND RESPONDENT
THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

Mr. Jaoko for the applicant

M/S Akuno for the respondent

RULING

1. Serving before court is a notice of motion application dated 31st July 2015. The applicant filed an amended memorandum of claim dated 7th August 2015 on 17th August 2015.

2. The applicant relies further on supplementary affidavit dated 4th February 2016 and filed on 8th February 2016 and list of documents dated 19th October 2015.

3. The applicant seeks the following prayers;

3 That pending the hearing and determination of the main suit, the court be pleased to make an order directing the 1st and 2nd respondents to reinstate the medical allowance which was previously given to the employees who are members of the applicant, as well as civil servants which medical allowance was removed on diverse dates in the years 2012 to 2014.

4. The application is based on grounds set out on the face of the application and by supporting affidavit of Seth Panyako (General Secretary of Kenya National Union of Nurses sworn on 31st July 2015 as follows;

On diverse dates of the year 2012 to 2014 the government, 1st respondent and thereafter the 2nd respondent removed from the payslips of the nurses and civil servants medical allowance.

That the removal of the medical allowance from the payslips of the members of the applicant has exposed the members of the claimant to very serious financial hardship.

That there is no justification for the unilateral withdrawal of the medical allowance.

The 1st and 2nd respondents have no power or authority to remove the said medical allowance.

That the members of the applicant continue to suffer irreparable injury unless the medical allowance is reinstated pending the hearing and determination of the main suit.

5. In the main suit the applicant seeks a declaration that the withdrawal of the medical allowance is unreasonable, unlawful, null and void and that the court directs the 1st and 2nd respondents to reinstate the medical allowance to the employees who previously enjoyed the benefit.

Response

6. The application is opposed vide respondent's grounds of opposition filed by the 1st and 3rd respondents on 19th October 2015 and a replying affidavit sworn on 9th December 2015 and filed on the same date.

7. The gravamen of the opposition is as follows;

That the applicant represents a very small segment of the large population of the entire civil servants and disciplined forces who are making contributions to the medical scheme and whose views have not been sought before filing this suit.

That it would be improper for the court to reinstate the said medical allowance without incorporating the views of other stake holders who are comfortably making contributions without any complaint to the new National Hospital Insurance Fund (NHIF) medical scheme.

That the other civil servants and disciplined forces should be enjoined in the suit therefore.

That the current NHIF deductions are legal and are made pursuant to the National Hospital Insurance Fund Act, Section 15 and 16 which is a valid Act of parliament.

That the applicant has not demonstrated the prejudice or inconvenience its members are likely to suffer and whether the same cannot be remedied otherwise if the interim orders are not granted.

8. That the court lacks jurisdiction to hear and determine the issues raised as the same are best left to the Legislative arm of Government.

That there is pending **Nairobi High Court Constitutional petition no. 61 of 2015, Trade Union Congress of Kenya –Vs- the NHIF** challenging the legality of the Gazette Notice increasing the NHIF rates and the court should await the outcome of the petition.

9. That the respondents and the public at large stand to suffer irreparable loss if the stay orders are granted as the new NHIF rates have been deducted since April 2015 and further various programs have been rolled out and Kenyans are already benefitting.

That the 1st respondent is managing the integral payroll and personnel data base (IDPP) System and has a currently running contract with the National Hospital Insurance Fund (NHIF) for provision of medical cover for civil servants and disciplined services which ought to be supported and maintained.

10. That prior to the introduction of the medical scheme for civil servants on 1st January 2012, civil

servants and disciplined services were drawing monthly medical allowance ranging from Kshs.375 – Kshs.2,490 which was taxed, as outpatient medical cover. That employees were also entitled to a maximum of between Kshs.1,000 and kshs.1,500 per day in-patient medical refund for self, spouse and children below 22 years in that system, employees with cost of the outpatient treatment from medical allowance they were drawing on a monthly basis and had to pay the in-patient bill first then claim reimbursement up to the indicated maximum bills.

11. Where the bills were in excess of the entitlement, an ex-gratia assistance was granted at the discretion of the Accounting officer and subject to availability of funds. That in most cases, employees were unable to access this assistance leading to considerable financial hardships forcing staff to resort to harambees, salary advances or loans.

12. In view of the above, the government introduced a comprehensive medical scheme for civil servants and disciplined services with effect from 1st January 2012 to facilitate the employees access to quality health care and as means of meeting its obligation under the Employment Act, 2007 and Constitution of Kenya 2010.

That this was achieved by converting the existing medical benefits to civil servants including the medical allowance, medical exgratia assistance, the in-patient medical refunds and an additional top up payment by the government into a comprehensive medical insurance scheme.

13. That the medical allowance ceased in January 2012 for good cause and the application has no merit and the same be dismissed with costs.

Determination

14. The issue for determination is whether the applicant has satisfied the requirements for grant of interim mandatory injunction pending the hearing and determination of the suit.

15. In the case of **Giella –vs- Cassman Company Limited [1973] EA 338**, relied upon by the Court of Appeal in **Mrao Limited –vs- First American Bank of Kenya Limited and 2 others Civil Appeal No. 39 of 2002**, the court of Appeal at Mombasa per Kwach, Bosire and O’Kubasu JJA held;

“The principles for granting an interlocutory injunction are that;

a. The applicant must show a prima facie case with a probability of success;

b. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;

c. If the court is in doubt, it will decide an application on the balance of convenience.”

16. The court went on to say;

“a prima facie case in civil application includes but is not confined to a ‘genuine and arguable case.’ It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

17. Upon a careful evaluation of the material presented to the court at this stage, the applicant has failed to demonstrate that there exists a right which has apparently been infringed by the respondent and that unless the applicant is granted interim relief, it might suffer irreparable injury, which would not be adequately compensated by an award of damages.

18. At this stage we will refrain from making any determination on the merits of the case or any defence of it. A decision on the merits must await the substantive consideration of the facts and applicable law

after full hearing of the main suit.

See **East Africa Court of Justice in Mary Ariviza and Okotch Mondoh –vs- AG of Kenya & Secretary General of East African Community, EALS 2005 – 2011 P.4.**

19. The application lacks merit and same is dismissed with costs in the cause.

Dated and delivered at Nairobi this 31st day of May, 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE