



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO CAUSE NO. 593 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 8th December, 2016)

KENYA NATIONAL UNION OF NURSES.....CLAIMANT

VERSUS

NAIROBI COUNTY GOVERNMENT.....1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

PRINCIPAL SECRETARY MINISTRY OF HEALTH.....3RD RESPONDENT

THE INSPECTOR GENERAL–NATIONAL POLICE SERVICE.....4TH RESPONDENT

COUNTY CHIEF MEDICAL OFFICER – ROBERT AYISI.....5TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....6TH RESPONDENT

RULING

1. The Application before Court is a Notice of Motion dated 8.8.2016 filed by the Applicant herein seeking the following orders:

1. That this Honourable Court be pleased to certify this Application to be of utmost urgency and service on the Respondent be dispensed with in the first instance.

2. That the Honourable Court be pleased to issue an order of stay of execution of the judgment delivered by the Honourable Lady Justice Wasilwa on 19th July 2016 pending the hearing and determination of this Application interpartes.

3. That the Honourable Court be pleased to issue an order of stay of execution of the judgment delivered by the Honourable Lady Justice Wasilwa on 19th July 2016 pending the hearing and determination of the intended appeal.

4. That the costs of this Application to abide the outcome of the intended Appeal.

2. The Application is supported by the affidavit of George Kithi the 1st Respondent/Applicant's Counsel

sworn on 8th August 2016.

3. The Application is also premised on the following grounds:

a) That the 1st Respondent/Applicant is aggrieved by the Judgment and decree delivered by this Honourable Court on 19th July 2016 and intends to appeal the same to the Court of Appeal.

b) That the Applicant herewith has already filed and served upon the Claimant/Respondent with the said Notice of Appeal dated 25th July 2016 and filed in Court on 27th July 2016.

c) That the Applicant has further requested for certified copies of the typed proceedings, judgment and the decree thereto for the purposes of pursuing, the intended appeal at the Court of Appeal through its letter addressed to the Deputy Registrar of this Honourable Court dated 25th July 2016 and filed on 28th July 2015.

d) That the Applicant's intended appeal raises serious issues of facts and law and the said intended appeal is arguable for the reasons that:

i) The Honourable Court failed to consider and ignored the Applicant's pleadings and submissions filed in the Court.

ii) The Honourable Court went on to order the reinstatement of the nurses dismissed from work and who have been away from work for a period of over one year even after the Applicant herein had clearly pleaded that their positions as nurses in Pumwani Hospital had already been filled up with other nurses who had been employed pursuant to their absconding work.

iii) The Honourable Court failed to make a determination on the fact that the Members of the Claimant had participated in an unlawful strike as clearly provided for in the Labour Relations Act and as such could not benefit from an illegality.

iv) The Honourable Court erred in making a determination that the nurses who are members of the claimant/Respondent ought to be reinstated with no loss of salary or benefits whereas the law is very clear that a party who participates in a strike cannot be paid for the period that she/he was not attending work and in this case which is more than one year.

v) That the Honourable Court failed to address itself on the issues of jurisdiction on whether it could determine the matter and make substantive orders where an appeal by the said Nurses is pending before the Public Service Commission and yet to be determined.

vi) The order issued by the Court will completely prejudice the Applicant herewith as recruitment and placement had already been done and the positions that were previously held by the Claimants members already filled after they were lawfully dismissed from employment.

vii) That the decree of the Court is incapable of obedience since there are no positions in the County Government to be filled by the claimant's Members after other persons were employed to fill the positions left by the claimant members as from April 2015.

viii) That the Decree of the Court is also incapable of obedience as the Applicant herewith is a Government and as such any expenditure must be appropriated for. This takes time and must be catered for in the annual budgetary allocations and as such compliance of the same within 30 days from 19th July 2016 is impossible.

ix) That there being no position to be filled by the Claimant members currently, their

reinstatement will cause an absurdity and this will mean that there will be a double number of employees who have same work that is already assigned to other employees who have been recruited to fill the position that were vacant upon the dismissal of the Claimants members after they participated in an unlawful strike in an essential service and further refused to resume work even after efforts to have them back were refused and ignored by the Claimant and its members.

x) That there is a clear error on the face of the record since the Learned Justice Wasilwa finds that the Claimants Members conduct warranted disciplinary action and that the Applicant herewith was entitled to discipline them but again goes on to reinstate them to work without any loss of salary or benefits even after failing to work for more than one year.

xi) The Honourable Court erred in directing payment for work not done.

xii) The Honourable Judge failed to take into consideration the conduct of the nurses before the strike, during the strike and after the strike before making its final orders of reinstatement. The contribution of the nurses towards their dismissal was never considered nor put into consideration before making the said order.

e) That if the orders sought herewith are not granted, then the appeal will be rendered nugatory on the following reasons:

i) The orders of the Court are for reinstatement of employees to work after one year of absence from work and if the same is done, then the appeal challenging their reinstatement will be rendered nugatory.

ii) The orders of the Court further provide for the reinstatement without loss of salary and benefits and if the same is executed, then there will be nothing pending for determination at the Court of Appeal as the payment of the said monies is challenged and forms part of the grounds of appeal for Application herewith.

f) That consequently, there is sufficient cause to warrant stay of execution of the orders issued on 19th July 2016.

g) That if the orders sought herein are granted, no prejudice will be suffered by the Claimant members that cannot be compensated by costs.

h) That the Claimant members have also been away from work for over one year and as such no prejudice will be occasioned if the judgment of the Court directing their reinstatement awaits the hearing and determination of the Appeal herewith which the Applicant intends to file and prosecute as a matter of urgency.

i) That in view of the foregoing, it is only proper and just that the execution in this matter be stayed pending the hearing and determination of the intended appeal which is highly arguable.

j) That it is in the interest of justice that the orders sought herein be granted.

4. The Application is also supported by the affidavit of one Newton Mung'alla the Deputy Director, Legal Affairs Department of the 1st Respondent/Applicant herein.

5. The Applicant has deposed that they are dissatisfied with judgment of this Court dated 19th July 2016 and are desirous of appealing against it.

6. They argue that they have an arguable appeal as per their grounds above and have also stated that the Court failed to consider their pleadings and submissions. They have further submitted that the order of this Court will prejudice the Applicant as recruitment and placement had already been done and the

positions that were previously held by the Claimant Members already filled up.

7. It is their contention that the decree is incapable of obedience as the Applicant who is a Government does not have any expenditure capable of being appropriated and thus taken time and must be catered in the annual budgetary allocation.

8. They have also stated that if the Applicants prayers are not granted, the intended appeal would be rendered nugatory. They aver that they have filed this application which they ask should be allowed. They aver that it is in the interest of justice that the application be allowed.

9. The application above was opposed by the Respondents/Claimants herein. The Respondents filed their grounds of opposition on 2.9.2016 through their Counsel. They have deponed that the supporting affidavit of Mr. Newton Mungalla sworn on 8.8.2016 offends the provisions of Section 2(b) (c) (d) (e) of the Labour Relations Act which provide as follows:

“2. In this Act, unless the context otherwise requires: “authorized representative ‘means’

(a)

(b) An employer or the Chief Executive Officer of an employer;

(c) The Secretary of a group of employers;

(d) The Chief Executive or association secretary of an organization;

(e) Any person appointed in writing by an authorized representative to perform the functions of the authorized representative”.

10. The Respondents have also submitted that the said supporting affidavit further offends the provisions of Section 73(3) of Labour Relations Act which also provide as follows:

“73 (3) A trade dispute may only be referred to the Industrial Court by the authorized representative of an employer, group of employers, employers organization or trade union”.

and Section 63 (a) (c) of County Government Act which provides as follows:

“63(1) except as provided for in the Constitution or legislation, the County Public Service Board has the Power to make appointments including promotions in respect of officers in the County Public Service.

(2) The Power of the County Public Service Board under subsection (1) shall be exercised:

(a)

(b); or

(c) On the county Public Service Board’s own motion on account of best interest of the County Public Service and parity of treatment of Public Officers taking into account the circumstances of each case.

11. They submit that the affidavit further offends Section 2(b) (c) (d) (e) of Labour Relations Act and Section 86 of County Government Act. They therefore state that Newton Mung’alla lacks *locus standi* hence the application should be dismissed.

12. The Applicants have also argued that the entire application offends the provisions of rule 5(2) of the Court of Appeal rules 2010 which provide as follows:

“5 (2) subject to Sub-Rule (1) the Institution of an appeal shall not operate to suspend any sentence or to stay execution but the Court may:

a)

b) In any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 75, Order a stay of execution, an injunction or a stay of any further proceedings or such terms as the Court may think fit.

13. They have also argued that the application offends the provisions of Order 42 Rule 6 of the Civil Procedure Rules. They argue that the Applicants will not suffer any substantial loss if the application is not allowed and that the appeal has no chances of success as the judgment of this Court was based on sound interpretation of the law.

14. Having considered these submissions and in consideration of the appropriate law, and case law, I note the arguments of the parties. The first issue to clear is whether the supporting affidavit sworn by one Newton Mung’alla offends the law and whether Newton Mung’alla has locus to depone to the issues in the affidavit.

15. The Respondents have argued that the deponent has no locus to depone to the issues in the affidavit as he is not an authorized representative of the Applicants nor is he authorized in writing by the County Public Service Board to represent them and depone of the issues.

16. In question, it is true that under the Labour Relations Act, only an authorized representative of the Applicant may institute a trade dispute. However, the nature of the application in Court is not the nature of a trade dispute but a simple application for stay. I will not put it in the category of trade dispute.

17. On the issue of delegation of power by the County Public Service Board, I note that the County Public Service Board can delegate its functions to any one or more of its members. However, the functions envisaged herein are functions of the County Public Service Board as listed in the County Government Act which functions include hiring, firing and discipline of staff. When it comes to litigation however, the County Public Service Board can use its Counsel and Newton Mungalla is one such Counsel as he has described himself in the affidavit.

18. I therefore find that the affidavit of Newton Mungalla has not offended any provisions of law and the issues deponed to are in order.

19. Concerning the main application for stay, I note that the Applicants have filed this application and brought it under Rule 16, Rule 27(1) (g) and 27(4) of the Industrial Court Procedure Rules 2010 which have now been repealed on 5/8/2016. That notwithstanding the law governing stay pending appeal is found at Order 42 Rule 6(2) of the Civil Procedure Rules which provide as follows:

2. “No order for stay of execution shall be made under

subrule (1) unless:-

a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay and;

b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”.

20. There is also case law on principles governing stay pending appeal. In **Chris Munga N. Bichange vs. Richard Nyagaka Tongi & Others (2013) eKLR** Kantai JA held as follows:

“The principles upon which this Court is to entertain applications for stay pending appeal or

intended appeal are now well settled. An Applicant must satisfy the Court that his intended appeal is arguable which is the same as saying that the appeal or intended appeal is not frivolous, and also satisfy the Court that unless the order of stay is granted the intended appeal, or appeal if successful would be rendered nugatory. Both requirements must be granted – see for instance the holdings of this Court in Silverstein vs. Chesoni (2002) 1 A 296 and Reliance Bank Limited vs. Norlake Investments Limited (2002) 1 EA 227”.

21. I will now test the submissions of the Applicants and Respondents against the law. Order 42 Rule 6(2) and case law cited above.

22. On the 1st issue of filing this application within a reasonable time, I note that the judgment of this Court was delivered on 9th July 2016 and this application filed on 8.8.2016. It is my position that one month is a reasonable time within which to file such an application. I find that the application was therefore filed without unreasonable delay.

23. On the issue of security, the Applicants categorically stated that they are unable to offer any and as such I will not delve into that area.

24. Concerning the proof by the Applicants that the intended appeal is not frivolous, the Applicants have listed their grounds of appeal.

25. Whether the grounds are meritorious or not, it is the Court of Appeal to determine. However, looking at the grounds, the Applicants have stated that this Court failed to consider their submissions and pleadings which in my view is not substantiated but is a frivolous.

26. On the other grounds stated I believe the Court of Appeal will consider all of them and make a determination as they are arguable.

27. I will now consider the ground of whether the appeal will be rendered nugatory unless the orders sought are granted. The order this Court has granted is for reinstatement of the nurses.

28. The Applicants have argued that if the nurses are reinstated and the Court of Appeal finds the reinstatement unwarranted, then they would not be able to refund salaries paid over the period of reinstatement. This argument is 2- pronged. I may also argue that if the Court of Appeal finds that the nurses should have been reinstated then the Applicants will also be forced to pay them salaries they would have earned for no services rendered.

29. In this Court’s view, it would be a better end to pay for services rendered than to pay for no services.

30. The remedy of reinstatement is a very special remedy. It is meant to cushion an employee where damages cannot adequately compensate the employee in cases where the employer is found to have wrongfully terminated the employee.

31. Allowing a stay where the Court has already made a finding that reinstatement is the only appropriate remedy is tantamount to giving with one hand and taking away with the other.

32. In view of my sentiments above, I will find a stay order not appropriate in the circumstances and I decline to grant orders of stay sought.

33. The Applicants/Respondents are henceforth ordered to reinstate the Respondents/Claimants as earlier ordered and in any case not more than 30 days from today.

34. Costs to the Respondents.

Read in open Court this 8th day of December, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Pamella Kisaghi, Department/Relations Office for Claimant holding brief for Omulama

Rubia for 2nd, 3rd, and 4th Respondents