



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 401 OF 2016

**IN THE MATTER OF UNLAWFUL AND UNPROTECTED STRIKE COMMENCING 17
OCTOBER 2016 ISSUED BY THE RESPONDENT UNION**

IN THE MATTER OF SECTION 81(3) OF THE LABOUR RELATIONS ACT 2007

AND

IN THE MATTER OF FOURTH SCHEDULE OF THE LABOUR RELATIONS ACT 2007

BETWEEN

MOI TEACHING & REFERRAL HOSPITAL.....CLAIMANT

VERSUS

KENYA NATIONAL UNION OF NURSES.....RESPONDENT

RULING

1. Moi Teaching & Referral Hospital (employer) in a motion filed under certificate of urgency on 12 October 2016 against the Kenya Union of Nurses (Union) seeks

a. ...

b. ...

c. 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 23/9/2016 and served upon the Claimant on 26/9/16 pending hearing of the claim filed herein.

d. ...

2. When the motion was placed before Court on 12 October 2016 *ex parte*, the Court certified it urgent and also granted prayer *b* as proposed in the application.

3. The motion was urged *inter partes* on 31 October 2016.

4. The main ground advanced by the employer is that it provides essential services and therefore in terms of section 78(1)(f) of the Labour Relations Act, the Union and or employees cannot validly call or

participate in a strike.

5. Such a strike, in the view of the employer would be illegal or unprotected.

6. The Union in opposing the application contends that the motion is *res judicata* as the Court had pronounced itself on the issues in dispute in Cause No. 269 of 2014, CBA No. 1 of 2015, Petition No. 70 of 2014 and Cause No. 20 of 2016; that the application does not satisfy the legal test for grant of temporary injunctions as set out in *Giella v Cassman Brown & Co. Ltd* (1973) EA 358 and that the right to strike is underpinned by Article 41 of the Constitution.

7. Both parties referred this Court to the decision of Nduma Principal Judge in *Okiya Omtatah Okoiti v Attorney General & 5 others* (2015) eKLR where the Judge addressed the question of constitutionality of sections 78(1)(f) and 81(3) of the Labour Relations Act.

8. The parties appeared to give conflicting interpretations as to the conclusion reached by the Principal Judge on the question.

9. One of the substantive prayers sought by the Employer is

A declaration that the Respondent Union members belong to essential services in the strict sense hence not allowed to participate in strikes as provides (sic) for under section 81(3) of the Labour Relations Act 2007.

10. The statutory anchor to the employer's substantive prayer was addressed in the aforesaid decision by the Principal Judge with a conclusion that it was inconsistent with the supreme law.

11. In constitutional litigation, where one Judge of comparable/concurrent jurisdiction has made a finding as to the constitutionality of a statutory provision, it is not good practice or prudent for another judge to purport to reach a different conclusion or to delve on whether the interpretation or conclusion was legally sound or not.

12. The best course of action is to request for a larger bench of the same Court to relook at the statutory provision, or to prefer an appeal.

13. The employer's application is largely predicated on a statutory provision in which the Principal Judge has rendered himself and in my view, it would not be appropriate for me to render myself on the question as a single judge.

14. Further, in the view of this Court, there is need for certainty and consistency in interpretation of statutory provisions alleged to be inconsistent with the supreme law to enable all persons/social partners to better organise themselves as far as competing rights and interests are in issue.

15. I would therefore direct that this Cause be placed before the Principal Judge to give further directions as to the next course of action, seeing as it is that the issue of strike(s) within sectors involved in essential services go beyond the 2 litigants herein.

16. Pending the directions by the Principal Judge, I would grant proposed order (c) in the motion dated 12 October 2016 but for a limited period of 45 days.

17. Cause to be mentioned before the Principal Judge on 8 December 2016.

18. Costs in the cause.

Delivered, dated and signed in Nakuru on this 2nd day of December 2016.

Radido Stephen

Judge

Appearances

For Employer	Mr. Masese, Senior Legal Officer, Federation of Kenya Employers
For Union	Mr. Katwa
Court Assistants	Nixon/Daisy