



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 89 OF 2015

KENYA NATIONAL UNION OF NURSES.....CLAIMANT

v

THE NANDI COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

THE ATTORNEY GENERAL (PUBLIC SERVICE COMMISSION)....2ND RESPONDENT

THE MINISTRY OF HEALTH.....3RD RESPONDENT

RULING

1. The Kenya National Union of Nurses (the Union) commenced legal proceedings against the Nandi County Public Service Board (1st Respondent), the Attorney General on behalf of the Public Service Commission (2nd Respondent) and the Ministry of Health (3rd Respondent) on 24 March 2015. The issue in dispute was stated as *refusal to confirm into permanent and pensionable terms of employment of ESP staff on contract*.
2. Together with the Memorandum of Claim, the Union filed a motion under certificate of urgency seeking

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(2). THAT, pending the hearing and determination of this Application, this Honourable Court be pleased to issue an interim order restraining the 1st Respondent from further altering the Terms of Employment of ESPs staff to their disadvantage until further directions of the court.

(3). THAT, pending the hearing and determination of this Application, this honourable Court be pleased to issue an Interim order restraining the 1st Respondent from interviewing, selecting and or employing new staff from outside the service to the exclusion of the ESP health workers.

3. The Court certified the motion urgent and directed that it be served for *inter partes* hearing on 27 March 2015.
4. During submissions at the *inter partes*, the Union indicated that prayer 3 of the motion had been overtaken by events and it was abandoning it. For examination therefore is prayer 2 of the motion.
5. The 1st Respondent filed a replying affidavit to the motion on 27 March 2015.
6. There is no affidavit of service on record to show whether the 2nd and the 3rd Respondents were served with the motion or whether Notices of Summons were issued.
7. The Union's case is that the 3rd Respondent employed nurses under the Economic Stimulus Programme and some were seconded to the County Government of Nandi in 2011 (other nurses

- were sent to the other counties).
8. According to the Union, the 3rd Respondent directed the County Governments to absorb into permanent and pensionable terms the ESP nurses but the 1st Respondent has not complied with the directive but continues to retain them on contract, though money for the absorption had been budgeted for.
 9. The Union contends that the nurses may lose their contracts on expiry in July 2015.
 10. The Union exhibited a letter dated 15 August 2013, in which the 3rd Respondent informed a Conciliator appointed to help resolve the dispute concerning the ESP nurses that the National Treasury had granted approval for the absorption of some 3,421 of the ESP nurses into permanent and pensionable terms of employment, leaving out some 6,759 who were to be considered later.
 11. The Union also exhibited a letter dated 24 January 2014 in which the 3rd Respondent requested the Governor, County Government of Nandi to introduce the ESP nurses on contract into the IPPD system and that they be absorbed into permanent and pensionable terms of employment.
 12. Mr. Yego took the 1st Respondent's case. According to the 1st Respondent, the present motion was filed prematurely and lacked merit.
 13. In the replying affidavit, it was deposed that the County Government of Nandi was in the process of recruiting health workers on permanent and pensionable terms of employment pending funding and staff rationalisation. The affidavit also deposed that the ESP nurses had contracts expiring in July 2015, and that they would be at liberty to apply once advertisements were made.
 14. The 1st Respondent further contended that there was no recognition agreement with the Union hence the suit was a nullity.
 15. In submissions on behalf of the 1st Respondent, Mr. Yego submitted that the Union had failed to satisfy the test for grant of injunctive relief as set out in the case of *Giella v Cassman Brown & Bros Co Ltd*.
 16. In a brief reply, Mr. Omulama, Industrial Relations Officer with the Union conceded that the Union and the 1st Respondent did not have a recognition agreement but that the ESP nurses were her members.

Evaluation

17. The present motion raises serious issues which merit articulation but which can only be properly examined at a full hearing. The Union has exhibited communication which suggests that the National Government had taken some policy decisions regarding the employment terms of the nurses recruited under the aegis of ESP.
18. At that time, it is not clear whether the health sector had been completely devolved.
19. The Court also notes that the suit raises issues of intra-governmental relations (National and County levels). These relations may be complex and may require alternative avenues for redress.
20. The 1st Respondent, through its Secretary has deposed that it is in the process of recruiting health workers and that the ESP nurses would be free to compete with others for the positions. That may not fully resolve the dispute in as far as those who may not be successful are concerned.
21. Ongaya J very recently in *Grace N. Makori & 176 Ors v Muranga County Public Service Board & 2 Ors* (2015) eKLR (delivered on 8 May 2015) dealt with a case where similar issues arose for determination. The Judge made reference to section 138 of the County Government Act and section 15(2) of the Sixth Schedule of the Constitution among others and declared that the ESP nurses in Muranga were entitled to be absorbed into permanent and pensionable terms of service.
22. Without endorsing as correct the position taken by Ongaya J, the Court is of the view that the Union has raised serious legal issues with a direct impact on the legal rights of the ESP nurses which require ventilation on the merits and before a decision is taken thereon, those rights need protection on the interim.
23. The 1st Respondent also raised the issue of lack of a recognition agreement with the Union. The Court directs that this issue be ventilated during the hearing of the main Cause.

Disposition

24. The Court therefore grants order 2 of the motion.

25. Further, the Court directs that all the Respondents file their Responses and documents to be relied on within the next 21 days so that the Cause can be set down for hearing on the merits.

26. The Union is also directed to file affidavits of service to confirm service of Summons upon the Respondents.

27. The costs of the motion to be in the cause.

Delivered, dated and signed in Nakuru on this 15th day of May 2015.

Radido Stephen

Judge

Appearances

For Claimant: Mr. Omulama, Industrial Relations Officer, Kenya National Union of Nurses

For 1st Respondent: Mr. Yego, instructed by Z.K. Yego & Co. Advocates

2nd Respondent: No appearance

3rd Respondent: No appearance

Nixon: Court Assistant