



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

ELRC CAUSE NO. 244 OF 2015

KENYA NATIONAL UNION OF NURSES.....CLAIMANT

VERSUS

- 1) THE COUNTY GOVERNMENT OF MOMBASA**
- 2) MOMBASA COUNTY PUBLIC SERVICE BOARD**
- 3) THE PUBLIC SERVICE COMMISSION..... RESPONDENTS**

RULING

INTRODUCTION

1. The Notice of Motion before the court is dated 17.4.2015 and it is brought by the Claimant, a trade union on behalf of her members (grievants) who are employees of the Respondents within Mombasa County under a special arrangement called Economic Stimulus Program (ESP). Under the ESP the grievants were employed on 3 years contract. The employment under ESP was a national program which commenced before the promulgation of the new Constitution of Kenya in August 2010. The effect of the new constitution was the devolution of health services from the National Government to be a function of the County Government. Consequently and forthwith the ESP health workers including the grievants who thereto served in the area which is now County of Mombasa were to be transferred or seconded to the 1st & 2nd Respondent.

2. On 30.7.2014, the 4th Respondent forwarded a list of 90 ESP staff to the 1st Respondent and advised her to continue paying the said officers by vouchers pending transfer of the officers pay roll to her for absorption. On 24.4.2015 the 1st Respondent forwarded the list of the ESP staff to the 2nd Respondent to process the absorption of the said staff into the county payroll. In the meanwhile, the 1st and 2nd Respondents advertised vacancies for recruitment of 50 nurses on 12.12.2014 and 13.1.2015. The 50 positions were for permanent and pensionable contracts. The grievants were offended by the said advertisement because the Respondent should have given them priority over any other new recruits since that was the intention of the 3rd and 4th Respondents before the devolution of the Health Services to the counties. The 1st and 2nd Respondent denied any wrong doing and maintained that the said advertisement was intended to recruit a special cadre of nurses to render services in the theatres of which the grievants were free to apply for the a competitive recruitment.

3. The main issue for the determination at this stage is whether a conservatory order should issue to restrain the Respondents from recruiting new nurses before first absorbing all the grievants into the country payroll on permanent and pensionable basis. After considering all the materials placed before the court, a conservatory order is warranted as prayed pending the hearing and final determination of the main suit. The motion was disposed of by written submissions by the Claimant by the 1st and 2nd Respondents of which the counsel highlighted in court on 25.6.2015. The 3rd and 4th Respondent did not however file any defence to the suit or the interlocutory motion.

CLAIMANT'S SUBMISSIONS

4. Mr. Koech prosecuted the motion on behalf of the Claimant. He relied on the pleadings and the supporting affidavit to pray for the interlocutory order to restrain the Respondent from recruiting fresh nurses before first absorbing the grievants on permanent and pensionable terms. The counsel submitted that some ESP nurses have since been absorbed into the county payroll but on 12.12.2014 and 13.11.2015, the 1st and 2nd Respondents advertised vacancies for 50 nurses instead of just absorbing the grievants who were already in county payroll on permanent basis. According to the counsel, the grievants should have been given priority whenever employment chances with better terms occurred in the public service. However the grievants contracts were merely extended in the terms which were inferior to those staff who are employed on permanent and pensionable basis. The grievants are apprehensive that their contract under the ESP arrangement can be terminated after new nurses are employed on permanent and pensionable basis and as result suffer irreparable harm. According to the grievants the extension of the ESP contract instead of absorbing them in the county payroll on permanent and pensionable basis is unfair labour practice within the meaning of Article 41 of the Constitution.

5. The counsel further submitted that the Claimant has proved a *prima facie* case with high chances of success as this court in **Grace N. Makori and 176 others vs Muranga County Public Service Board & 2 others** and **ELRC No.89 of 2015 Kenya Union of Nurses Vs Nandi County Public Services Board & Others** had granted similar conservatory orders as herein sought.

6. Finally the Claimant has submitted that if the court is in any doubt, it should determine the motion on a balance of convenience. According to the Claimants, the balance of convenience is tilted in favour of the grievants who are already in the payroll of the county government. In the Claimant's view if the order sought is denied the grievants might lose their employment and which in effect would destroy the substratum of the suit before its determination on merits. Consequently, the Claimants prayed that the Respondent s be restrained from recruiting fresh nurses before first absorbing the grievants and in the unlikely event that any new nurses have already been recruited the court to bar them from taking office.

1ST AND 2ND RESPONDENTS SUBMISSIONS

7. Mr. Mwachenje learned counsel for the 1st & 2nd Respondent highlighted on the replying affidavit and the written submissions and asked the court to dismiss the Claimant's motion. He submitted that the motion has not met the three essential requirement for granting *interlocutory* injunctions was stated in **Giella vs Cassman Brown & Co. Ltd.** being *prima facie* case with probability of success, irreparable harm and Balance of convenience. According to the counsel the main issue in this case is the absorption of the grievants by the 1st and 2nd Respondent on permanent and pensionable terms before recruitment of any other new nurses.

8. Mr. Mwachenje confirmed that his clients did advertise 50 vacancies for recruitment of nurses. That the intended 50 nurses were a special cadre of nurses called Peri-Operative nurses to work in theatres. That because the advert did not specify that only Peri-Operative nurses were needed, the grievants misinterpreted it to mean that the 1st and 2nd Respondent were not willing to absorb them as their staff on permanent basis. The counsel however submitted that his clients are willing to absorb the grievants on permanent basis after completing an audit on their specialty and once funds are transferred from the National Government. He cited **Article 187 (2)** of the constitution that provides that funds shall be transferred alongside the devolution of a function. He contended that the 1st and 2nd Respondents were

pursuing transfer or allocation of funds from the National Government to enable them to employ the grievants permanently. In that regard the counsel submitted that in the *Grace N. Makori case*, supra, the court gave the county Government time within which to budget and look for funds from the National Government for purposes of employing the ESP nurses. The counsel concluded by agreeing that the Replying Affidavit confirms that the county Government herein, has budgeted for hiring of the grievants and it was waiting for allocation of funds.

REJOINDER BY CLAIMANT'S COUNSEL

9. Mr. Koech learned counsel for the Claimant denied that the advertisement in dispute was for a special cadre of nurses as contended by the Responded counsel. He further submitted that the grievants' contracts were about to lapse and indeed some had already expired and as such the grievants stood to suffer irreparable harm. He further denied that the grievants had been given any Pin Numbers as alleged by the defence counsel. He concluded by maintaining that in *Grace N. Makori Case*, the court directed the County Government to absorb the ESP nurses on permanent and pensionable terms from the date of expiry of their contracts.

ANALYSIS & DETERMINATION

10. There is no dispute that the grievants are members of the Claimant Union. There is also no dispute that the grievants were employed by the 3rd & 4th Respondent under ESP until they were transferred to the 1st and 2nd Respondent after the promulgation of the 2010 constitution. There is further no dispute that the 1st and 2nd Respondents are ready and willing to absorb the grievants on permanent and pensionable basis after completing the ongoing exercise of evaluation of their abilities, and immediately the funds they have budgeted for the said absorption are allocated by the National Government under **Article 187 (2)** of the constitution. Lastly there is no dispute that in December 2014 and January 2015, the 1st and 2nd Respondent did advertise vacancies for recruitment of 50 nurses before first absorbing the grievants on permanent and pensionable basis. The issues for determination is whether the motion herein has met the threshold for grant of the conservatory orders sought pending the hearing and determination of the main suit.

Threshold for grant of Conservatory Injunction or Prohibition.

11. The law in relation to grant of interlocutory injunction in Kenya remains largely case Law: The prerequisites for grant of interlocutory injunction were by the *Court of Appeal in C.A.C.A No. 51 of 1972 Giella vs Cassman Brown & Co. Ltd. [1975] E.A. 358* at page 360 as follows:

- (a) The applicant must show a *prima face* case with a probability of success.**
- (b) Applicant must prove that he will suffer irreparable injury unless interlocutory injunction is granted.**
- (c) If the court is in doubt, it will decide the application on a balance of probability**

The question that arises is whether the Claimant herein has met the foregoing conditions.

Prima Facie

12. *In ELRCC No. 88 of 2015, Paul Kamau Maina & Others vs Kenya Civil Aviation Authority*, this court cited the decision in *Mrao Limited vs First American Bank of Kenya [2003] KLR 125* where it was held that:

“...a prima facie case in a 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...”

This court continues to hold the foregoing view that, the applicant for interlocutory injunction must not only show that he has an arguable case but must also prove that a legal right has been infringed or is about to be infringed on by the defendant.

13. In this case the grievants were employed on fixed term contracts by the 3rd and 4th Respondents under ESP arrangement before being transferred to the 1st & 2nd Respondent under the new constitution. Their contracts have been extended on short term basis pending a process of the grievants absorption by the county government on permanent and pensionable basis as it has happened to some of their ESP colleagues in Mombasa County and other counties country wide. In that regard the grievant have a genuine and reasonable expectation of employment in such permanent terms. Indeed the 1st and 2nd Respondent have admitted that they are ready and willing to absorb the grievants on permanent basis once the exercise of evaluating their specialty is concluded and the budget for such hiring is funded by the National Government. They have even cited the ***Grace N. Makori case*** where the court allowed the count Government of Muranga time to secure funding for purposes of absorbing the ESP nurses on permanent basis.

14. This court is satisfied that the Claimant has not only shown that she has a genuine and arguable case but also that the grievants right to fair labour practice and good terms and conditions of service are about to be infringed by the intended recruitment of 50 new nurses on permanent basis. The reason for the foregoing is that by recruiting the new 50 nurses on permanent basis the grievants will probably have their short term contracts of service either terminated or not renewed. In addition this court sitting at Nyeri in the ***Grace N. Makori Case*** has already made declaration that it is unfair Labour practice and violation of the Constitution for the Respondent to deny the ESP staff permanent employment. It has also not been denied that only a few counties including Mombasa have not yet absorbed the ESP nurses on permanent basis. The grievant have therefore a right to reasonable expectation of being absorbed by the county government on permanent basis before any other reason who has not been working there.

15. In this court's view there is no justification in the contention by the defence that the advertised vacancies were not the ones occupied by the grievants but for Peri-Operation nurses. The Court has considered a copy of the advert albeit not clear and saw nothing on it including the job description that shows that the vacancies were for Peri-Operation nurses which could not be filled by the grievants. Likewise there is no justification in the contention that the county lacks funds. The truth is that the country has money to employ 50 “Peri-Operation nurses” after reallocating the money meant for hiring of county administrators. The view held by the Claimant is that the money available should be used to give the grievants the first priority. That view by the Claimant is genuine and arguable on the merits during the hearing. Consequently the court find on a balance of probability that the Claimant has proved a *prima facie* case with probability of success.

Irreparable Harm

16. The Claimants has submitted that some grievants' contracts have expired while others are about to expire. If not protected the grievants will suffer injury in circumstances that are not clear whether or not they will get any separation gratuities. Looking at the contracts annexed to the pleadings, there is no such benefits provided for. They will also lose their expectations to serve in the Public Service not for any other reason but that other new nurses will displace them. Consequently the court finds on a balance of of probability that the grievants are likely to suffer injury which may not be adequately remedied by damages if injunction is denied at this stage.

Balance of Convenience

17. The Claimant has submitted that the balance of convenience favours the grievants who are already in employment under the ESP. According to the Claimant, if conservatory order is not granted, the grievants may lose their employment and as such destroy the substratum of the suit. The court agrees with that contention by the Claimant. If the grievants lose their jobs before the trial is complete, the suit

will be rendered moot and therefore nugatory in the event the suit succeeds after trial.

18. Consequently the court is satisfied that the Notice of Motion meets the threshold for granting of conservatory injunction pending the hearing and determination of the suit and it is allowed to the extent that 1st and 2nd Respondents are restrained and prohibited from hiring any other nurses on permanent and pensionable terms before first absorbing the grievants in such terms pending the hearing and determination of the suit herein. In addition to the foregoing, if in the unlikely event that the Respondents have already recruited other nurses as advertised in December 2014 and January 2015, the Respondents are restrained from allowing the said new nurses from assuming office before first absorbing the grievants on permanent and pensionable terms pending the hearing and determination of the suit herein. The effect of this ruling is that all the grievants shall continue being in employment under same terms of the ESP contract or such other better terms as may be agreed pending the hearing and determination of this suit whether the grievants' respective contracts lapse before then or not.

DISPOSITION

19. The Notice of Motion dated 17.4.2015 is allowed to the extent stated above Costs of the Motion shall be in cause.

It is so ordered.

Dated signed and delivered at Mombasa this 31st day of July 2015.

O. N Makau

JUDGE