



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 541 OF 2015

KENYA NATIONAL UNION OF NURSES CLAIMANT

VERSUS

KIAMBU COUNTY PUBLIC SERVICE BOARD RESPONDENT

THE HON. THE ATTORNEY GENERAL ACTING FOR

THE MINISTRY OF HEALTH 2ND RESPONDENT

THE PUBLIC SERVICE COMMISSION 3RD RESPONDENT

RULING

1. Notice of Motion Application dated 12th May 2015 and filed on the same date seeks for orders:

(ii) that an interim order be and is hereby issued restraining the 1st Respondent from altering the Terms of employment of M/s Eunice Mwangi, the Grievant herein to her disadvantage.

(iii) that an interim order be and is hereby issued directing the 1st Respondent to release the withheld salary and allowance of M/s Eunice Mwangi immediately with effect from November 2014 to March, 2015 and the increment she is entitled to as per her letter of appointment dated 11th August 2014 amounting to Kshs.338,407.10.

(iv) That an interim order be and is hereby issued directing the 1st Respondent to revert her name to the Kiambu County payroll until further directions of this Honourable Court.

2. The Application is based on the grounds set out in the Notice of Motion as follows;

- i. the aforesaid interim orders were granted by the Court on 7th April 2015 pursuant to a notice of application filed on 2nd April, 2015.
- ii. that despite the issuance and service of the orders upon the Respondents, the said Respondent have refused / failed and / or ignored the aforesaid orders and continue to defy the same with impunity.
- iii. that the Respondents herein acted in a manner that is contemptuous of the dignity of the Court.

3. Meanwhile, the 2nd and 3rd Respondents have on 7th May 2013 filed Grounds of Opposition dated 30th April 2015, to the effect;
 - i. that there is misjoinder of Respondents herein;
 - ii. that no specific orders have been sought against the 2nd and 3rd Respondents herein and as such, their names should be struck out of this claim.
4. The suit is against the County Government of Kiambu, whereas the 2nd and 3rd Respondent being The Hon. The Attorney General and The Public Service Commission are institutions dealing with the National Government and have no connection to the dispute between the Union on behalf of an employee of the County Government and the County Government regarding terms and conditions of service.
5. The Court has perused the 4th Schedule Part II of The Constitution of Kenya, 2010, and is satisfied that, County Health Services, under which the Grievant services is a function of the County Government.
6. That The Constitution of Kenya, 2010, under **Article 156(4)** provides;
7. *“The Attorney General –*
 - a. *is the Principal Legal Adviser to Government;*
 - b. *shall represent the National Government in Court or in any other legal proceedings to which the National Government is party, other than criminal proceedings;”*
8. With regard to the Public Service Commission, the Court has perused the pleadings and is satisfied no specific orders are sought against it.
9. The Public Service Commission is established under **Article 233** of The Constitution of Kenya, 2010, and its mandate under **Article 234(2)** includes the power to;
 - i. establish and abolish offices in the Public Service; and
 - ii. appoint persons to hold or act in those offices, and to confirm appointments.
10. It has been held, which holdings the Court concurs with, that all Independent Commissions form part of the National Government.

In this regard, though no specific orders are sought against the Commission, the Grievant is a public officer and therefore the Public Service Commission has a role in the establishment of offices in the County Governments and deployment of officers to those offices.

This is the connection the Commission has to this dispute, hence the representation by The Hon. The Attorney General.

11. The objection with regard to the 2nd and 3rd Respondents is not upheld therefore.

Response by the County Government

12. The 1st Respondent filed Grounds of Opposition dated 6th May 2015, on 7th May 2015 to wit;
 - i. that **Section 77(2)** of the County Governments Act No. 17 of 2012 provides that disputes of the nature filed by the Claimant / Applicant shall in the first instance lie as an appeal with the Public Service Commission.
13. That the Claimant / Applicant has thus failed to follow the statutory laid down procedure and the suit has therefore been filed prematurely.
14. That the prayers in the Notice of Motion seek specific performance of a contract of service which prayers cannot be granted under common law.
15. That the suit as filed is frivolous, vexatious and otherwise an abuse of the Court process.

For this proposition the Court was referred to **Petition 3 of 2014, at Nakuru, between Nakuru County Government and Joseph Lenai**, in which A. Msila J. held;

“this reiterates that it is evident that the Applicant has not followed the set down process for redress as provided by the law and it is also evident that the recruitment exercise is still ongoing and that the Applicant’s right to publicly participate in the recruitment exercise is found to be still intact.”

16. There is a lot of case law on due process and this Court is guided by the Court of Appeal case of **Speaker of The Kenya National Assembly Vs. The Hon. James Njenga Karume C. Appl. No. NAI 92 of 1992 where Kwach, Cockar and Muli JJA** stated;

“..... that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed”

17. The 1st Respondent further filed a Replying Affidavit sworn by Justin N. Kimani, the Chairman Kiambu County Public Service Board.
18. The Respondent deposes that the Grievant was employed under the ESP Program and that subsequently she received a letter of offer dated 5th June, 2013 which placed the said Grievant under probationary terms for a period of one (1) year.
19. That the Kiambu County Public Service Board cannot offer employment on permanent and pensionable terms due to the fact that the County Pension Scheme has yet to be set up. However, the 1st Respondent will upon creation of the scheme, graduate terms of employees on contract into permanent and pensionable.
20. A letter from the County Assembly dated 13th April 2015 supporting its position is annexed and a joint communique on the County Pension Scheme is Annexed and marked KNKI.
21. That the continued failure on the part of the Applicant to execute the contract offered by the County Government has caused her name to be omitted from the County payroll as she is deemed to have left employment and or refused to take up the appointment.
22. That her terms have not been altered to her disadvantage as claimed because the Grievant has never been on permanent and pensionable terms but on contract terms.
23. That the Grievant has come to the Court with unclean hands as she has failed to disclose to the Court that she has refused to execute the contract that would see her be included in the payroll.
24. That the Application is frivolous, vexatious and otherwise a breach of law and that the same ought to be dismissed.

Determination

25. The fact of the matter is that the Court granted interim orders on 9th April 2015, in which it directed the 1st Respondent to release the withheld salary and allowances of the Applicant Ms. Eunice Mwangi immediately with effect from November 2014 to March 2015 and the increment she is entitled to as per her letter of appointment dated 11th August 2014 amounting to Kshs.330,407.10.
26. That an interim order was issued directing the 1st Respondent to revert her name to the Kiambu County payroll until further directions of the honourable Court.
27. It is common cause that the Grievant has continued to serve the 1st Respondent without receiving a salary.
28. Notwithstanding the pending dispute is to be resolved upon full hearing of the main suit, the 1st Respondent is obliged to obey the Court order.
29. The Court notes that the order was served on the State Law Office.

The said order ought to have been served directly on the 1st Respondent also.

30. The Court is satisfied that now the 1st Respondent is aware of the orders of the Court dated 9th April 2015, but instead of implementing the same pending the resolution of the main suit, the 1st Respondent seeks to justify the disobedience of the Court order dated 9th April, 2015, which it has not sought to be set aside.
31. The Court does not take kindly to this approach by the 1st Respondent which is in disregard of a Court order.
32. The Court upon a careful consideration of the rival arguments herein confirms the orders of the Court issued on 9th April 2015, pending the hearing and determination of the main suit, the Court being certified that a *prima facie* case has been established by the Applicant and that the Applicant is likely to suffer irreparable harm if the interim orders are not confirmed and implemented pending the hearing and determination of the suit.
33. Provided the Grievant has been and continues to provide services to the 1st Respondent, the balance of convenience is in favour of granting the interim orders sought.
34. The Court upholds the Application and directs;

That the ruling be served directly on the 1st Respondent who should immediately comply with the same failing which contempt proceedings to be instituted against the relevant officials of the Kiambu County Public Service Board jointly and severally.

Dated and Delivered at Nairobi this 3rd day of July, 2015.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE