



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION 13 OF 2015

MARY WANJIRU NDWIGA & 913 OTHERS PETITIONERS

VERSUS

THE PRINCIPAL SECRETARY, MINISTRY OF HEALTH 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. The Petitioners filed application dated 31st August 2015. This application came under Certificate of urgency upon which the Court issued interim orders directing the Respondents to pay the Petitioners due salaries from January 2015 to date. Matter was placed for mention and for further directions on 14th September 2015 when the parties appeared and the Respondent sought for more time to file their responses and report on compliance with the interim orders. The matter was further placed Further Mention and directions on 21st September 2015 when both parties appeared, the petitioner submitted that the Respondent had not complied and the Respondents submitted that they had not complied for the reasons that they had filed their application dated 18th September 2015 under Certificate of urgency.

2. Noting the matters at hand and the fact of non-compliance with the Court orders of 4th September 2015 by the respondents, the Court directed parties to argue the pending application by the petitioners. The Respondents filed application dated 18th September 2015 under Certificate of urgency. State Counsel on Record confirmed service upon the Respondents by the Petitioners was on 11th September 2015; a Replying Affidavit was filed on 18th September 2015; and the Respondents filed application dated 18th September 2015. What was due for mention and directions on 21st September 2015 is the petitioner's application dated 31st August 2015. The Respondents are yet to move the Court with their application dated 18th September 2015.

Petitioners' application

3. The petitioner are in Court with application dated 31st august 2015 seeking for orders that;

1. *Spent.*
2. *That the Court be pleased to grant an interim order that the 1st Respondent do deposit with the Court at the first 1st respondent's costs the January 2015 to august 2015 salary and allowances (less taxes) plus compound interest at commercial rates due on account of the Clinical Officers Interns (diploma level0 in service pending the hearing and determination of the application.*
3. *That the Court be pleased to order that upon being deposited in Court the salary be released to*

Onyoni Opini & Gachuba Advocates for the Petitioners as stakeholder to distribute to the Clinical Officers Interns (Diploma Level) in service and file returns in Court pending the hearing and determination of the application.

4. *That the Court be pleased to order that the 1st Respondent do deposit with the Court at the 1st Respondents costs the monthly salary (less taxes) in respect of the balance internship period on account of the Clinical Officers Interns (Diploma level) in service with effect from end of September 2015 pending the hearing and determination of the petition.*
5. *That the Court be pleased to order that upon being deposited in Court the salary effective September 2015 be released to Onyoni Opini & Gachuba Advocates for the petitioner's advocates as stakeholders to distribute to the Clinical Officers Interns (Diploma Level) in service in and file returns in Court pending the hearing and determination of the petition.*
6. *That the Court be pleased to grant any other appropriate relief it may deem fit to grant.*
7. *That the costs of this application be provided for.*

4. The application is supported by the annexed affidavit of Mary Wanjiru Ndwiga and on the grounds that in December 2014 the 1st Respondent posted the Interns to 76 internship hospitals in Kenya and placed them under job group H employees for one year and were entitled to a monthly salary and allowances thereof. The interns' salary and allowances are provided for in the financial statements for fiscal year 2014/2015 and for the year 2015/2016 which the 1st Respondent has withheld from January 2015 to August 2015.

5. Other grounds are that the 1st Respondent has discriminated against the Clinical Officers Interns (Degree level), nursing Interns and medical Officers Interns who are paid but the Petitioners are not paid. The petitioners are youths who are vulnerable and marginalised in society and require the court's protection from exploitation.

6. In the affidavit of Mary Wanjiru Ndwiga in support of the petitioner's application she avers that her affidavit is made for and on behalf of all the Petitioners herein. That the Petitioners as Interns were posted to 76 hospitals by the 1st Respondent and placed at job group H in the revised scheme of service for Clinical Officers employees for one year and are therefore entitled to a monthly salary and allowances. Such salary is provided for in the fiscal year 2014/2015 and 2015/2016 but these salaries have not been paid since January 2015 to date. Other Clinical Officer Interns (degree level) and nursing Officers and medical Officers Interns are paid but the Petitioners have been discriminated against as they are not paid. That As youth who are vulnerable, the Petitioners seek the protection of the Court against their exploitation.

7. On 4th September 2015 the Petitioners filed a Further Affidavit sworn by Mwaniki Gachuba who deposes that as counsel for the petitioners, this is a representative suit for the 914 Petitioners who are Clinical Officer Interns (Diploma level) in the Petition filed by Mary Wanjiru Ndwiga in such a representative capacity. The Petition is also filed in terms of Rule 9 of the Employment and Labour Relations Court Rules – the Industrial Court (Procedure) Rules, 2010.

8. In reply, the Respondents filed the Replying Affidavit of Dr. Khadijah Kassachoon the Principal Secretary Ministry of Health and avers that the application by the Petitioners is grounded on generalities, conjectures and suppositions in respect of the respondents. The 1st Respondent has not employed or engaged the Petitioners or any Clinical Officer diploma holder's Interns and hence cannot claim for payment of salary. That Clinical medicine diploma course program offered in Kenya and regulated by the Clinical officers' council established under the Clinical Officers (training, registration and licencing) Act requires students undergo a one year compulsory internship program in order to be registered as a Clinical officer.

9. Kassachoon also avers that the Ministry of Health in liaison with the Registrar of Clinical Officers only aids and facilitates the students in getting them placement for internship in the various health institutions. The internship opportunity offered does not amount or is not employment of the students but only meant to offer the students an opportunity to acquire the practical skills and exposure before

registration as Clinical Officers. The Petitioners therefore do not have any legal rights or constitutional rights that can be enforced against the Respondents or the government. The Revised Scheme of Service for Clinical Personnel dated March 2014 is not evidence that the Petitioners are entitled to a salary. The claims made by the Petitioners for a salary are erroneous and misguided and the orders thus sought are untenable in law as there is no demonstration of any case against the respondents. That the application by the Petitioners should be dismissed.

10. In the oral submissions of both counsels for the parties, the Petitioners submitted that the Petitioners have established a *prima Facie* case against the respondent's noting that they were issued with letters of posting in December 2013 to report to various stations and as employees of the 1st Respondent they are entitled to a salary and allowances which was set out in the fiscal budget for 2014/2015 and 2015/2016. Upon the Petitioners posting and being placed under job group H, they became employees as defined under section 2 of the Employment Act and thus have the right to claim as in their Petition for their due salaries and allowances. Unless such salaries and allowances are paid they will suffer irreparable damage that cannot be compensated in monetary terms.

11. The Petitioners also submitted that upon their posting by the 1st Respondent they received the Revised Scheme of Service as an indication that they have been offered employment and had been graded at job group H, Clinical Officers III. The 1st Respondent was conscious that there was an employment relationship with the Petitioners at job group H and despite their salaries being budgeted for, these have not been paid. The Treasury made a provision in the budget for such salaries and for this to be, the 1st Respondent must have submitted the budgetary proposal which received approval and an allocation made. The Respondents should therefore indicate where such funds are. That the Petitioners as youths are marginalised and prone to exploitation and should be protected by the court.

12. The Petitioners rely on the cases of **Mrao Ltd versus First American bank of Kenya Ltd & 2 Others, Court of Appeal (Mombasa), Civil Appeal No.39 of 2002; James Oduko versus Computer for School Kenya, Cause No.1437 of 2011; and Econet Wireless Kenya Limited versus The Minister for Information and Communication of Kenya & Another, Misc. Appl. 1640 of 2003.**

13. The Respondents on their part submitted that the orders sought by the Petitioners in their application are similar word for word as in their Petition and to grant such in the interim would be to deal with the Petition in its entirety. For the Court to grant as pleaded in the interim would be to place the Respondents at a hardship as once paid any salary as directed, the Petitioners would not be able to repay back where their Petition is found to lack merit.

14. That the letter of posting issued to the Petitioners is explicit and had no intention of creating any form of employment or that the Petitioners had been graded to job group H hence to be salaried. At the time of posting the petitioners, the 1st Respondent had no constitutional mandate or capacity to pay them as health was already devolved. Any salary claimed cannot be paid as this is too general and to direct for such payment would cause substantial hardship upon the respondents.

15. That the Petitioners should have attached copies of their pay slips stating what was due to them in payment. The government pays upon allocation of a staff number. There non-specification of what is due thus renders the Petition fatal and must fail. The budget statements presented by the Petitioners are general and once Treasury made a presentation in Parliament, there must be the approval of the *Appropriation Bill* for the 1st Respondent to get their allocation. This is not the case here. The scheme of service submitted was not approved by the Public Service Commission and the Petitioners cannot rely on it.

16. The Respondents also challenged the jurisdiction of the Court on the basis that there is no contract of employment, oral or otherwise to create an employment relationship between the parties and to warrant the current petitioner before this court. There is no evidence of the Petitioners receiving any payment of wages to warrant them to file the Petition before this court. Since January 2015 the Petitioners have not been paid, they suffer no prejudice where the orders sought are not granted.

Determination

Whether the Court has jurisdiction; and Whether the orders sought should issue in the interim.

17. To build clarity in this matter, I take great exceptions to the submissions made by State Counsel for the respondents. The facts stated in submissions are not correct, are misleading and negligent of such an officer. The Scheme of Service stated to be a draft has since been approved by the Ministry of Devolution an Planning and copied to the Public Service Commission, the letter and authority for the same is attached by the Respondents in their Replying Affidavit sworn by Dr. Kassachoon annexure “DKK-2” vide letter dated 24th March 2014 from the Principal Administrative Secretary, Juster Nkoroi. Such Scheme of service, Revised Scheme of Service for Clinical Personnel was to be implemented from March 2014 to assist in the *recruitment, deployment, retention and general development of Clinical Personnel*. Further, there is misrepresentation of facts with effect to budgetary planning, allocation and approvals from the respondent’s proposals to the Treasury and role of Parliament. The making and passing of the *Appropriation Bill* does not serve the purpose set out in the submissions of the State Counsel. Where no conversant avoid making such assertion. These do not foster the course of justice before this court.

18. Jurisdiction of the Court is challenged. The jurisdiction of the Court stems from the provisions of Article 41, 162(2) and (3) of the Constitution as well as from section 12 of the Employment and labour Relations Court Act and any other written law conferring jurisdiction. The Court under Article 41 of the Constitution is granted an inherent right to address constitutional violations with regard to employment and labour relations while under Article 162 of the Constitution the Court is established with original jurisdiction for address any case of employment and labour relations under any statute passed by parliament. In this regard section 12(3) of the Employment and Labour Relations Court Act give this Court exclusive jurisdiction to grant the following orders thus;

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

(i) interim preservation orders including injunctions in cases of urgency;

(ii) a prohibitory order;

(iii) an order for specific performance;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated under this Act or any written law;

(vi) ...

(vii) ...

(viii) any other appropriate relief as the Court may deem fit to grant.

19. Under the above provisions, where the court, on good grounds is presented with a claim, application or any matter stemming from an employment and labour relations, the constitutional and legal provisions and the jurisdiction conferred upon the court, can grant such orders in the interim or as final orders. Section 12(3) (viii) give the Court wide powers and the discretion upon good grounds and in the interests of justice to grant;

(viii) Any other appropriate relief as the Court may deem fit to grant.

20. These are provisions that the Court has to apply judiciously and upon good basis. Such is the case here where the claimant, moved the Court on 31st august 2015 and on 4th September 2015 when interim

orders herein were made. Such orders were issued on good foundation and on the principles now settled in the case of **Giella Vs Cassman Brown & Company Limited [1973] EA 358**. Having established a *prima facie* case for the grant of interim orders, and upon the Court finding sufficient reason to so grant, it cannot thus be said the Court lacked the jurisdiction to grant such orders.

21. The relationship between the parties herein and the matters leading to the Petition stems from the letters of *posting of Clinical Officer Interns* dated 23rd December 2014 is issued to the petitioners. The letter states;

THE MINISTRY OF HEALTH

OFFICE OF THE DIRECTOR OR MEDICAL SERVICES

...

TO: all the Medical Superintendents

Internship hospitals

RE: POSTING OF CLINICAL OFFICER INTERNS

The Ministry of Health supported the Clinical officers' Council to equal access of internship placement for Clinical Officers upon their college and Council exams.

In order to facilitate this exercise, the following Clinical Officer Interns have therefore been posted to your facility for the internship. I would also ask the Hospital to provide every support to ensure training and learning takes place as required by law.

All the candidates should report to the respective internship hospital by 12 January 2015. The hospitals returns should be sent to the Registrar, Clinical Officers Council for further action.

Director of Medical Services.

22. The Petitioners are therefore *stricto sensu* not students. They have completed their college and council exams and been *posted* by the 1st Respondent for placement as Clinical Officers for internship and awaiting the Council confirmation. The drafters of the Employment Act addressed such a scenario under section 2 of the Employment Act and indeed Parliament passed it with approval when an 'employee' was defined to include such an intern, learner, bonded or a salaried person;

'Employee' means a person employed for wages or a salary and includes an apprentice and indentured learner.

23. Such a definition did not stop at a person who receives 'wages or a salary' this is expanded to include those in *apprenticeship and indentured learners*. Such are persons in training, preparation or assist in the means of production or assist in the business development and earn a wage, a salary, allowance or token as they are indentured or bonded and in agreement that upon completion of such internship they full acquire full status of qualification and receive confirmation in their profession. Such is the case for all professionals in the health sector, legal sector and fiancé sectors just to list a few. Learners in apprentice and indenture are thus placed at a high responsibility to prove their worth by undertaking such duties under the tutelage of mentors or peers before the regulatory body approval and confirmation to the required status. For the role their play, such Interns such as the Petitioners were, they enjoy rights and benefits as they serve their master, employer or as the case might be.

24. The Petitioners are before the right court. They have established a good case that warrant the court's intervention. There are cited constitutional violations that the Court must address and by

addressing the interim orders sought, the Petition will not abet.

25. In this case, the posting of the Petitioners was by the Minister of health under the docket of the Director of medical Services. This cannot be said that as of 23rd December 2014, the 1st Respondent by error sent such introns to the hospitals to undertake their duties in ignorance of devolution and thus did not budget for the Interns to ensure each ... *Hospital to provide every support to ensure training and learning takes place as required by law.*

26. Under such directions, and in the context of current government planning and resource allocation and the responsibilities bestowed upon each public officer, state Officer and the principles governing such offices as under article 10 of the constitution, accountability and people participation is key. Upon making budgetary allocations and such submissions being presented to Parliament as the seat of the people's representatives, the *Budget Statement delivered to the National Assembly on 12th June 2014* and covering the period of 1st July 2014 to 30th June 2015, and the subsequent budget statement for the following financial year is not easy talk. This is a ministerial statement made to the National Parliament upon which there is a constitutional requirement and with Parliamentary approval, the 1st Respondent is supposed to cascade it down to the level of all sectors it cover including the Petitioners posted to *Hospital to provide every support to ensure training and learning takes place as required by law.* As such accountability requires that the amounts outlined by the Minister for National Treasury setting out at paragraph 3.3 *Investing in Quality and Accessible Health Care*, and with it clearly allocating the sum of Ksh.2.4 Billion for *Doctors/Clinical officers/nurses internship programme*, this sets the clear framework for the demands and current petition.

27. Without proper accountability and outline on the expenditures going into the allocations the Minister for National Treasury made and received approval by Parliament as going for the investment in quality an accessible health care, where the Petitioners were posted, the Respondents must render such an account. The duty vested upon the Respondents is not to wish the matter away as the posting of the Petitioners was done by the 1st Respondent in pursuance of the mandate vested upon this office and in the furtherance of such a duty, there exists good grounds to have that account rendered in terms and the dues owed to the petitioners.

28. The Petitioners are specific as outlined in the Petition all being 914. The Respondents have the means, capacity and duty to establish how such Interns should be facilitated and compensated for their posting. Where the Petitioners have continued with their internships as outlined by the Director of Medical Services for the 1st Respondent and indeed the receiving *Hospital to provide every support to ensure training and learning takes place as required by law* the Medical Superintendents have had the services of such interns, by the duty vested upon such offices and upon the respondents, the Petitioners are entitled to their claim for a salary, allowances or both combined.

29. I find there exists a legitimate expectation on the part of the Petitioners as Interns who have been posted to the various hospitals by the 1st Respondent to enjoy the facilities and resources placed at their disposal and set aside for their benefit. In an open and democratic society, I find such expectation as valid and require the action of the respondents. For the 1st Respondent to simply state that there exists scheme of service that do not include a salary for the Petitioners without setting out how such public resources outlined in the fiscal statements approved by Parliament for their use and application while *Investing in Quality and Accessible Health Care* and hence the implementation of the interns programme, is to escape responsibility. There exists an allocation of Ksh.2.4 billion for the purpose of the programme and in this regard the posting of the Petitioners. The 1st respondent, carry a mandate beyond the individual. This is a public office, held for and on behalf and for the benefit of the people of Kenya and whatever resources are allocated, when called upon, accountability is required.

30. The application is that since their posting the Petitioners have not received any salary or allowances. There exists no pay slips upon which such a salary or allowance can be assessed at this point. But the court is not left without a mechanism to enforce compliance. For the Respondents to require the Petitioners to produce such a pay slip so as to qualify/warrant the grant of the orders sought is simple

highhandedness. Such bureaucracy does not aid justice. It only protracts the matter by making the ends of justice a mirage. This is not the purposes for which this Court exists. To make such a demand upon the Petitioners is the injustice.

31. The Respondents carry a public duty towards the officers, Interns and staff under their care, employment and internship. Such responsibility include the facilitation and support necessary for the Interns posted in the 1st Respondent facilities. The Respondents cannot collectively run away from such duty and responsibility. There is a duty to render an account. Not just to the Petitioners but to the people of Kenya for whom resources have been placed at the hands of the respondents. This is the account that must be rendered here.

With the above outline, the list of the Petitioners now held by the respondents, noting the budgetary allocations made available to the 1st Respondent I direct as follows;

- a. **The Respondents shall render an account with regard to the Petitioners salary and allowances based on the Budgets made and approved by Parliament for the fiscal year 2014/2015 in terms of the orders made on 4th September 2015;**
- b. **Such account shall be rendered within 7 days;**
- c. **The Respondents shall file such accounts on or before the 1st day of October 2015;**
- d. **The Court shall proceed based on a) and b) above to direct as appropriate.**
- e. **Parties shall herein appear in Court on the 5th of October 2015 for such directions.**

Delivered in open court at Nairobi this 23rd Day of September 2015.

M. Mbaru

Judge

In the presence of:

Court Assistant.....

.....

.....