



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO CAUSE NO. 593 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 19th October, 2015)

KENYA NATIONAL UNION OF NURSES.....CLAIMANT

VERSUS

NAIROBI COUNTY GOVERNMENT.....1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

PRINCIPAL SECRETARY MINISTRY OF HEALTH.....3RD RESPONDENT

THE INSPECTOR GENERAL–NATIONAL POLICE SERVICE...4TH RESPONDENT

COUNTY CHIEF MEDICAL OFFICER – ROBERT AYISI...5TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....6TH RESPONDENT

RULING

1. There are four (4) applications for determination:

1. *The Claimant's application dated 13.4.2015.*
2. *The 1st Interested Party's Application dated 5.5.2015*
3. *Claimant's Application dated 11.6.2015*
4. *Claimant's Application dated 22.6.2015*

2. The Claimant in the Application seeks for prayers 2, 3, 5, 6, 7, 8, 10, 11, 12 to wit:

1. *That pending the hearing and determination of this Application inter-parties, this Honorable Court be pleased to make an order directing the County Government of Nairobi, County Chief Medical Officer – Robert Ayisi and the Cabinet Secretary for Health of County Government of Nairobi stopping them from Harassing, intimidating, assaulting either directly or through authorized agents (the Nairobi County Government Askaris), threatening to sack or threatening*

- to cause to be arrested the 186 nurses who are currently employed at Pumwani Maternity Hospital Nairobi until the issues and problems facing the said hospital are resolved.*
- 2. That pending the hearing and determination of this application inter-parties, this Honourable Court be pleased to make an Order directing the Inspector General – National Police Service, to provide security to the 186 nurses who are currently employed at Pumwani Maternity Hospital Nairobi or ensure their general safety and protect them from being attacked by the (Nairobi County Government Askaris), or members of the Public until further Orders of this Honourable Court.*
 - 3. That pending the hearing and determination of this Application inter-parties, this Honourable Court be pleased to make an Order directing the County Government of Nairobi, County Chief Medical Officer – Robert Ayisi and the Cabinet Secretary for Health County Government of Nairobi, the Principal Secretary Ministry of Health stopping them from victimizing any Hospital staff, Nurses who either went on strike or the sit-in on the issue of JW babies issue.*
 - 4. That pending the hearing and determination of this Application inter-parties, this Honourable Court be pleased to make an Order directing that a return to work formula be drawn between the nurses and the Hospital Management and the current status quo be maintained until the return to work formula is implemented.*
 - 5. That pending the hearing and determination of this Application inter-parties, this Honourable Court be pleased to make an Order directing the County Government of Nairobi, County Chief Medical Officer – Robert Ayisi and the Cabinet Secretary for Health of County Government of Nairobi stopping them from harassing, intimidating, assaulting either directly or through authorized agents (the Nairobi County Government Askaris), threatening to sack or threatening to cause to be arrested the 186 Nurses who are currently employed at Pumwani Maternity Hospital Nairobi until the issues and problems facing the said Hospital are resolved.*
 - 6. That pending the hearing and determination of this Application inter-parties, this Honourable Court be pleased to make an Order directing the Inspector General – National Police Service, to provide security to the 186 Nurses who are currently employed at Pumwani Maternity Hospital Nairobi to ensure their General safety and protect them from being attacked by the (Nairobi County Government Askaris), or members of the Public until further orders of this Honourable Court.*
 - 7. That pending the hearing and determination of this Application inter-parties, this Honourable Court be pleased to make an Order directing the Inspector General – National Police Service to appoint the requisite police officers to investigate the allegations of swapped babies belonging to JW and DM and file the report in Court within such a reasonable time as may be ordered by the Court.*
 - 8. That pending the hearing and determination of this Application inter-parties, this Honourable Court be pleased to make an Order directing that a return to work formula be drawn between the nurses and the hospital management and the current status quo be maintained until the same is implemented.*
 - 9. That pending the hearing and determination of this Application inter-parties, this Honourable Court be pleased to make an Order directing the County Government of Nairobi, County Chief Medical Officer – Robert Ayisi and the Cabinet Secretary for Health of County Government of Nairobi, the Principal Secretary Ministry of Health stopping them from victimizing any hospital staff, Nurses who either went on strike or the sit-in on the issue of JW babies issue.*
3. The Application is supported by the grounds on the face of the Application. The Applicant states that there was a publication in the media on the issue of swapping babies belonging to JW which sparked public outrage as a result of the false accusation levelled against the nurses. As a result of

the accusation and publication members of the public were very incited against the nurses of Pumwani Hospital and consequently on 7.4.2015, at 2.30 am, a group of 20 – 30 men stormed the hospital and told nurses on duty that they will rape and beat them because they are thieves stealing babies. A nurse by the name MW was injured in the process.

4. The incident was reported to Shauri Moyo police station but there was no immediate response and nurses had to escape through gate B of the hospital. The 5th Respondent ordered the nurses to come to work but they could not because of fear. The public has been brain washed to believe nurses at Pumwani steal babies. The Claimant submits that there is insecurity at Pumwani Maternity Hospital which made the nurses to run out of the hospital in fear of their lives. The Claimant seeks for their Application to be allowed.
5. The next application by the Claimant is dated 11.6.2015, where the Claimant seeks for prayers that the 1st Respondent to continue paying the salaries of the 186 nurses employed at Pumwani Maternity hospital and to withdraw the Notice to Show Cause issued to the said nurses and to explain why the Notices to show cause were issued. The Claimant contends that the 1st Respondent has denied the nurses salaries for the months of May, June and July 2015 and has attached pay slips as Annexure SO2.
6. The Claimant also states that there is a Court Order of 7.4.2015, stopping the 1st Respondent from victimizing, arresting, threatening to sack or sacking the nurses. This was because of the incidence of 7.4.2015 at 2.30 am when the nurses had to run away for of their lives and the 1st Respondent threatened to sack them. To date the 1st Respondent being an occupier within the meaning of Sections 2, 6 and 8 of the Occupier Safety Health Act has not made any efforts to provide security for the nurses. The Orders were extended from time to time but the Respondents disobeyed them by continuing to issue Notices to Show Cause to the nurses. The nurses were also issued with suspension letters which was also in disobedience of the Court Orders.
7. The third Application by the Claimant is one dated 22.6.2015 seeking to cite the Respondents for contempt of Court Orders which they are well aware of. The Order was duly served and the Respondent has disobeyed the said orders by suspending the nurses and withholding their salaries. To date no efforts have been made to rectify the situation. Claimant seeks for the Prayers sought to be granted.
8. In response to the submissions by the Claimant the 1st Respondent filed a Replying Affidavit sworn by the Acting County Secretary stating that the Orders sought are not tenable. That the Orders sought could only be enforced by the 4th Respondent. The allegation that the 1st Respondent sent County Askaris to beat up the nurses is not true since it is a criminal act and as such a report should be made to the Police since this Court cannot be asked to investigate assault. The 1st Respondent's position is that the Orders granted are being misinterpreted by the Claimant to mean that the County Government is stopped from disciplining the nurses. It is for this reason that the 1st Respondent has filed an Application to set aside the interim Orders. The Orders given are blanket Orders touching on 186 nurses whereas only 51 nurses are on strike.
9. The Respondent also states that the Claimant has sued the County Chief Medical Officer in his personal capacity and as such any Order granted against him should be vacated.
10. On the second Application by the Claimant seeking payment of salaries and recusal of the show cause letters. The 1st Respondent states that there is another Petition 35 of 2015 filed in this Court where they sought stopping of the strike which the Court granted on 20.4.2015 which the Claimant disobeyed and currently there are pending proceedings in Court against the union officials.
11. On the issue of insecurity at Pumwani Maternity Hospital the 1st Respondent states that it has addressed it by deploying armed policemen on 9.4.2015. Since there is no legal strike ongoing

then the Claimant's members have been absenting themselves from work. This according to the 1st Respondent is an act of gross misconduct. The 1st Respondent issued Show Cause letters to the nurses which they have failed to respond to date.

12. The Respondent relies on section 80 of the Labour Relations Act allows the employer to withhold salaries while the employees are on strike and in this case the employees do not deserve salaries for absenting themselves from work and for participating in a strike. The Respondent also relies on Section 55 (b) of the County Government Act which empowers the County Public Service Board to exercise disciplinary control over those in their employment.

13. In response to the Application dated 22.6.2015 the Respondents put in a replying Affidavit sworn by the County Chief Officer, County Public Management on 20.7.2015. The Respondent avers that it issued Show Cause Letters to the claimant's members who failed to reply to them and this subsequently led to their suspension. The Respondent is of the view that if the officers are cited for contempt then this would be tantamount to gagging the officers from performing their duties.

14. The Respondent urges Court to dismiss the Application of 22.6.2015 as it is not based on legal or factual grounds but on a misinterpretation of a Court Order.

15. The 2nd, 3rd, and 4th Respondents have filed grounds of opposition and state that they have been improperly joined in these proceedings for the reason that under the 2010 constitution, health services are devolved and they fall under the ambit of the 1st Respondent and not on the 2nd Respondent. Further that the Orders of 17.4.2015 were not in any way directed to the 2nd, 3rd, and 4th Respondents. They relied on Article 152, 155 and 156 of the Constitution and Section 5 of the Attorney General Act which are to the effect that the AG represents the National Government and not the County Government.

16. The Claimant on the other hand is of the view that the nurses were employed by the 2nd Respondent and seconded to the 1st Respondent. The nurses, according to the Claimant are still under the Ministry of Health and as such the 2nd, 3rd, and 4th Respondents are properly joined in the proceedings. The Claimant states that the Respondent has not provided any proof to show that only 51 nurses are on strike. The 5th Respondent is sued as an official of the County Government who acted on its behalf.

17. The Claimant states that the nurses have not refused to go back to work for no apparent reason it's just that Pumwani is not a safe working environment. The first Respondent refutes this allegation and contends that it has provided armed security for both day and night and saying that the Hospital is insecure is untrue. Other workers including doctors are on duty.

18. Having considered submissions by the parties, issues for determination by this court are as follows:

1. ***Whether the 2nd, 3rd, 4th & 5th Respondents are properly enjoined in this case.***
2. ***Whether the Respondents have disobeyed this Court's order to warrant punishment for contempt.***
3. ***What order the Court can give in the circumstances.***

19. On the 1st issue, the Respondents submitted that it was improper for the Applicants to enjoin the 2nd, 3rd and 4th Respondents who are officers of the Central Government given that health functions have since been devolved to the Counties. They also stated that the interim orders given by this Court were not in any way directed to the 2nd, 3rd, and 4th Respondents. By extension they also submitted that the Attorney General the 6th Respondent represents the National Government

and not the County Government.

20. It is true that the Public Service Commission, and Permanent Secretary, Ministry of Health may not deal directly with issues of the County Government but the Permanent Secretary, Ministry is the overall accounting officer of all health functions in the Country and cannot by any means decline to address issues of concern in a health institution because they are in the Counties.

21. The Public Service Commission is the overall employer of all Civil Servants. By virtue of the old constitution, the Public Service Commission employed some if not all the Claimants members who they have now seconded to the Counties.

22. Section 73(1) of the County Government Act 2012 provides that:

“(1). The national Government shall put in place measures to protect its public officers on secondment to the Counties from loss or disadvantage with respect to revenues, benefits, gratuity or other terminal benefits.....”

The entire section deals with secondments of public officers to the Counties and since the true position of the Claimants members is not clear, it would be in the interest of justice to have Public Service Commission on board to protect their interests.

23. In relation to the Attorney General, Section 43 of County Government Act 2012 provides that:

“A County Government may, pursuant to Article 156(4) of the constitution request the Attorney General to represent the County Government in Court or in any other legal proceedings to which the County Government is a party other than in criminal proceedings”.

24. This section envisages a position where the Attorney General could represent the County Government if need be. In the instant case, the issues of security which are said to have been transferred with fall under the Central Government and the presence of the Attorney General is a welcome position.

25. It is therefore the finding of this Court that the 2nd, 3rd and 4th Respondents are properly enjoined in this case.

26. As to the 5th Respondent, the Applicants have not specifically pleaded what his role in this case as in relation to orders sought. Given that the 1st Respondent is a party to this case and the 5th Respondent is an employee of the 1st Respondent, it is improper to have him sued in his personal capacity.

27. I therefore strike the 5th Respondent from this proceedings with costs to him.

28. On the 2nd issue of disobedience of this Court's orders, this Court gave orders on 16/4/2015 in terms of prayer 1 and 2 vide the Claimants applications dated 22/6/2015, the Claimants sought to cite the Respondents for contempt of Court orders for which they are well aware of. The officers of 1st Respondents sought to be cited are Leboo Ole Morintat – County Chief Officer Public Service Management, Bernard Muia – Health Executive and County Chief Medical Officer, Robert Ayisi for disobeying Court orders issued on 17th April 2015. The Applicants aver that the said contemnors are said to have disobeyed this Court's orders by suspending nurses and withholding their salaries.

29. There are 2 issues to determine here- whether the cited officers were in contempt of the Court Orders and (2) whether they committed any acts or omissions in disregard of the Court orders.

30. On the 1st issue there is no proof by the Claimant Applicants that the said officers were served

with the court order of 17/4/2015. It is apparent that the Litigations Department of 1st Respondent were served with the Court Order as per the documents attached to the application. In the case of ***Prof. Mwaniki Silas Ngari vs. Prof. John S. Akama & Another***, I discussed the issue of service of court orders and had cited the ***Wambora case*** which stated that the law now is the knowledge of court order is sufficient for purposes of contempt proceedings.

31.The Applicants have not even proved aspect of knowledge of the Court Orders by the alleged contemnors. It is therefore the finding of this Court that those cited for contempt had no knowledge of the Court Orders and the application to punish them for contempt is rejected.

32.The 2nd limb of the issue of acts/omission committee by the Respondent also came into consideration was the issue of writing letters of suspension to 53 nurses on 27/5/2015 and withholding their salaries, an issue covered by the Orders of the Court dated 16/4/2015?.

33.On 16/4/2015, I issued Orders in terms of prayer 1 and 2 and the orders do not in my view deal with suspension of the nurses nor withholding of their salary. The orders forbade the harassment, intimidation, assault of the nurses and it is this Court's finding that there was no act/omission committed by the contemnors in contravention of this Court's Order.

34.Having so stated and having considered all the 3 applications and the submissions made I find that the issue of security of workers is paramount and this must be provided not only by the 1st Respondent their employer but also the 4th Respondent.

35.The issue of harassing and intimidating the nurses is also an issue that must be discouraged at all time. This however does not take away the Respondents power to discipline errant employees whilst following due process.

36.I therefore order as follows:

1. ***Security of the nurses at Pumwani Maternity be enforced by the 1st Respondent and 4th Respondent.***
2. ***The parties are encouraged to engage in negotiations and conciliation to ensure proper resolution of this suit.***

37.The Order to remain in force until the main suit is dispensed with.

Read in open Court this 19th day of October, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Jaoko for Claimant – Present

Mutua for 1st and 5th Respondents – Present

Miss Akumu for Attorney General