



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 70 OF 2014

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE PRINCIPAL SECRETARY LABOUR.....2ND RESPONDENT

THE PRINCIPAL SECRETARY HEALTH.....3RD RESPONDENT

THE PRINCIPAL SECRETARY DEVOLUTION.....4TH RESPONDENT

THE PUBLIC SERVICE COMMISSION (PSC).....5TH RESPONDENT

THE KENYA NATIONAL UNION OF NURSES (KNUN).....6TH RESPONDENT/

CROSS PETITIONER

JUDGMENT

1. The Petitioner relies on the Petition and the Supporting Affidavit dated 19th November 2014 and the Petitioner's Response to Cross-Petitioner dated 17th March 2015.
2. The 1st and 5th Respondents filed Replying Affidavit dated 14th May 2014, and 2nd Respondent's Affidavit dated 28th January, 2015. The 6th Respondent filed a Replying Affidavit dated 2nd December 2014 and Cross-Petition dated 28th February 2015.

Petition

3. This petition has been brought seeking the following relief;

(a) A declaration be and is hereby issued that the impugned pending strike by members of the 6th Respondent is illegal.

(b) That a declaration be and is hereby issued that there is need for the state to enact a legal and policy framework to secure the rights of workers in essential services, and to ensure the amicable resolution of Labour disputes without disrupting service delivery.

(c) That the Honourable Court do issue and hereby issues a mandatory order ordering the 1st,

2nd, 3rd, 4th and 5th Respondents to enact a comprehensive legal and policy framework resolving Labour disputes for essential services without disrupting service delivery.

4. The Petition is based on the following grounds set out in the body of the petition;

(18) On 1st September 2014, in contravention of section 81(3) of the Labour Relations Act 2007 which prohibits strikes or lock-outs in essential services, the 6th Respondent issued a 21 days strike notice calling for nationwide strike by nurses set to commence on Monday 24th November 2014.

(19) The reason for the strike is;

(i) failure by the Government to sign and facilitate registration of the negotiated Collective Bargaining Agreement (CBA).

(ii) failure by the Government to confirm into permanent and pensionable terms of service all nurses on contract (ESPS and Capacity).

5. That similar past strikes in the health sector which is an essential service provider have resulted in the great suffering, and even deaths of innocent Kenyans who cannot afford and/or access medication in private health care facilities.
6. That there is no comprehensive policy and legal framework for the amicable resolution of labour disputes in the health sector or even in other essential services.
7. That there is therefore the urgent need to establish the necessary comprehensive policy and legal framework for the amicable resolution of labour disputes in the health sector or even in other essential services.

Legal basis

8. The petition is filed pursuant to Articles 1, 2, 3, 10, 19, 20, 21, 22, 23, 37, 47, 232, 258, and 259 of the Constitution of Kenya 2010.
9. Article 20 (4) (a) provides that in interpreting the Bill of Rights, a Court, tribunal or other authority shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom.
10. Article 22 vests the *locus standi* in the efficacy of the bill of Rights inter alia on the Petitioner.
11. While Article 23 vests the High Court with the jurisdiction in accordance with Article 165 to hear and determine applications for redress of denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights. The appropriate relief a Court may grant include an order for an injunction.
12. That under Article 162(2) and the Employment and Labour Relations Act, 2014 (as amended) the Employment and Labour Relations Court has mandate equivalent to that of the High Court aforesaid.
13. That the only emergency situation that can oust a Bill of Rights are those contemplated in Article 58 as read with Article 132 (4) (d) of the Constitution.
14. That section 81(1) of the Labour Relations Act, 2002 defines “essential services” to mean “a service the interruption of which would probably endanger the life of a person or health of the population.”
15. Hospital services are listed as essential services in section 2 of the fourth schedule to the Labour Relations Act, 2007.
16. That section 81 (3) of the Labour Relations Act 2007 prohibits strikes or lock-outs in essential services.

Alleged violation by the Respondents

17. The Respondents have violated;

- i. the right to legitimate expectation under the preamble, Article 10, 47, 73, 201, 226 and 237 of the Constitution.
- ii. The right to fair administrative action in Article 47, 165(1 & 7)
- iii. the right to equal protection and equal benefit of the law, and from discrimination under Article 27.
- iv. the right to fair administrative action under Article 47.

Particulars of violation

- i. failure to regulate the process of restricting enjoyment of rights in law compromise natural justice.
- ii. failure to provide legal and policy framework ensuring the resolution of labour disputes without disrupting essential services.
- iii. discrimination to the extent that the rights of workers in essential services are not protected by critical legislation and policies.
- iv. violation of the rights of workers in essential services to get administrative action due to lack of legal and/or policy framework for restricting the enjoyment of rights as stated in Article 24.
- v. right to life and to health under article 28 and 43 to the extent workers in essential services are left to their own devices, forcing them to resort to strike action to address their needs. The right to life and health of members of the public who depend on public health facilities are violated anytime there is strike action.
- vi. Article 21 (2) is violated to the extent that the state has failed to take legislative, policy and other measures including the setting of standards to achieve the progressive realization of the rights guaranteed under Article 43.

18. The 1st to 5th Respondents filed grounds of opposition dated 28th January 2015 as follows;

- i. The Court lacks jurisdiction to hear and determine the matters in light of the provision of Article 162 of the Constitution as read with Section 12 of the Industrial Court Act.
- ii. The Court lacks the appropriate jurisdiction to deal with the substance of the matter which is purely a discretionary function of the Executive.
- iii. The application and the Petition as drawn and filed fails to bring out clearly the Petitioners grievances and to bring out clearly the allegations against the Respondents as the applicants have not pointed out the particular provisions of the law violated.
- iv. The Petition and application are an abuse of the Court process.

19. The Respondent prays that the Court dismiss the application and Petition with costs.

6th Respondent

20. In a replying affidavit sworn by Seth Panyako the Secretary General of the 6th Respondent states as follows;

21. The 3rd Respondent has frustrated efforts by the 6th Respondent to have the negotiated CBA signed by informing the 6th Respondent vide a letter dated 18th June 2014, only employees left in the National Government and not those moved to devolved Government may benefit from the negotiated CBA. That the 6th Respondent should engage the various County Governments with a view to make the County Governments accept the terms contained in the CBA to ensure harmonious implementation of decisions between the two Governments.
22. The 3rd Respondent further advised that the 1st Respondent had also directed him that the setting of remuneration packages for Public Officers is within the jurisdiction of the Salaries and Remuneration Commission. The Salaries and Remuneration Commission however informed both parties that its role was to guide them on the negotiations of CBA and that a concluded CBA should be submitted to the Commission by the Respondent before any advice was given.
23. The 3rd Respondent has since declined to set a date for the signing of the CBA.
24. That the Economic stimuli programme was initiated by the Government in 2009/10 financial year with the objective of stimulating Economic growth as part of measures to jumpstart the economy

in the wake of 2007/2008 post election violence and the negative effort of the 2007/2008 global recession.

25. That under the programme nurses were appointed on contract terms which were to be translated from contract to permanent and pensionable terms upon expiry of three years. By circular dated 15th August 2013, Government stated it would absorb 4,662 ESP Health Workers, whose contracts would expire in 2014 and by a circular dated 7th August 2014, Cabinet Secretary, Health informed all County Governments to absorb the ESP Health Workers upon expiry of their contracts.

To date twenty (20) counties have refused to absorb ESP staff.

26. On 1st September 2014, 6th Respondent issued a twenty one (21) days strike notice to commence on 22nd September 2014 which notice was later extended by a further 60 days by the 6th Respondent, National Executive Council to give 3rd and 5th Respondents more time to meet and resolve the pending issues, and in particular to sign the CBA and absorb the ESP Health Workers.

27. The 6th Respondent subsequently engaged the Council of Governors with a view to get the counties to accept the CBA. The issues were however, not resolved and the Kenya National Commission on Human Rights (KNCHR) intervened vide a letter dated 9th October 2014. The issues of absorption and signing of the CBA remain outstanding to date.

28. That the 3rd and 5th Respondent have failed to honour the mandatory provisions of Section 57 of Labour Relations Act, 2007 and Article 41 of the Constitution.

29. The 6th Respondent prays the Court to grant orders prayed in the Application and Petition dated 19th November 2014.

30. The 6th Respondent further sought leave to file a cross-petition within seven (7) days vide an application dated 28th February 2015. The draft cross-petition is attached to the Application. The 6th Respondent implores the Court in the cross-petition to determine;

whether refusal to sign a CBA by the 3rd and 5th Respondent is constitutional and lawful;

whether the employees purported to have been seconded to County Governments are still employees of the National Government;

whether the concluded CBA applies to both employees of County and National Governments; and whether the 3rd and 5th Respondent should be compelled to absorb the Economic ESP Health Workers into permanent and pensionable terms of employment.

31. The Court notes that the 6th Respondent fully supports the Petition and is not suited to file a cross-petition as it purports to do vide the application. The action by the 6th Respondent amounts to collusion between the 6th Respondent and the Petitioner.

32. The cross-petition violates Rule 15(3) as read with Rule 15(1) of the Constitution of Kenya (protector of Rights and fundamental freedoms) Practice and Procedure Rules 2013 in that it has filed a replying affidavit in which it fully supports the Petition and has gone ahead to file a cross petition which does not materially detract from the Petition itself.

33. The Court finds that the action by the 6th Respondent is an abuse of the Court process and the Court declines to allow the filing of the cross-petition for the aforesaid reason and that the cross-petition does not disclose the specific constitutional violations by the original petitioner against the 6th Respondent. This does not qualify as a cross-petition therefore and does not warrant admission.

34. Issues for determination

- i. Whether this Court has jurisdiction to hear and determine the Petition.
- ii. Whether the Petitioner has clearly brought out the constitutional violations by the 1st to 5th Respondents.
- iii. Whether Section 81(3) of the LRA which prohibits strikes or lockouts in essential services is

- sufficient for purposes of limiting the enjoyment of rights as provided in Article 24 (1-3).
- iv. Whether a declaration should be issued that there is need for a comprehensive policy and legal framework for the amicable resolution of labour disputes in essential services, including in health.
 - v. Whether refusal to sign the concluded Collective Bargaining Agreement by the 3rd and 5th Respondents is constitutional and lawful.
 - vi. Whether the 3rd and 5th Respondents should be compelled to absorb the Economic stimulus programme (ESP) Health Workers into permanent and pensionable terms of employment.
 - vii. Whether the Salaries and Remuneration Commission has capacity to set the salaries of unionsable employees.

Issue (i)

35. The subject matter of this dispute as set out in the Petition being the lawfulness or otherwise of strikes in the essential service; the adequacy of statutory dispute resolution mechanism in the essential service and terms and conditions of service of nurses serving in the County Governments are matters of Employment and Labour Relations described under Article 162(2) of the Constitution of Kenya 2010 as read with Section 12 of the Employment and Labour Relations Act 2014 (as amended).
36. The Court has exclusive jurisdiction over such matters by dint of Article 165(5) of the Constitution which provides;

“The High Court shall not have jurisdiction in respect of matters –

(b) Falling within the jurisdiction of the Courts contemplated in Article 162(2).”

37. This is one such matter and the Court has jurisdiction to deal with it. **The Court of Appeal at Nairobi in the Civil Appeal No. 6 of 2012, Prof. Daniel N. Mugendi –vs- Kenyatta University and 3 others is instructive on this matter.**
38. The Judges reviewed with approval, the decision by Majanja, J. in **Petition No. 70 of 2012, United States International University (USIU) –vs- The Attorney General & 8 others** in determining whether the High Court should continue to determine Employment and Labour Relations matters in the light of the establishment of the Employment and Labour Relations Court.
39. The Court held;

“in sum on this ground of jurisdiction we find as we had stated earlier that the High Court had no jurisdiction to entertain the claim which essentially was based on breaches of contract of employment along with some unstated claims of breaches of rights, as the learned Judge did find It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to Article 165(5)(b)”.

40. The Court finds that this Court has jurisdiction to deal with this Petition.

Issue ii, iii & iv

41. The Court will deal with issues ii, iii and iv together as the same are related.
42. Section 81 of the RLA reads:

“ (1) In this part ‘essential services’ means a service the interruption of which would probably endanger the life of a person or health of the population or any part of the population.

(2) The Minister after consultation with the Board –

- 1. Shall from time to time amend the list of essential services contained in the Fourth Schedule; and
- 2. May declare any other service an ‘essential service’ for the purpose of this Section if a strike or

lock-out is so prolonged as to endanger the life, person or health of the population or any part of the population.

3. *There shall be no strike or lock out in essential service.*
4. *Any trade dispute in a service that is listed as or is declared to be an essential service may be adjudicated upon by the Industrial Court.*
5. *A collective agreement may provide that any service may be deemed to be an essential service.”*

43. This provision was enacted before the Constitution of Kenya 2010. The Section limits the right to go on strike provided under Section 76 of the Labour Relations Act where;

(a) The trade dispute that forms the subject of the strike or lock-out concerns terms and conditions of service;

(b) The trade dispute is unresolved after conciliation –

- i. Under this Act; or
- ii. As specified in a registered collective agreement that provides for the private conciliation of disputes; and

(c) Seven days written notice of the strike or lock-out has been given to the other parties and to the Minister by the authorized representation of;

- i. the trade Union, in the case of a strike;
- ii. the employer, group of employers or employers’ organisations in the case of a lock-out.

44. On the other hand Article 41(2) (d) of the Constitution guarantees every worker the right to go on strike.

45. This right is limited by Section 76 and Section 81 of the labour Relations Act as set out above.

46. Article 24(1) of the Constitution provides;

“ a right or fundamental freedom in the Bill of Rights shall not be limited except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including;

- a. *The nature of the right on fundamental freedom;*
- b. *The importance of the purpose of the limitation;*
- c. *The nature and extent of the limitation;*
- d. *The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*
- e. *The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*

Despite Clause (1), a provision in legislation limiting a right or fundamental freedoms;

- a.
- b. *Shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and*
- c. *Shall not limit the right or fundamental freedom so far as to derogate from its core on essential service.”*

47. Section 76 places procedural limitations on the right to go on strike provided under Article 41 (2) (d) of the Constitution. The Section further restricts strike action to only disputes to do with terms and conditions of service.

48. The limitations under Section 76 are clear and specific and do not derogate from the core or

essential content of the right to strike.
49. The limitation under Section 81 (3) are specific that;

“there shall be no strike or lock-out in an essential service.”

This limitation is absolute and derogates from the core or essential content of the right to strike. Similarly the limitation under Section 78 (1) (f) which reads;

“no person shall take part in a strike or lock-out or in any conduct in contemplation of a strike or lock-out if;

(f) the employer and employees are engaged in an essential service derogates from the core or essential content of the right to strike.”

To this extent, Section 81(3) and 78 (1)(f) purports to nullify the right to go on strike provided under Article 41 (2)(d) of the Constitution. Article 2 (4) of the Constitution provides;

“any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”

50. The Court finds that Section 78(1) (f) and 81 (3) of the Labour Relations Act, 2007 do not meet the legal standards set under Article 24 (2)(c), as read with Section 41 (2) (d) of the Constitution.

The legislature needs to relook these provisions in light of the Constitution of Kenya, 2010.

51. The reality today is that the workers in the essential service and in particular the Health workers have participated in many strike action since the enactment of the Constitution of Kenya 2010.

52. The Petitioner blames this eventuality on lack of an adequate mechanism to deal with disputes in the essential services and particularly the Health Sector.

53. The other cause of this eventuality, is lack of a registered Collective Bargaining Agreement in the sector both at the National level and the County level.

54. It is common cause that the Health Sector has been devolved to the Counties and most health workers including doctors, nurses and various cadre of medical officers are now employees of the County Governments except certain aspects of the service to do with discipline of health employees which are still retained by the Public Service Commission.

55. It is the Court’s considered view and the Court so finds that;

- i. Workers in Kenya have a right to go on strike as provided under Article 41 (2) (d) of the Constitution.
- ii. The right to go on strike is adequately limited under Section 76 of the Labour Relations Act 2007 with regard to;
 - i. the cause for the strike, which must be a demand with respect to terms and conditions of service or the recognition of a trade union;
 - ii. the procedure to be followed before the workers engage in the strike are as follows;
 - a. the dispute is unresolved after conciliation under the Act; or
 - b. as specified in a registered collective bargaining agreement;
 - c. a seven days written notice of the strike has been given to the other parties and to the minister by the authorized representative of the trade union.

56. Section 78 (1) under (a) (b) (c) (d) (e) & (h) sets out circumstances under which a strike is automatically illegal and prohibits participation in such a strike;

- a. where a law, Court, Collective agreement, or recognition agreement prohibits a strike;
- b. where the subject matter of the strike is regulated by a collective agreement or recognition agreement.

- c. if the parties have agreed to refer the trade dispute to the Industrial Court or to arbitration.
- d. in the case of a dispute on recognition, the trade union has referred the matter to the Court.
- e. the trade dispute was not referred for conciliation in terms of the Act or a collective agreement providing for conciliation.
- f. the strike or lock-out constitutes a sympathetic strike or lock-out.

57. These limitations conform to Article 24 of the Constitution and constitute adequate control of the right to go on strike.
58. In this matter, we are concerned with the prohibition of strikes in essential services prohibited under Section 78 (1) (f) and Section 81 (3) of the Labour Relations Act, 2007.
59. These provisions derogate from the core content of the right to strike provided under Article 41 (2) (d) of the Constitution and the legislature should revisit the law with a view to removing the apparent conflict between the Constitutional provision and the statutory law.
60. In view of the above, the Court holds that employees in the essential services only need to conclude a collective bargaining agreement which provides an effective framework for expedient dispute resolution where the employer delays conclusion of a collective bargaining agreement, otherwise, the Labour Relations Act, 2007, provides sufficient dispute resolution mechanisms which include, mandatory conciliation before the matter is escalated for adjudication in Court.
61. To this end, the Petitioner has not established a case on a balance of probability to be granted the reliefs sought.

Petition is accordingly dismissed with no order as to costs.

Cross-Petition

62. With regard to the Cross Petition in which the 6th Respondent seeks the Court to allow the Petition and the Cross-petition as pleaded, as the Court has already observed, the Court finds that, the 6th Respondent being not opposed to the Petition itself, cannot be heard to file a cross-petition in the same vein. The action by the 6th Respondent amounts to collusion with the Petitioner and therefore an abuse of the Court process.
63. A cross-petition must necessarily be in opposition to the main Petition but not for the purpose of introducing a new suit mid-stream. The Court finds that the purported cross-petition is an abuse of the Court process.
64. As the Court has observed, it is in the interest of good labour relations, and harmony in this sector that a collective bargaining agreement(s) be concluded with the respective employer(s) of the employees in the Health Sector.
65. Since the health employees should enjoy uniform terms across the counties, it is useful that a common collective bargaining agreement do cover health workers across all the counties. It may be futile to conclude a collective agreement between the Union and the National Government if indeed the employer of the Health Workers is the County Government in line with the devolved government.
66. A joint negotiations mechanism vide the Council of Governors may be a more useful platform for the purpose.
67. For these reasons the cross-petition is also dismissed with no order as to costs.

Dated and Delivered at Nairobi this 18th day of December 2015

MATHEWS N. NDUMA

PRINCIPAL JUDGE