



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Petition 50 of 2012 & 1 of 2013**

**IN THE MATTER OF ARTICLE 22 AND 23 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION AND THREAT TO VIOLATION OF THE  
NURSES (WORKERS) FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 3,  
10,36 AND 41 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA AND SECTION  
SEVEN OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF THE REPUBLIC OF  
KENYA**

**AND**

**IN THE MATTER OF SECTION 14, 15, 17, 19 AND 20 OF THE LABOUR RELATIONS ACT  
2007 LAWS OF KENYA**

**AND**

**IN THE MATTER OF SECTION 5,6,7 AND 31 OF THE LABOUR INSTITUTIONS ACT 2007  
AND**

**IN THE MATTER OF REGISTRATION OF THE KENYA NATIONAL UNION OF NURSES  
(KNUN) UNDER THE**

**LABOUR RELATIONS ACT 2007 LAWS OF KENYA**

**AND**

**IN THE MATTER OF CONSTITUTIONALITY OF SECTION 14(d) OF THE LABOUR  
RELATIONS ACT 2007 LAWS OF KENYA**

**BETWEEN**

**SETH PANYAKO  
LILIAN OSUNGA  
LYDIA NGARE  
JOSEPH WANDEREVA  
LAWRENCE KINYUA**

**WINNIE NAISIAMBE SHENA.....PETITIONERS**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE REGISTRAR OF TRADE UNIONS.....2<sup>ND</sup> RESPONDENT**

**AS CONSOLIDATED WITH INDUSTRIAL CAUSE NO.1 OF 2013**

**RULING**

On 4<sup>th</sup> January 2013, Hon. Lady Justice Maureen Onyango issued an order in the following terms:-

1. **THAT** Cause Nos. 1 of 2013 and Petition No.50 of 2012 be and are hereby consolidated and be heard as Petition Number 50 of 2012.
2. **THAT** orders Nos. 4 and 5 of the Court's orders issued on 28<sup>th</sup> December, 2012 be and are hereby vacated since they were issued before hearing other parties to the Petition.
3. **THAT** the nurses be and are hereby directed to go back to work while the Court deals with their fundamental rights as prayed in the Petition.
4. **THAT** any nurse who fails to go back to work immediately is in breach of their employment contract and risks disciplinary action in terms of Section 80 of the Labour Relations Act.
5. **THAT** the Attorney General, the Kenya Union of Civil Servants, the Federation of Kenya Employers, the Kenya Progressive Nurses Association and the National Nurses Association of Kenya be and are hereby granted leave to file their various responses to the Petition within fourteen days from today.
6. **THAT** the Petitioners be and are hereby granted leave to file any rejoinders to the documents filed by the various parties on or before 22<sup>nd</sup> January, 2013.
7. **THAT** the case be mentioned on 29<sup>th</sup> January, 2013 for further directions at 9.00 a.m.
8. **THAT** the Petitioners are directed to serve all the parties with copies of the petition.

On 8<sup>th</sup> January 2012, the Petitioners brought an Urgent Application seeking to have the orders of Justice Maureen Onyango above set aside.

The Court noting that the Nurses had failed to honour the orders of the Court declined to entertain the petition unless and until they obeyed the order of the court observing that if the court entertained them whilst they continued to defy an order of the court, it would be conniving with parties who had chosen not to observe the rule of law and that if parties before court were to be allowed to choose and pick which orders to obey and which not to observe, this would set the administration of justice in disarray with consequences too ghastly to contemplate.

The Nurses through their duly appointed representatives made a commitment to return to work immediately observing that it was in the interest of justice that the Petition seeking registration of Kenya Union of Nurses be disposed off expeditiously to allow calm to return to the workplace.

The Court noted that the nurses ought to have come to the court in terms of Section 30 of the Labour Relations Act which reads:-

*“30 – Any person aggrieved by a decision of the Registrar made under this Act may appeal to the*

*Industrial Court against that decision within thirty days of the decision”.*

The parties present agreed that the Petition No.50 of 2012 as consolidated with Cause No.1 of 2013 be deemed to be an Appeal.

The Court being aware of the need to resolve the matter urgently and taking into Account the provisions of Article 159(2) of the Constitution.-----

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted .....; and

(d) Justice shall be administered without undue regard to procedural technicalities as read with Section 15(1) of the Industrial Court Act, 2011; which reads:-

*“Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution”,*

made an order in the following terms:-

1. **THAT** Petition No.50 of 2012 as consolidated with Cause No.1 of 2013 be and is hereby deemed to be an Appeal against the decision of the Registrar of Trade Unions on 27<sup>th</sup> November, 2012 refusing the registration of Kenya National Union of Nurses in terms of Section 30 of the Labour Relations Act No.4 of 2007
2. **THAT** the matter will proceed as such on 14<sup>th</sup> January, 2013.
3. **THAT** the nurses have undertaken to return to work immediately and it is so ordered.
4. **THAT** the matter be mentioned on 11<sup>th</sup> January, 2013 to review the situation at the workplace and give further directions as may be deemed necessary by the parties and the court.
5. **THAT** the Order be served on all the parties in Petition No.50 of 2012 as consolidated with Cause No.1 of 2013 forthwith.

Of note therein was order Numbers 3 and 4 wherein the nurses undertook to return to work immediately and the matter was set down for mention on 11<sup>th</sup> January, 2012 to review the situation at the workplace and that the court will give further directions as maybe deemed necessary.

On 11<sup>th</sup> January when the matter came for mention it became apparent that though the Nurses had returned to their various stations of work, there were issues that needed to be resolved to have peace and harmony in this essential service. Mr. Seth Panyako gave evidence an oath regarding these issues and the court heard submissions from the various counsel for the parties. The issues maybe summarized as follows:-

Some nurses had received letters to show cause why their services should not be terminated; Some had received letters of transfers without notice or consultations; others had actually been dismissed; and salaries for the majority had been stopped.

In short, the terms; and conditions of service of most of the nurses had been varied to their detriment without due regard to substantive and procedural requirements as provided in the Employment Act, No.II 2007.

Given that the nurses had engaged in a strike action that had in the interim been declared unlawful

pending hearing *interparties* there was a need as is customary in Industrial Relations for the parties to engage each other to resolve these impediments that were preventing the nurses from providing a most essential service to the public. Accordingly the court directed as follows:-

1. **THAT** the Labour Commissioner be and is hereby enjoined as *amicus curie*.
2. **THAT** Kenya Union of Domestic, Hotels, Education Institutions, Hospitals & Allied Workers (KUDHEIHA) be and is hereby enjoined as an Interested Party.
3. **THAT** all the parties to the suit who have not yet been served with the Petition/Appeal and all other papers filed be served by the Petitioner/Appellant by close of business today (11<sup>th</sup> January, 2013).
4. **THAT** the Ministry of Medical Services, the Ministry of Public Health Service and Sanitation, the Labour Commissioner, the National Nurses Association of Kenya and the Public Service Commission are hereby directed to engage in a return-to-work formula and report to court within seven (7) days from today. All parties to this sitting be served with all relevant papers including exhibits [(1) – (V)] produced in court today.
5. **THAT** this matter be mentioned on 21<sup>st</sup> January, 2013.
6. **THAT** meanwhile, the Appeal will be heard on 23<sup>rd</sup> January, 2013 at 9.30 a.m.

Pursuant to the order, the Labour Commissioner appointed Mr. S.M. Mbae to act as a conciliator on 14<sup>th</sup> January 2013 and the conciliator convened a meeting on 15<sup>th</sup> January 2013; 17<sup>th</sup> January, 2013; 24<sup>th</sup> January, 2013 and 1<sup>st</sup> February, 2013.

The Conciliator presented two comprehensive reports to the court on 29<sup>th</sup> January, 2013 and 5<sup>th</sup> February 2013. Without apportioning blame to any of the parties, it is clear that the parties did not engage in good faith so as to resolve the issues outlined in item 7 of the Comprehensive list of impediments submitted by the nurses to the Conciliator. Indeed todate there has not been any response to these issues by the representatives of the Ministries who instead relied on one technicality to another to postpone the conciliation meetings. In some meetings they did not send representatives at all.

The court having invoked its inherent powers under Section 15(1) of the Industrial Court Act 2011, and Article 159 of the Constitution to order the parties to engage in conciliation, it cannot now fold its hands when it is apparently clear that the parties have failed to place public interest before personal whims leading to prevarication and blame passing that the court can no longer tolerate.

On 30<sup>th</sup> January 2013, the court issued an order limiting the scope of the conciliation to:-

- (i) Whether or not the Nurses have returned to work and to address any impediments they may have encountered in that respect.

Meanwhile, the Court also directed that the report of the conciliation be presented to court on 6<sup>th</sup> February 2013 and Mr. Kiage for the Attorney General was granted leave to file an affidavit in response to the allegations by the Nurses that impediments had been placed on the nurses way upon their return to work in compliance with the court order. This was to enable the court to make a determination in the event conciliation failed.

When the matter was mentioned, yesterday (6-2-2013), Mr. Kiage had not filed the Affidavit and was granted leave to file the same by 12.00 noon today (7-2-2013), which was duly filed.

The affidavit is deponed to by Mr. Mark Bor the Permanent Secretary in the Ministry of Public Health and Sanitation.

The Permanent Secretary conceded that one hundred and nine (109) nurses have been transferred out of approximately 20,000 nurses for different reasons including service need, own request, cross transfer and social problems. He contends that it is the prerogative of the employer to transfer employees which prerogative is to be exercised fairly and without discrimination.

The nurses contend that the employer has targeted those nurses in the proposed union leadership and perceived trouble makers. The Permanent Secretary states that these grievances should be handled individually and not collectively.

On the issue of notices to show cause and stoppage of salaries, he states that these are disciplinary matters well within the mandate of the Accounting Officer under Section 31(c) of the Public Service Commission Act, 2012.

That the employees are also governed by the Code of Regulations and in particular Section G19 lays down provisions on appropriate action to be taken against a public Officer who is absent from duty without permission.

He states further that the rigours of these provisions have been relaxed to ensure normalcy resumes to the health sector in the country and to show good will and ensure that any nurse who resumed duty was immediately reinstated to the payroll with immediate effect. A directive has also been given to all Provincial Officers to ensure that no officer is victimized and the names of all those who have resumed duty be forwarded to the headquarters immediately to facilitate reinstatement to the payroll.

He states also that the 21 Officers who have received posting orders have not been demoted because no reduction in rank or seniority occurred.

He adds that the employer has placed no impediment to the employees to return to work.

Having considered the submissions for the petitioner outlined herein and the submissions by the employer which include various concessions by the Permanent Secretary on behalf of the employer, the court directs as follows:-

1. **THAT** the nurses through their named representatives issue a Public Statement immediately asking all the nurses to report to work on Monday, 11<sup>th</sup> February, 2013.
2. **THAT** no conditions whatsoever should be placed on the nurses who have complied with the court orders of 4<sup>th</sup> and 8<sup>th</sup> January, 2013 upon their return to work on Monday 11<sup>th</sup> February, 2013.
3. **THAT** the Nurses should return to the stations they were at prior to the commencement of the strike action and should not be transferred; demoted; dismissed and or victimized in any manner by fact of any issues that were before the conciliator and have not been resolved.
4. **THAT** the unpaid nurses' salaries be paid forthwith, and in any event not later than 7 days from the date of this order.
5. **THAT** all the other issues placed before the conciliator by the union except item 7 be deferred pending the decision of the court in the Appeal pending before the Court.
6. **THAT** the Permanent Secretary, Ministry of Medical Services and the Permanent Secretary, Ministry of Public Health Service and Sanitation are directed to ensure that this order of the court is implemented.

**It is so ordered.**

**DATED and DELIVERED** at Nairobi this 7th day of February 2013.

**Mathews N. Nduma**

**PRINCIPAL JUDGE**