



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

PETITION NUMBER 23 OF 2013

IN THE MATTER OF THE LABOUR RELATIONS ACT, 2007

AND

IN THE MATTER OF THE TEACHERS SERVICE COMMISSION ACT, 2012

AND THE STRIKE CALLED BY KENYA NATIONAL UNION OF TEACHERS

TEACHERS SERVICE

COMMISSION.....PETITIONER/APPLICANT

VS

KENYA NATIONAL UNION OF

TEACHERS.....RESPONDENT

AND

SALARIES AND

REMUNERATION

COMMISSION.....INTER

ESTED PARTY

RULING

Introduction

1. On 25th June 2013, the Respondent called a nationwide strike of its members.

In response, the Petitioner filed a petition together with a Notice of Motion on 26th June 2013 under Certificate of Urgency seeking orders to restrain the Respondent and its members from continuing with the strike.

2. When the matter came before me on 26th June 2013, I certified it urgent and directed the Petitioner to serve the Respondent and the Interested Party and set an *inter partes* hearing for 28th June 2013. I also granted leave to the Petitioner to serve the Respondent by substituted service. In spite of due service there was no appearance for the Respondent. The Petitioner was represented by Muthoni Kimani, Allan Sitima and Francis Njoroge.

The Petitioner's Submissions

3. Muthoni Kimani for the Petitioner submitted that the Respondent's members had proceeded on strike without issuance of a seven days' strike notice as required by law. According to the Petitioner a notice issued by the Respondent in February 2013 had expired and could not be applied for purposes of the ongoing strike. The Petitioner further argued that the Respondent's members were engaged in an essential service and could not therefore legally go on strike.

4. In a supplementary affidavit sworn by Gabriel Lengoiboni, the Respondent's Chief Executive Officer, the Respondent sought to demonstrate the process leading to the degazettement of Legal Notice Number 534 of 1997 and the gazettement of Legal Notice Number 16 of 2003, which was the subject of the dispute between the parties.

5. Ms. Kimani submitted that the Respondent was fully involved in the crafting of Legal Notice Number 16 of 2003 and could not therefore disown it at this stage. The Petitioner produced a number of documents in support of this argument including the Respondent's letter dated 28th October 2002, nominating its members to the negotiating sub committee and a subsequent letter dated 28th November 2002 vide which the Respondent accepted a revised draft agreement on teachers salary award of 1997.

6. According to the Respondent, this agreement resulted to Legal Notice Number 16 of 2003 which was a product of a negotiated settlement and which the Respondent was not entitled to negate.

7. In the supporting affidavit also sworn by Gabriel Lengoiboni, he depones that the Respondent and its members had benefited from the terms contained in Legal Notice Number 16 of 2003 over a period of ten years and the Respondent's attempt to renege on the terms of the said Legal Notice was an exercise in bad faith.

8. Counsel for the Petitioner submitted that the continuing strike was detrimental to the Petitioner as it had crippled education services across the country. The strike was in violation of the rights of the Kenyan child as conferred by Article 53 of the Constitution. Counsel further submitted that the Respondent's members' right to go on strike was not absolute and that the Respondent should have referred the dispute to this Court in accordance with Section 73 of the Labour Relations Act.

No Response from the Respondent

9. The Respondent did not file any reply nor did it make any appearance in these proceedings in spite of due service. The Court did not therefore have the benefit of its side of the story. The Court will nevertheless proceed to discharge its mandate of rendering substantive justice.

Recognizable Dispute

10. The first issue for determination in this application is whether there exists a legally recognizable dispute between the Petitioner and the Respondent. In the supporting affidavit sworn by Gabriel Lengoiboni, he depones that the Petitioner has fully implemented Legal Notice Number 534 of 1997 as read together with Legal Notice Number 16 of 2003 and that the parties should now proceed and negotiate a collective bargaining agreement.

11. Lengoiboni further depones that the Petitioner has in the past applied extra-judicial means to resolve trade disputes between itself and the Respondent because the parties do not have a Collective Bargaining Agreement.

12. The Petitioner submitted a Memorandum of Agreement between the Government of Kenya and the Respondent dated 3rd December 2002. Clause 5 of this Memorandum states as follows:

“That the Teachers Service Commission (Remuneration) Order contained in Legal notice No. 534 of 1997 be amended pursuant to this agreement.”

13. In the understanding of the Court this is the genesis of the dispute between the parties in this case.

It seems to me that the parties differed on the actual extent and import of the amendment to Legal Notice No 534 of 1997. The Petitioner told the Court that a Conciliator appointed by the Minister for Labour was unable to resolve the dispute which is now the subject of the ongoing strike. There is therefore a recognizable dispute between the parties to wit; rationalization of remuneration due to the Respondent's members under Legal Notice No. 534 of 1997 and Legal Notice Number 16 of 2003.

Balancing of Rights

14. The Petitioner told the Court that as a result of the teachers' strike, the right of the child to free and compulsory basic education as provided for in Article 53 of the Constitution has been violated and that the Court should arrest the violation.

15. It is not in dispute that every time the teachers down their tools the children under their watch and tutelage suffer immeasurably. However, this fact cannot be used as a justification to push the rights of the teacher underfoot. The employer of the teachers and by extension the Government of Kenya must secure and protect the rights of the teachers in order to safeguard the rights of the children.

Legality of the Strike

16. I will now address the question whether the on going strike by the Respondent's members was called within the law. The law on strikes and lock-outs is found in Part X of the Labour Relations Act.

Section 76 of the Act provides that:

A person may participate in a strike or lock-out if-

(a) the trade dispute that forms the subject of the strike or lock-

out concerns terms and conditions of employment or the

recognition of a trade union;

(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 representative of

(i) the trade union in the case of a strike ;

(ii) the employer, group of employers or employers' organization in the case of a lock-out.

17. Section 78 sets out what constitutes a prohibited strike or lock-out. One of the instances in which a strike or lock-out is prohibited is where the employer and employee are engaged in an essential service.

18. The Petitioner advanced the argument that teaching is an essential service. I will therefore proceed to rule on this point. While the Trade Disputes Act (now repealed) expressly categorized teaching services as essential, the Labour Relations Act does not do so.

19. Section 81(1) of the Labour Relations Act defines 'essential services' as far as strikes and lock-outs

are concerned as:

“service the interruption of which would probably endanger the life of a person or health of the population or any part of the population.”

20. Moreover the Fourth Schedule to the Act categorizes only six services as essential and they do not include teaching services. I therefore find no legal basis for the argument by the Petitioner that teachers may not go on strike because they are engaged in an essential service.

21. From my analysis of the circumstances surrounding the strike which is the subject matter of the case before me, I find that the Respondent did not issue the seven days' strike notice as required by law.

22. Moreover, it seems to me that the conciliation process never begun in earnest. For these reasons I make the following orders:

- a. The Petitioner and the Respondent are directed to decamp from their hard line positions and proceed to the negotiating table in good faith. For the avoidance of doubt, these negotiations shall be limited to rationalization of remuneration due to the Respondent's members under Legal Notice No. 534 of 1997 and Legal Notice Number 16 of 2003. The negotiation meetings shall be convened by the Cabinet Secretary for Labour.
- b. The parties are directed to report the outcome of these negotiations to this Court at 9.00 am on Monday, 15th July 2013.
- c. The teachers are directed to report back to work by 8.00 am on Tuesday, 2nd July 2013. Any strike beyond this time shall be unprotected and illegal.
- d. In order to preserve industrial peace, the parties and/or their Members and/or agents and/or servants and/or sympathizers are restrained from Commenting on this matter outside the confines of the negotiations hereby ordered.

Orders accordingly.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 1ST DAY OF JULY 2013

LINNET NDOLO

JUDGE

In the Presence of:

.....**Petitioner**

.....**Respondent**