



Bwachete v Chief Officer Medical Services, Public Health & Sanitation Kisii County & 2 others (Judicial Review E019 of 2024) [2024] KEELRC 2660 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEELRC 2660 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW E019 OF 2024
NZIOKI WA MAKAU, J
OCTOBER 30, 2024**

BETWEEN

VICTOR BWANCHETE APPLICANT

AND

**CHIEF OFFICER MEDICAL SERVICES, PUBLIC HEALTH & SANITATION
KISII COUNTY 1ST RESPONDENT**

**COUNTY SECRETARY & HEAD OF PUBLIC SERVICE KISII
COUNTY 2ND RESPONDENT**

SECRETARY KISII COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

RULING

1. The Applicant seeks various reliefs in his motion before the Court. These eerily mirror the prayers in his Petition.

Applicant’s submissions

2. The Applicant submits that his transfer to Nyamache Sub-County Referral Hospital was unprocedural and lacked a valid reason. He avers that the decision to transfer was unilateral and without consideration of his safety. In support of these contentions, he cites his request to be transferred to Nduru Sub-County hospital upon learning of his relocation to Nyamache, which is the same area where the CEO of Kisii Teaching and Referral Hospital who had previously threatened him resides. Additionally, the Applicant avows that the transfer was effected without hearing any of his representations contrary to Section 43 (3) of the Public Service Act 2017, to the effect that transfers: should lead to improved service delivery, take into account children of the public officer and should not be arbitrary.



3. In respect of withholding of his salary for the month of April the Applicant submits that it was arbitrary and contrary to his rights to fair labour practices, fair administrative action and a fair hearing. He argues that the Respondent's action of withholding his salary while he was exercising his constitutional right to strike pursuant to a strike notice by the Union's national office was inimical to Sections 17 and 18 of the *Employment Act*. Moreover, the Applicant asserts that the Respondent's decision to serve him with a notice to show cause despite being aware of the strike notice dated 26th March 2024 contravened his civic right to strike under Article 41(2)(c) of *the Constitution*.
4. The Applicant further cites the rights of employees as enshrined in Article 41 of *the Constitution* particularly regarding remuneration, reasonable working conditions, and the right to form and join trade unions as aligned with section 10(5) of the *Employment Act* on remuneration and fair working conditions. In staking claim to the reliefs sought the Applicant reiterates the breach of his constitutional rights. He calls for grant of certiorari on the strength of section 7(2)(c), (e) and (n) of the Fair Administrative Actions Act on review of unfair and ill-motivated administrative action. Consequently, he prays that the application be allowed as prayed.

Respondent's submissions

5. The Respondent contends from the outset that prayers 2 and 4 of the application have been overtaken by events, as the Applicant is already working at Nduru Sub-County Hospital. Additionally, the Respondent argues that the issue of withheld salary will be addressed before the disciplinary tribunal. In further opposing the application the Respondent contends that this court lacks jurisdiction on account of the exhaustion doctrine. It cites the Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR which emphasizes the centrality of jurisdiction and the principle that courts must cease operations immediately upon discovering lack of jurisdiction. Furthermore, the Respondent submits that the Application offends the express provisions of section 77 of the *County Governments Act* and Section 9(1), (2) & (3) of the Fair Administrative Actions Act. It specifically references section 77 which allows appeals to the Public Service Commission by any person dissatisfied or affected by a decision of the County Public Service Board or any individual exercising disciplinary control over a public officer. It also mentions Section 9(1), (2) & (3) of the Fair Administrative Actions Act regarding the High Court's jurisdiction to entertain Judicial Review applications, the requirement for internal review or appeal mechanisms to be exhausted before seeking judicial review, and the high court's authority to enforce compliance with the exhaustion principle.
6. The Respondent also cites the Court of Appeal in the case of Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR in which it was held that:

“it is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews.. The exhaustion doctrine is a sound one and serves the purposes of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.”
7. In further buttressing its argument, the Respondent draws attention to Article 159(2)(c) of *the Constitution* enjoining the court to promote alternative dispute resolution mechanisms. It also references section 2 of the Fair Administrative Actions Act, defining 'administrative action' as any act, omission or decision of any body affecting the legal rights of individuals. The Respondent emphasizes that it reserves the right to transfer its employees to any part of the County in accordance with their employment contracts. It submits that any objections to



such transfers must first be addressed through the available appeal mechanisms before approaching the court. Regarding the Applicant's withheld salary, the Respondent submits that this court lacks jurisdiction, as it has the authority to withhold salary during the pendency of disciplinary proceedings. It asserts that the court may only assume jurisdiction after the disciplinary hearing and any subsequent appeal processes have been completed.

8. Concerning issues related to the strike, the Respondent reiterates that these were addressed in *County Government of Kisii v Kenya Medical Practitioners Pharmacists & Dentists Union (KMPDU) & another (Cause E016 of 2024)* [2024] KEELRC 561 (KLR) (14 March 2024) (Ruling). In further opposing the application the Respondent submits that the Applicant is guilty of material non-disclosure and is attempting to coerce the Court into issuing orders by omitting vital information. It draws the Court's attention to the Applicant's letter requesting posting to Nduru Sub-County hospital, in which evidence of intimidation or coercion is notably absent.
9. The Respondent further cites the case of *Bahadurali Ebrahim Shamji v Al Noor Jamal & 2 others – Civil Appeal No. 210 of 1997*, as quoted in the case of Halima Haji Sarah v Multiple Hauliers (E.A) Limited & another [2022] eKLR where the court in extensively dealing with the issue of non-disclosure of material facts stated in a nutshell that: the Applicant must provide a complete and fair account of relevant facts, as the court relies on facts to make decisions. The Applicant must conduct proper inquiries to uncover any additional material facts. The depth of these inquiries depends on various factors, such as the urgency of the case and the potential impact on the Defendant. If material non-disclosure is found, the court can annul any orders on the basis of incomplete information; however, the nature of the non-disclosure whether it was intentional or innocent will be considered and the court may issue a new order if complete facts are presented later.
10. The Respondent further asserts that the Applicant is intent on creating confusion to achieve a favourable outcome, emphasizing that the Applicant is obligated to disclose all necessary facts to enable the court to render justice and in conclusion calls for striking out of the application for lack of jurisdiction.
11. The Judicial Review application is one based on action that was founded on something the Court declared illegal and therefore not protected vide Kisumu ELRC Cause No. E016 of 2024. The fruit of a poisonous tree is itself poisonous. As such it cannot be the basis of action to seek relief or remedy. Additionally, the application seeks to stop something that has already happened, to wit, the transfer of the Applicant from Nyamache Sub-County Referral Hospital. When a strike is declared illegal it impugns any industrial action taken and as in this case, the Applicant should have withdrawn the Judicial Review application. Having failed to do so, it is the Court's duty to dismiss the Judicial Review alongside the application filed herein. In the interests of industrial peace and harmony, each party will bear their own costs.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF OCTOBER 2024

NZIOKI WA MAKAU, MCIARB.

JUDGE

