



REPUBLIC OF KENYA



KENYA LAW
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**Associaton of Public Health Officers of Kenya v Siaya County Secretary & 2 others
(Petition E010 of 2024) [2025] KEELRC 407 (KLR) (17 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 407 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E010 OF 2024
JK GAKERI, J
FEBRUARY 17, 2025**

BETWEEN

ASSOCIATON OF PUBLIC HEALTH OFFICERS OF KENYA PETITIONER

AND

SIAYA COUNTY SECRETARY 1ST RESPONDENT

SIAYA COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

SIAYA COUNTY GOVERNMENT 3RD RESPONDENT

RULING

1. Before the court for determination is the applicant/Respondent's Notice of Motion dated September 16, 2024 filed under Certificate of Urgency seeking Orders that:
 1. Spent.
 2. Spent.
 3. Spent.
 4. The judgment of the court dated 25th July, 2024, all consequential orders and execution be set aside.
 5. The Applicants be granted unconditional leave to defend this suit.
 6. Costs be in the cause.
2. The Notice of Motion is expressed under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 10 Rule 11 and Order 51 Rule 1 and 4 of the Civil Procedure Rules and is based on the grounds set out on its face and the Supporting Affidavits of Wilfred Nyagudi and Joseph Ogotu sworn on 17th September, 2024. While Mr. Wilfred Nyagudi states that he is the Acting Secretary, Siaya County



Public Service Board, Mr. Joseph Ogutu deposes that he is the Secretary Siaya County Government and their affidavits are similar.

3. Both affiants depose that the ex parte judgement was delivered on 25th July, 2024. Mr. Wilfred Nyagudi deposes that the 2nd respondent was not served. Mr. Ogutu deposes that the 1st and 3rd respondent were not served with any pleadings or notice and were thus unaware of the matter.
4. Both depose that the respondents stand to suffer loss irreparably as they did not take part in the proceedings and there is a high chance of the judgment being enforced.
5. That the respondents response/defence raise triable issues and will suffer prejudice if condemned unheard and pray that the judgment be set aside.

Response

6. In his Replying Affidavit sworn on 29th October, 2024, Mr. Mohammed Bagajo Duba deposes that the application is incompetent and bad in law as the respondents were served with the Notice of Motion and Petition on 15th March, 2024 around 3:23pm via email address infopsb@siaya.go.ke and info@siaya.go.ke, emails displayed on their website, for the 2nd and 1st and 3rd respondents respectively.
7. That the pleadings were served on time but they did not enter appearance or attend court and the court had jurisdiction to hear and determine the matter.
8. According to the affiant, the respondent's intention is to disrupt a validity obtained judgment and the application has been overtaken by events.
9. Mr. Mohammed Duba further deposes that the respondents had not demonstrated the prejudice they will suffer by complying with the ex parte judgment as the 2nd respondent is free to re-advertise the position of Siaya County Director of Health and afford all health professionals an opportunity to take part in the recruitment exercise.

Submissions

10. On 30th October, 2024, Mr. Odhiambo for the Petitioner/respondent informed the court that he had filed a response on 29th October, 2024 and served via email.
11. Counsels were agreeable that the Notice of Motion be canvassed by way of written submissions and were accorded 14 days a piece to file and exchange submissions but none had filed on 28th November, 2024 and were accorded 21 days a piece to do so with a mention on 23rd January, 2025 to confirm compliance.
12. None of the counsels was present in court and none had filed submissions.
A ruling date was given.
13. The applicant's salient relief or order is for the judgment dated 25th July, 2024 to be set aside.
14. Order 10 Rule 11 of the Civil Procedure Rules provides that –

Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.
15. From the wording of Order 10 Rule 11, it is evident that whether or not to set aside or vary and ex parte judgment is a matter of discretion which the court must exercise judicially not capriciously or whimsically.



16. In *David Kiptanui Yego & 134 Others V Benjamin Rono & 3 Others* [2021] eKLR H. A. Omondi held:

Courts have the discretionary power to set aside *ex parte* judgment with the main aim being that justice should prevail. The Courts are not required to consider the merits of a defence in an application of this nature, although the applicant has a defence to the counter-claim which it should be allowed to be heard on merit. Therefore, courts ought to look at the draft defence to the plaint and accompanying witness statements before proceeding to give its ruling as to whether the applicant's defence raises triable issues. In *Patel V E.A. Handling Services Ltd* (1974) EZ 75 and *Tree Shade Motor Ltd V D.T. Dobie Co. Ltd* [CA 38 of 1998](#) and *Mania V Muriuki* (1984) KLR 407 the courts held that the discretion of the court should be exercised to avoid injustice or hardship resulting from accident, inadvertence and excusable mistake or error".

17. See also *Phillip Kiptoo Chemwolo & Mumias Sugar and Co. Ltd V Augustine Kubede* [1982 – 1988] KAR, *CMC Holdings Ltd V. Nzioki* [2004] KLR 173, *Mureithi Charles & Another V. Atina Nyagesoka* [2022] eKLR, and *Martha Wangari Karua V IEBC & Others* among others.

18. In *Mwala V Kenya Bureau of Standards* [2001] 1 EA 148 the court stated:

“to all that I should add my own views that a distinction is to be drawn between a regular and irregular *ex-parte* judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked, the same ought to be set aside not as a matter of discretion, but *ex debito justitiae* for a court should never countenance an irregular judgment on its record”.

19. Similarly, in *Kimani V Mc Connell* [1966] EA 545, the court held that a regular judgment ought not to be set aside unless the court is satisfied that the defence raises triable issues.
20. In the instant application, the applicant is challenging the jurisdiction of the court and want of service.
21. On jurisdiction, the applicant merely states that this court has no jurisdiction to hear and determine this matter as it is a constitutional petition and constitutional petitions are a presence of the High Court.
22. It is trite law that jurisdiction is everything as eloquently captured by Nyarangi JA in *Owners of the Motor Vessel “Lilian S” V Caltex Oil (Kenya) Ltd* [1989] KLR1, 14.
23. The jurisdiction of the Employment and Labour Relations Court has been addressed in a catena of decisions; the latest being the Supreme Court decision in *Kenya Tea Growers Association and Others V National Social Security Fund*, Petition No. 004 of 2023 where the court stated:

In our view, there is nothing in the Constitution, the ELRC Act, or indeed in our decision in the *Karisa Chengo Case* to suggest that in exercising its jurisdiction over disputes emanating from employment and labour relations, the ELRC court is precluded from determining the constitutional validity of a statute. This is especially so if the statute in question lies at the centre of the dispute. What it cannot do, is to sit as if it were the High Court under article 165 of the Constitution, and declare a statute unconstitutional in



circumstances where the dispute in question has nothing or little to do with employment and labour relations within the context of the ELRC Act. But, if at the commencement or during the determination of a dispute falling within its jurisdiction, as reserved to it by article 162(2)(a) of the Constitution, a question arises regarding the constitutional validity of a statute or a provision thereof, there can be no reason to prevent the ELRC from disposing of that particular issue. Otherwise, how else would it comprehensively and with finality determine such a dispute? Stripping the court of such authority would leave it jurisdictionally hum-strung; a consequence that could hardly have been envisaged by the framers of the Constitution, even as they precluded the High Court from exercising jurisdiction over matters employment and labour pursuant to article 165(5)(b). We are therefore in agreement with the appellants' submissions regarding this issue as encapsulated in paragraph 69 of this Judgment”.

24. Similarly, in *Daniel N. Mugendi V Kenyatta University & 3 Others* [2013] eKLR, the Court of Appeal expressed itself as follows:

In the same token, we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incidental to those matters...”

25. Finally, in *United States International University ((USIU) Attorney General* [2012] eKLR Majanja J. held as follows:

In the final analysis, I would adopt the position of the Constitutional Court of South Africa in *Gcaba V Minister of Safety and Security* (Supra). The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), Section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret *the constitution* and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of Section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of *the Constitution* within a matter before it”.

26. I say no more on the Employment & Labour Relations court's jurisdiction to hear and determine constitutional petitions.
27. On service, the applicants aver that they only became aware of the matter on 25th July, 2024 when the respondent served a copy of the judgment. The Supporting Affidavits of Mr. Wilfred Nyagudi and Joseph Oguttu are emphatic that their advocates on record perused the file and established that the matter had proceeded ex parte and an ex parte judgment delivered on 25th July, 2024.
28. The affiants are silent on how their advocates on record learnt that there was a matter pending against the applicants and when.
29. The applicant's contention is that no service was effected, the respondent on the other hand contends that service was indeed effected via email and an affidavit of service filed.
30. Records show that the instant Petition were filed on 13th March, 2024 and came upon 14th March, 2024, when the court directed the applicant to service within 2 days the respondent was accorded 7 days after service.



31. In the meantime, the applicants were temporarily restrained from any further short-listing, interviews and/or recruiting and appointment of any person to the position of County Director of Health JG “CPSB” (1 POST) and a mention was slated for 15th April, 2024 for confirmation of the filing of submissions for the Notice of Motion and Petition but none had filed and parties were accorded 30 days a piece to do so.
32. On 15th April, 2024, the respondent’s advocate filed an Affidavit of Service dated 15th March, 2024, deposing that all applicants were served via email address infopsb@siaya.go.ke and info@siaya.go.ke and an electronic print out dated 16th March, 2024 at 3:23pm was attached showing that service had been effected via email.
33. None of the applicants denied that the email addresses to which the documents were sent did not belong to them or contend that they were out of order or the responsible person failed to act of the documents.
34. The importance of service of pleadings in the administration of justice cannot be over-emphasized.
35. In *Koinange Investments & Development Ltd V Robert Nelson Ng’ethe* [2014] eKLR, the Supreme Court observed as follows:

As correctly pointed out by the applicant, service of court documents is an important component in the administration of justice and is a common aspect of litigation that confronts courts of all cadres, in the normal business schedule.

Service is a procedural function is regulated by law and other relevant instruments”.

See *Moses Mwicigi & 14 Others V Independent Electoral and Boundaries Commission & 5 Others* [2016] eKLR.
36. From the evidence on record, it is decipherable that the respondent’s Notice of Motion and Petition were served via the applicant’s email addresses, but for unexplained reasons decided to wish the matter away but not responding to it.
37. Regrettably, the applicants made no attempt to controvert the evidence of service provided by the respondent.
38. Intriguingly, and noteworthy, the applicants did not allege or depose that by reason of absence of service by the respondent they concluded the interviewing process and appointed a County Director of Health, a process the interim Orders restrained, otherwise they would have been cited for contempt of court.
39. Evidently, the respondent Advocates email message dated 16th March, 2024 at 3:23pm, adverted to earlier, attached the stay Orders and the applicants appear to have been aware of it.
40. In the courts view, the applicants were aware of the Notice of Motion, Petition and the stay Orders but perhaps choose to await the outcome in order to determine the next course of action.
41. The argument on lack of service is unsubstantiated and fails.
42. Similarly, although the applicants allege that they stand to suffer “loss irreparably” as they did not participate in the proceedings, they have not disclosed the shape, type or form the alleged loss could take and when it would materialize.



43. This is important because the only loss the applicants stand to suffer is the cost of re-advertising the position of County Director of Health as directed by the Court and interview potential applicants for the position.
44. The loss is quantifiable in monies counted.
46. Finally, concerning whether the applicant's defence raises triable issues, the applicant's Replying Affidavit sworn on 17th September, 2024, identifies jurisdiction as the only issue, that the court had no jurisdiction to hear and determine the Petition, which in the courts view, is a matter of law not evidential.
47. Black Law Dictionary defines the term "triable" as subject or liable to judicial examination and trial".
48. In *Job Kilach V Nation Media Group Ltd* [2015] eKLR the court stated:
- ... A bonafide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial".
49. In *Patel V Cargo Handling Services Ltd* [1974] EA 75 at 76 Duffus P stated that:
- ... a triable issue ... is an issue which raises a prima facie defence and which should go to trial for adjudication".
50. In the court's view, jurisdiction is such a critical issue that it ought not be raised by way of a notice of motion after the impugned judgment has already been delivered and should be a ground for appeal.
51. The upshot of the foregoing is that the Applicants Notice of Motion dated September 16, 2024 is without merit and it is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 17TH DAY OF FEBRUARY, 2025.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

