



Kenya County Government Workers Union v County Government of Homa Bay & 2 others; Public Service Commission & 2 others (Interested Parties) (Miscellaneous Case E118 of 2024) [2025] KEELRC 968 (KLR) (26 March 2025) (Ruling)

Neutral citation: [2025] KEELRC 968 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
MISCELLANEOUS CASE E118 OF 2024
NZIOKI WA MAKAU, J
MARCH 26, 2025**

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION APPLICANT

AND

COUNTY GOVERNMENT OF HOMA BAY 1ST RESPONDENT

HOMA BAY COUNTY ASSEMBLY SERVICE BOARD 2ND RESPONDENT

CLERK, COUNTY GOVERNMENT OF HOMA BAY 3RD RESPONDENT

AND

PUBLIC SERVICE COMMISSION INTERESTED PARTY

DENIS CHAPA OKAA INTERESTED PARTY

JARED OMONDI MINGUSA INTERESTED PARTY

RULING

- Through an application dated 5th February 2025, the Homa Bay County Assembly Service Board (the 2nd Respondent/Applicant) seeks to set aside *ex debito justitiae* the court orders issued on 30th January 2025, which had adopted the 1st Interested Party’s decision dated 1st August 2024. The 1st Interested Party’s decision had found the dismissal of the 2nd and 3rd Interested Parties from employment unprocedural and, consequently, ordered their reinstatement along with payment of withheld salaries and allowances. In support of its application to set aside the orders, the 2nd Respondent/Applicant argued that the Court had issued substantive orders *ex parte* and introduced an order of reinstatement that was not part of the 1st Interested Party’s decision. Furthermore, it asserted that it had already sought a review before the 1st Interested Party, which was still pending determination.



2. The Applicant/Respondent filed a replying affidavit on 19th March 2025. However, this affidavit was expunged from the record for being filed without leave of the court.
3. The application was canvassed by way of written submissions. However, only the Applicant/Respondent's submissions are on record.

Applicant/Respondent's Submissions

4. In opposition to the application the Applicant/Respondent identifies the following issues for determination:
 - i. Whether the orders dated 22nd January 2025 ought to be set aside;
 - ii. Whether the Respondents have properly filed the appeal/review application before the 1st Interested Party; and
 - iii. Whether the execution of the orders dated 22nd January 2025 ought to be stayed.
5. On the first issue the Applicant/Respondent submits that the orders ought not to be set aside as they were issued regularly. It reiterates that the 2nd Respondent was served with the application dated 20th September 2024 together with the hearing and mention notices appurtenant to it but failed to respond. In support of its position the Applicant/Respondent relies on *James Kanyita Nderitu v Marios Philotas Ghika & another* [2016] eKLR, on the applicable principles to be taken into account before setting aside of orders. Additionally, it relies on the case of *Frigonken Ltd v Value Pak Food Ltd* [2010] eKLR in which it was held that an order could only be set aside ex-debitio justitiae in instances where there was no proper service.
6. The Applicant/Respondent asserts that jurisdiction to set aside orders are discretionary and the 2nd Respondent/Applicant has approached the court with unclean hands. He relies on *Patel v East Africa Cargo Handling Services Ltd* [1974] EA 75 in which the court underscored the importance of doing justice to parties and any party who seeks equitable orders must come to court with clean hands. The Applicant/Respondent submits that even assuming that the orders were issued ex parte the 2nd Respondent/Applicant ought to have complied first before seeking to set them aside. It relies on *Wildlife Lodges Ltd v County Council of Narok & another* [2005] 2 EA 344 (HCK), where it was underscored that there was no excuse for a party to disobey a court order merely on the ground that it had been made ex-parte. He also cites the case of *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi)* [2018] KEHC 8750 (KLR), where it was stated:

“It must however be remembered that court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying therewith, the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a court order is made in a suit the same is valid unless set aside on review or on appeal.”
7. On the 2nd Issue the Applicant/Respondent submits that the application for review to the 1st Interested Party is an afterthought. It draws attention to the fact that it was filed on 3rd October 2024 despite being dated 15th August 2023. The Applicant also highlights the fact that they were served with the application after they had filed the application dated 20th September 2024 for adoption of the 1st Interested Party's orders. Moreover, it points to the fact that the 2nd Respondent/Applicant deliberately misspelled its email address in a bid to feign service. It affirms that the application was not



served as there was no evidence of service pointing to bad faith on 2nd Respondent/Applicant's part. It places reliance on *Erick Okinyi Tolo v Rafiki Micro-Finance Bank Limited & another* [2022] KEELRC 1450 (KLR), in which it was held that without proper, effective and verifiable service the unserved party would be unfairly excluded from proceedings, making it difficult to administer substantive justice. Regarding stay of the orders issued on 22nd January 2025, the Respondent/Applicant reiterates the invalidity of the review before the 1st Interested Party. In any case, it submits that the existence of a review in and of itself cannot form the basis for automatic stay of the Interested Party's orders issued on 1st August 2024. In support of its position, it cites section 88(4) of the *Public Service Commission Act* which provides:

“Despite the right of appeal or the right to apply for review in accordance with this Part, the implementation of the decision shall not be deferred or suspended pending the determination of the appeal or the application for review.”

8. Additionally, it cites *County Government of Mandera & another v Attorney General & another; Hussein Dayow Abdullahi & 3 others (Interested Parties)* [2020] KEELRC 893 (KLR), which in interpreting section 88(4) of the *Public Service Commission Act* held that a decision by the Public Service Commission shall not be automatically stayed on account of a review filed before the commission. Consequently, the Respondent/Applicant urges the court to exercise discretion in its favour and dismiss the application, noting that the 2nd Applicant/Respondent has been stalling implementation of the 1st Interested Party's decision.
9. The Court has considered the motion before it together with the annexures thereto as well as the submissions filed herein. The Court distils that the issue for determination is whether the orders granted ought to be set aside ex debito justitiae as proposed by the 2nd Respondent/Applicant. The Court is said to have issued the orders ex parte and without basis for the issuance. When a matter progresses in court and at the hearing, only one of the parties appears and the other does not and, the court ascertains that the opposite party was duly served with the notice to appear, the court may hear the case ex-parte and make an order against the absent party. These orders are neither null nor void. They are lawful, enforceable and proper. They are no less valid than an order issued in the presence of all parties. Such an order has the full force of the law. Such an order can only be vitiated on sound principles to be demonstrated. Failure to appear of itself is not a ground to vitiate the order issued. In this case there was proper service and when the matter came for hearing, no one appeared for the Respondents despite service having been effected upon them. There is ample proof of service as evidenced by the affidavit of the process servers who effected service upon the Respondents and Interested Parties. The service effected on Wednesday 27th November 2024 at 11:58am has not been shown to have been irregular or on the wrong parties. Indeed, the return of service of Mr. Peter Oginga clearly shows the service was properly effected on the parties who now seek to have the orders vacated ex debito justitiae.
10. When the Court heard the Applicant/Respondent and proceeded to issue the order, the fact that the 2nd Respondent/Applicant did not appear does not entitle it to have the order vacated ex debito justitiae. That can only be the case where there was manifest failure to serve, the order is illegal or null and void *ab initio*. To permit parties to sit out a judicial process only for them to come and assert nullity because they chose not to participate in the proceeding would be a mockery of justice.
11. In my considered opinion, the refusal of the Respondents to participate in the process leading to the issuance of the orders cannot vitiate them or cause the order to be amenable to a discharge or variation. The motion before me spectacularly fails and is dismissed with costs to the Applicant/Respondent.



As only the 2nd Respondent/Applicant moved the Court, it is the 2nd Respondent who shall meet the costs of this motion to the exclusion of the other Respondents or Interested Parties.

It is so ordered.

DATED AND DELIVERED AT KISII THIS 26TH DAY OF MARCH 2025.

NZIOKI WA MAKAU, MCI Arb.

JUDGE

