



**Republic v Public Service Commission & another; Kirinyaga
County Government (Exparte Applicant) (Judicial Review
E001 of 2022) [2024] KEELRC 224 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 224 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
JUDICIAL REVIEW E001 OF 2022
ON MAKAU, J
FEBRUARY 9, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

PUBLIC SERVICE COMMISSION 1ST RESPONDENT

**KENYA NATIONAL UNION OF NURSES ON BEHALF OF JUDITH GATHONI
MWANGI & 187 OTHERS 2ND RESPONDENT**

AND

KIRINYAGA COUNTY GOVERNMENT EXPARTE APPLICANT

RULING

1. This ruling relates to the 2nd Respondent’s Notice of Motion dated 25th July 2023 brought under Article 41, 47, 48 and 159 of the *Constitution*, section 1A, 1B, 3A of the *Civil Procedure Act* and order 45 of the *Civil Procedure Rules*. It seeks the following orders: -
 - a. That this Honourable court be pleased to order the *exparte* Applicant to allow the 2nd Respondent’s members to purge the contempt of court as per the judgment delivered on 27th April 2023 and the decree issued on 12th May, 2023.
 - b. That the 2nd Respondent and its members be allowed to purge the contempt of court so as to get audience of this Honourable Court in their pending applications in particular, the Miscellaneous Application Number 1 of 2021 dated 10th December 2021.
 - c. That this Honourable court be pleased to find that the *exparte* Applicant’s continued blockage of the 2nd Respondent and its members from purging the contempt of court is in itself contemptuous.



- d. That the costs of this Application be in the cause.
2. The application is supported by the affidavit sworn by Seth Ambusimi Panyako on 25th July 2023. In brief he deposed that the 2nd respondent filed appeal proceedings before the 1st Respondent (PSC) in compliance with orders given by the High Court in Nairobi Petition 2 of 2020 where the court dismissed the petition and referred the parties to the PSC. Further the applicant contended that the strike was based on section 14 of the *Occupational Safety and Health Act* which allows employee to leave his work place if it presents eminent and serious danger of life and health. The said section shields the employee from dismissal. For that reason, the affiant urged the court to exercise its discretion and grant the orders sought.
 3. The application is opposed by the primary applicant vide a Replying Affidavit sworn on 15th September 2023 by its Ms.Carolyne Kinyua. In brief she deposed that the applicant's members were employed in the essential services sector and therefore the strike had serious implication to greater public. The strike was unprotected and this court directed the nurses to report back to work on 24th May 2019, 28th May 2019 and in a final judgment on 4th July 2019.
 4. The respondents and members disobeyed the court orders deliberately until their services were terminated. Further she deposed that the applicant members were dismissed more than 4 years ago and therefore it is not possible to reinstate them to work. Further, it is the case for the exparte Applicant that the vacancies for the applicant's members were long filled after they refused to obey court orders. Consequently, she prayed for the application to be dismissed with costs.

Issues for determination

5. The applicant union admits that it violated court orders and now seeks for leave to purge the contempt in order to regain audience before the court. The issues for determination is whether the union has laid before this court a good basis upon which to benefit from the discretion sought.
6. The applicant had cited two reasons why they failed to comply with the orders of this court. The first one is that the High Court dismissed its petition and directed the parties to refer the grievance to the PSC. This allegation is laughable. I mean the dismissal of the applicant's suit by the High court had nothing to do with compliance with orders of this court having been declared to be an unprotected strike.
7. This court is the only forum under the law with mandate to determine whether or not a strike is lawful. Section 80 (3) of *the Act* provides that:

“Any issue concerning whether any strike or lock-out or threatened strike or lock-out complies with the provisions of this Act may be referred to the Industrial court.”

Section 73(2) of the *Labour Relations Act* further provides that:-

“Notwithstanding the provision of subsection (1), if a trade dispute-

- a. ...
 - b. is in an essential service, the Minister may, refer the dispute to the Industrial court.”
8. Section 74 of *the Act* also Provides that a trade union may refer a dispute to the Industrial court as a matter of urgency if the dispute concerns:



- a. “...
 - b. Employers and employee engaged in an essential service.”
9. I have quoted the above provisions herein to demonstrate that the order issued by this court on the interim and confirmed by a Judgment were competent and binding on all the parties to the suit and all other persons and governments or commissions including the interested party herein.
 10. As regards the alleged imminent and serious danger to life and health as the basis for not reporting to the work place, I must say that the applicant has fallen short of disclosing the particulars of the alleged imminent danger. I say so because there is evidence on record that the management continued in service, and new staff were recruited to work in the same facilities where the applicants’ members refused to work.
 11. The applicants had an opportunity to raise those issues before the judgment was rendered by this court. Further, if the court erred in the said judgment, they had another chance before the appellate court. They also ignored the fact that they were engaged in an essential service sector which barred them from engaging in strikes.
 12. Even if the right to strike had existed, I doubt whether the applicant’s members were entitled to continue in the strike after they were required to stop by the employer, and more so after court halted the same. This court exists to ensure that there is peace at the work place and as such its orders must be respected and obeyed if the said objective is to be achieved. Impunity and contempt of the court order will only breed chaos and untidy industrial relations.
 13. The emerging jurisprudences from our courts is that court orders are neither suggestions nor options given to the parties to chose whether or not to comply with the same. They are legal commands which must be respected, obeyed, complied with or implemented by the persons or officers of government or corporations both in public or private sector. The court orders retain their force until they are set aside upon review or appeal. As long as they are not set aside they must be obeyed.
 14. Having said that, I find and hold that the applicant’s defiance to court orders made in the interim basis and in the final Judgment of this court was uncalled for. It was not justifiable. The question that begs for answer is whether the applicant is remorseful.
 15. I think so. They have learnt their lesson considering that they were dismissed from employment for continuing with the strike in contempt of court order. For over four years, they are presumed to be out of formal employment. Therefore, I will allow the application on condition that the Applicant pays a fine of Two Hundred thousand shillings (Kshs.200,000.00) within 14 days of this ruling. The matter will be mentioned on 28th February, 2024 when the ELRC Misc.E001 of 2021 Kenya National Union of Nurses v Kirinyaga County Public Service Board will also be mentioned for fixing a hearing date.

DATED, SIGNED AND DELIVERED AT NYERI THIS 9TH DAY OF FEBRUARY, 2024.

ONESMUS N MAKAU

JUDGE

Order

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU



JUDGE

