



**University Academic Staff Union (UASU) v Moi University Council & another
(Judicial Review E004 of 2022) [2024] KEELRC 883 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 883 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
JUDICIAL REVIEW E004 OF 2022
MA ONYANGO, J
APRIL 18, 2024**

BETWEEN
UNIVERSITY ACADEMIC STAFF UNION (UASU) APPLICANT
AND
MOI UNIVERSITY COUNCIL 1ST APPLICANT
MOI UNIVERSITY 2ND APPLICANT

RULING

1. Vide application dated 14th August 2023, the Applicants seeks the following orders:
 1. That this application be certified urgent and be heard ex parte in the first instance.
 2. That the Judgment of 28th April 2023, and all consequential orders, be set aside pending the hearing and determination of this application inter parties.
 3. That the proceedings and/or orders and/or directions of the court given and/or made pursuant to the Judgment of 28th April 2023 be set aside ex-debito justitiae.
 4. That the Applicant's case be re-opened to allow the Applicant to present its response to the Judicial Review Application dated 23rd May 2022, and its witnesses to testify in the matter.
 5. That costs be provided for.
2. The grounds on the face of the application and in the supporting affidavit of Bernard Otieno Barasa, counsel for the Applicant sworn on 14th August 2023, are that the Applicant was served with an order dated 19th May 2022 granting the Respondent leave to file Judicial Review; that the Respondent went ahead and filed the Judicial Review Application through a motion dated 23rd May 2022 which was duly served on the Applicant herein; that the Applicants were at liberty to respond to the application within fourteen (14) days after service; that the Applicant being a member of the Federation of Kenya



Employers gave instructions to the Head of Legal Services of the Federation of Kenyan Employers to urgently take up the matter and represent the University; that the letter of instruction was sent via email on 30th May 2022 together with defence documents which the instructed counsel acknowledged receipt of and assured the Respondent of urgent action; that on 7th June 2022, the Applicants sent to the Federation's counsel other necessary documentation which was to be relied upon; that the instructed counsel acknowledged receipt of all the documentation through an email dated 7th June 2022; that through a letter dated 28th November 2022, the Federation of Kenya Employers sought further information in order to continue representing the Applicant and went ahead to issue an invoice of Kshs 232,000 being legal fees for representation in the JR application; that later upon conducting due diligence and perusal of the court file, the Applicant discovered that a judgment dated 28th April 2023 had been delivered against the Applicant for non-participation in the proceedings; that the failure on the part of the Applicant to attend court in the Judicial Review application was not deliberate but due to mishandling of the file by the Counsel on record who did not participate in the proceedings despite being properly instructed; that the Applicant wishes to recall the file from the Federation of Kenya Employers and to defend its case through its own in-house counsel and lastly, that the Applicant has a good defense and should be given an opportunity to be heard and present its case in the Judicial Review Application.

3. The application is opposed. The Respondent (the Applicant in the main motion) filed a Replying Affidavit sworn on 4th October 2023 by Jeremiah S. Ojuki Nyabuta, the Respondent's Organizing Secretary. He contends that the Applicants' assertion that the judgment on record should be set aside and the proceedings reopened for having been issued on account of their non-attendance is untrue, flimsy and untenable. He deposes that the Applicants have not tendered justifiable reasons to warrant the setting aside of the proceedings and consequential orders issued herein and/or reopening of their case since they were aware of the proceedings but failed to file their response due to their malicious antics which were then well calculated at commencing and concluding the subject recruitments to fill deanship positions in various illegal departments and several other positions before hearing and determination of the suit herein and aimed at defeating the law and orders herein. It is the Respondent's case that since the Applicants were duly served with all the pleadings and conservatory orders on record and since the court heard the suit herein substantively on merit, the judgment on record is regular, final in nature and cannot be disturbed. According to the Respondent, upon hearing the substantive Judicial Review Application, the consequential judgment/order is a final decree which cannot be set aside or varied by the court. The affiant further deposes that since the Applicant failed to exercise its right to defend the suit herein and since the judgment/decree of this court issued on 18th April 2023 is final in nature, the Applicant's only remedy, if any, lies with their erstwhile advocate based on negligence.
4. It is contended that since leave to file judicial review orders granted by the court vide the order issued on 19th May 2022 acted as stay of proceedings, the scheduled interviews and all other subsequent consequential proceedings of the interviews and/or proceedings of the Respondents, the resulted actions of recruitment and establishment of unconstitutional offices attributed by the Applicants herein was illegal and in contempt of the court orders. That the applicant has brought this application with unclean hands.
5. It is the Respondent's case that the court has no jurisdiction to determine this matter having rendered its final judicial review order on 18th April 2023.
6. The Court was thus urged to dismiss the instant application with costs.



7. The application was disposed of by way of written submissions. The Respondent's submissions were filed on 27th October 2023 while the Applicant's submissions were filed on 8th December 2023.

Respondents submissions

8. In their submissions, the Respondents framed the issues for determination to be;
- i. Whether the Respondents /Applicants have demonstrated sufficient grounds to warrant setting aside of judgment on record and or re-opening of the proceedings herein
 - ii. Which party is to bear the costs of the application
9. On the first issue, the Respondents/Applicants submitted that they had demonstrated the established grounds to warrant setting aside the judgment on record to wit;
- i. Judgment was entered irregularly.
 - ii. It has a defence on merit
 - iii. It has given a reasonable explanation for lack of participation in the proceedings
 - iv. If the impugned judgment is enforced before it is are given a chance to be heard, there would be substantial prejudice to be suffered not only by the Respondent but also by tax payers who have so far been paying for the public officers in service
10. The court was urged to allow the application dated 14th August 2023 with costs.

Respondents submissions

11. On its part, the Applicant/ Respondent framed the issued for determination to be:
- i. Whether the Applicants have laid any sufficient grounds to warrant setting aside of judgment on record and/or re-opening of the proceedings herein
 - ii. Whether the court lacks jurisdiction to re-open the judgment herein
 - iii. Who to pay costs of the instant application
12. On the first issue, the Respondent submits that the Applicants have not satisfied the grounds for setting aside of judgment under order 45 Rule 1, 2 and 3 of the *Civil Procedure Rules*.
13. It is submitted that the Respondent has not demonstrated that it has discovered new evidence relevant to this case that entitles it to the setting aside/re-opening of this court's judgment. That it has further not demonstrated whether the judgment of this court is erroneous or has clerical or other mistake.
14. The Respondent submits that the Applicant's failure to file its response, participate in the proceedings and the purported illegal implementing of illegal/void amendment under the *(Miscellaneous Amendments) Act* No. 18 of 2018 which created various unlawful positions in the University while the court orders and substantive judicial review application was pending hearing and determination, the Applicant should not be granted the orders sought.
15. On the second issue, the Respondent submits that irrespective of whether or not the judgment on record is a regular judgment, the court is *functus officio* having rendered its mind in finality.



16. According to the Respondent, the decree of a substantive judicial review application is final in nature and the same cannot be set aside/varied nor can the judicial review proceedings be re-opened after the final order.
17. It was submitted that the court having made its final determination granting the Respondent conservatory orders in accordance with the prayers sought vide the substantive application dated 27th July 2022, it has no jurisdiction and must down its tools as it is *functus officio*.
18. The court was urged to dismiss the instant application with costs.

Determination

19. I have considered the application dated 14th August 2023 and the affidavits both in support and against the same. I have further considered the submissions by both parties. The issue for determination is whether the Applicant is entitled to orders sought.
20. In the instant case, the Applicant does not deny that it was served with the substantive Judicial Review Motion herein. The record shows that the Applicant was served and acknowledged receipt of pleadings.
21. The record further reflects that before filing the instant application, the Applicant did not participate at all in these proceedings. This matter was in court on 30th June, 13th July, 3rd October, 7th November and 19th December, 2022 and there was no appearance by the Applicant in any of the court sessions.
22. On 19th December, 2022 the court fixed the matter for judgment on 24th February, 2023. The Applicant was given an opportunity to file submissions which it did not.
23. In its submissions the Applicant contends that the judgment herein is irregular, that the Applicant has a defence that raises triable issues, that there is reasonable explanation for the delay in filing the instant application and that no prejudice would be suffered by the Respondent.
24. All these are irrelevant in an application to set aside Judicial Review Orders where there were leave was granted to operate as stay as in the instant case.
25. The substantive JR motion herein was filed under Order 53 Rule 1 of the [Civil Procedure Rules](#) and leave granted to operate as stay. Although courts have powers to set aside or vary such orders made under Order 53, the power is very limited and sparingly exercised.
26. The principles upon which such orders may be set aside or reviewed were set out in the case of [Republic v Vice Chancellor Moi University & 3 others Ex-Parte Benjamin J. Gikenyi Magare](#) [2018] eKLR where at paragraph 27 the Court stated:

“I will not attempt to re-invent the wheel regarding the issue of setting aside stay orders issued when leave has been granted to operate as stay. I say so because a host of judicial decisions have now settled the position that setting aside such stay orders would only be merited if: -

 - a) There is non-disclosure of material facts
 - b) Concealment of material documents
 - c) Misrepresentation”
27. In the instant case the Applicant has not alleged or proved that there was material non-disclosure of material facts, or that the Respondent concealed material documents or that there was



misrepresentation. Its reasons for seeking the setting aside or review of the judgment herein are therefore not valid for grant of the orders sought.

28. For these reasons I find no merit in the application and dismiss the same with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 18TH DAY OF APRIL 2024

MAUREEN ONYANGO

JUDGE

