



Kenya National Union of Nurses v Kirinyaga County Public Service Board; Public Service Commission (Interested Party) (Miscellaneous Application 1 of 2021) [2024] KEELRC 2063 (KLR) (26 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 2063 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
MISCELLANEOUS APPLICATION 1 OF 2021
ON MAKAU, J
JULY 26, 2024**

BETWEEN

KENYA NATIONAL UNION OF NURSES APPLICANT

AND

KIRINYAGA COUNTY PUBLIC SERVICE BOARD RESPONDENT

AND

PUBLIC SERVICE COMMISSION INTERESTED PARTY

RULING

Introduction

1. This ruling relates to the applicant’s Notice of Motion dated 24th May 2021 brought under section 13 of the *Employment and Labour Relations Court (ELRC) Act*, Order 46 rule 19(2) of the *Civil Procedure Rules*, Section 89(1) of the *Public Service Commission (PSC) Act*, Article 162(2) of the *Constitution* and all other enabling provisions of the law, and it seeks the following orders:
 - a. The court to recognize, adopt and enforce the decision by the Public Service Commission (PSC) as orders and decree of this Court.
 - b. An order directing the Respondent to implement the decision of the PSC to reinstate the 188 nurses within 14 days with no loss of benefits.
 - c. Any other order that this Court deems just and fit in the circumstances.
 - d. Costs be in the cause.
2. The respondent opposed the motion.



Factual background

3. In May 2019 the Applicant's members (188 nurses) went on strike complaining of poor working conditions. The strike went on despite an interim court order issued on 24th May 2019, declaring it unprotected. The said order was confirmed after inter partes hearing, in a ruling delivered on 4th July 2019 which found the strike to be unlawful and unprotected. The nurses appealed against the said ruling but the appeal was dismissed.
4. While the court proceedings were going on, the applicant then invited the Nurses back to work but they continued with the strike and they were served with show cause letters which also invited them to disciplinary hearing on 16th June, 2019. The Nurses failed to attend the hearing and 188 Nurses were dismissed from service by the Board.
5. The applicant appealed against the dismissal to the Public Service Commission on 18th January, 2021 and after hearing the parties, the PSC found that the dismissal of the 188 Nurses was irregular, unfair and unlawful, and ordered for their reinstatement. The decision was rendered on 3rd March, 2021 and on 31st March 2021, the respondent applied to the PSC for review of the said decision on grounds that: -
 - a. The PSC had failed to distinguish the role of CPSB and the County Executive.
 - b. The nurses had been issued with Notice to show cause inviting them to disciplinary hearing.
 - c. There had been a replacement of the dismissed nurses.
6. In the meanwhile, the applicant filed the instant application on 25th May, 2021 asking this court to adopt the decision by the PSC as judgment of the court. On 13th October, 2021 and before the application was heard by the court, the PSC rendered its decision on the respondent's application for review in which it acknowledged that the Nurses had indeed been served with show cause letters before they were dismissed, but declined to reverse its earlier decision.
7. The said development prompted the applicant to file a Motion in Misc. Application 1 of 2021 on 10th December, 2021 seeking to bring on record the new decision by the PSC. On 15th March, 2022, the respondent sought leave to file Judicial Review proceeding against the decision by the PSC dated 13th October 2021. Marete J consolidated the two matters on 24th March 2022 and allowed the two applications on 28th September 2022. He also directed the leave granted to operate as stay of the decision by the PSC.
8. After considering the submissions by the two sides, I allowed the respondent's application for judicial review and issued the writ of certiorari quashing the decision of the PSC rendered on 13th October 2021 and further, a writ of prohibition barring the enforcement of the said decision. The reason for the said conclusion was that the decision was tainted with illegality and irrationality. However, there was no request for mandamus to compel the PSC to do anything in relation to the initial decision rendered on 3rd March 2021.
9. Despite the earlier consolidation of the two matters, I only rendered decision on the judicial review application and postponed my decision on the instant motion to allow the applicant herein to purge its members' contempt of court orders which had declared their strike illegal and directed them to resume work. The applicant did so subsequently, and hence this ruling.



Submissions

10. The applicant submits that the court has the jurisdiction to grant the orders sought by dint of section 89 of the [PSC Act](#) and urged for the orders sought. It further submits that the respondent's application for review filed before the PSC on 31st March 2021 was dismissed and the PSC upheld its decision of 3rd March 2021 which reinstated the 188 nurses to employment.
11. It also urged that the 188 nurses have suffered financial loss due to the arbitrary failure to reinstate them to work and therefore, officers of the respondent who have failed to comply with the decision of the PSC should suffer the consequences set out in section 89(2) of the [PSC Act](#) including removal from office and being cited for contempt of court.
12. It further urged that the decision of the PSC is still intact, the strike was justified due to poor working conditions, the respondent has never hired new nurses to fill the vacancies left after the dismissal of the grievant and the dismissed nurses are suffering due to lack of income.
13. The respondent submits that in view of my judgment in ELRC JR No.1 of 2022, the decision of the PSC of 3rd March 2021 should not be adopted as judgment. In the said judgment, I quashed the decision of the PSC of 13th October 2021 for being tainted with error of law because the PSC failed to reverse its decision after acknowledging that it had not considered the evidence filed by the respondent showing that it had invited the grievants to disciplinary hearing but they defied. The respondent urged that the same error of law vis-a-vis that unconsidered evidence permeates to the initial decision of 3rd March 2021.
14. The respondent further submits that the reinstatement of the 188 nurses is not practicable considering the time span from the date of dismissal and now. Further, the vacancies left by the grievants were filled up and there is no budgetary allocation for the additional workforce. Reliance was placed on my said judgment and the case of [Sotik highlands Tea Estates v Kenya plantation and Agriculture Workers Union](#) [2017] eKLR where the court held that the law does not allow reinstatement after the lapse of three years after separation.
15. The respondent submits that this Court is clothed with discretion to decline adoption of a decision which is tainted with an error of law. It further urges that the instant application is overtaken by events because there is a judgment which declared the grievants participated in an unprotected strike and further that they declined to participate in the disciplinary process initiated before the dismissal. Consequently, the Court was urged to dismiss the application with costs.

Analysis and determination

16. There is no dispute that the PSC made a decision on 3rd March 2021 to the effect that the 188 nurses were unfairly and unlawfully dismissed from employment by the respondent and ordered for their reinstatement. It is also a fact that the said decision was challenged by way of review before the PSC but the application for review was dismissed on 13th October 2021. It is also a fact that the decision rendered on 13th October 2021 was challenged through Judicial Review and the same was quashed on 27th April 2023 but the decision of the PSC dated 3rd March 2021, which is material to the instant motion, was left intact. The only issue for determination herein is whether the said decision of PSC rendered on 3rd March 2021 should be recognized, adopted and enforced as orders and decree of this court.



17. The jurisdiction to enforce a decision of the PSC is donated by section 89(1) of the PSC Act which provides that:

“ 89 Enforcement of Appeal decision

1. Any person who is affected by the decision of the Commission made under this Part may file the decision for enforcement by the Employment and Labour Relations Court provided for under Article 162(2)(a) of the Constitution.”

18. The application is properly before this Court because the appeal mechanism under section 77 of the County Government Act and the PSC Act has been exhausted and what the court is being asked to do is to enforce the ultimate decision emanating from the alternative appeal process.

19. The respondent contends that the decision should not be adopted and enforced because it is tainted with error of law; the 188 nurses were dismissed for participating in unprotected strike and they defied show cause letter; reinstatement is not practicable since there is neither vacancy nor budget allocation; and that three years have lapsed since the separation. The applicant contends that the decision for enforcement remains intact; the strike was due to poor working conditions; the termination was unlawful; and the respondent has not filled the vacancies left by the unlawful dismissal of the 188 nurses.

20. The question that arises is whether the court has discretion to decline to enforce a decision by the PSC filed by an affected party under section 89 of the PSC Act.

21. Section 88 (1) of the Public Service Commission Act provides that: -

“ A person who is dissatisfied or affected by a decision made by the commission following an appeal may apply for review and the commission may admit the application if-

- a. Fresh material facts arise which with due diligence could not be presented when the decision was initially made; or
- b. There is an error apparent on the record of the earlier decision.”

22. In this case the respondent applied for review of the decision made on 3rd March 2021 and in the decision made on 13th October, 2021, the PSC acknowledge that there was in deed an error apparent on record because the respondent had filed relevant evidence which was not considered in making the impugned decision. Never the less, the PSC declined to reverse the impugned decision in line with the said evidence that showed that the dismissal was done for valid reason and after affording the nurses an opportunity to be heard. To that extent I agree with the respondent that the decision rendered on 3rd March 2021 is still infested with the same error which was never corrected.

23. Besides, there is no doubt from the said decision that the PSC did not evaluate the practicability of reinstatement of the 188 nurses more than two years after the dismissal. It failed to consider the evidence that showed that the dismissed nurses had been replaced with other nurses hired after the dismissal and there was no budget allocation to cater for the reinstatement. These facts notwithstanding, the respondent has not cited any law or authorities which grants this court discretion to reject decision of the PSC outside judicial review process.

24. Consequently, I must agree with the applicant that the decision of the PSC delivered on 3rd March 2021 remains intact and has not been challenged in Court. As observed in factual background, the



only decision challenged and quashed was the one on the review application rendered on 13th October 2021. In view of the above matters, I adopt the decision of the PSC delivered on 3rd March 2021 for enforcement as provided under section 89(1) of the *PSC Act*. Since the applicant obtained the said decision while in contempt of this Court orders, I will not award them costs of the application.

DATED, SIGNED AND DELIVERED AT NYERI THIS 26TH DAY OF JULY, 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

