



**Republic v Public Service Commission & 24 others; Kirinyaga
County Public Service Board (Exparte Applicant) (Judicial Review
E002 of 2023) [2024] KEELRC 2524 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2524 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
JUDICIAL REVIEW E002 OF 2023
ON MAKAU, J
OCTOBER 18, 2024
IN THE MATTER OF AN APPLICATION FOR
ORDER OF CERTIORARI AND PROHIBITION
AND
IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT
AND
IN THE MATTER OF THE PUBLIC SERVICE
COMMISSIONS ACT AND COUNTY GOVERNMENTS ACT
AND
IN THE MATTER OF THE DECISION BY THE PUBLIC
SERVICE COMMISSION DATED 14TH APRIL 2021**

BETWEEN

REPUBLIC APPLICANT

AND

PUBLIC SERVICE COMMISSION 1ST RESPONDENT

**AND DENTISTS UNION & 23 OTHERS & 23 OTHERS & 23 OTHERS & 23
OTHERS 2ND RESPONDENT**

AND

KIRINYAGA COUNTY PUBLIC SERVICE BOARD EXPARTE APPLICANT



JUDGMENT

Introduction

1. Pursuant to leave of this Court of 20th July 2023, the Applicant filed this Application for orders that:
 - a. That an order of certiorari to remove and bring into this Honourable Court for the purposes of quashing, the decision of the 1st Respondent delivered on 14th April 2021 between the members of the 2nd Respondent and the ex-parte applicant reinstating the members of the 2nd Respondent back to their previous employment and the refusal to vary the said decision dated 28th March 2023.
 - b. That an order of prohibition do issue prohibiting the 2nd Respondent through their servants, agents, employees or directly from enforcing the 1st Respondent's decision delivered on 14th April 2021, or executing the judgement delivered in Nyeri ELRC MISC No. E004 of 2021; KPMDU vs Kirinyaga County Public Service Board.
 - c. That any other and further relief that this Honourable Court may deem fit and just to grant in the circumstances.
 - d. That the costs of the application be provided for.
2. The application was premised on the grounds set out in the Statutory Statement and Affidavit of Carolyne Kinyua sworn on 14th July 2023. The gist of the Application is that the decision by the 1st respondent on 14th April 2021 was entered ex-parte and the Applicant was denied a fair hearing. The Applicant's faults the 1st Respondent for failure to review its decision of 28th March 2023 alleging that it is functus officio.
3. The 1st Respondent raised a Preliminary Objection on grounds that:
 - a. The Honourable Court is not seized with the jurisdiction to entertain this matter since by ruling dated 16th September 2022, the Honourable Justice D. K. Marete while considering the Application dated 16th July 2021 filed by the union and a Notice of Preliminary Objection filed by the Applicant dated 17th March 2022 in Nyeri Employment and Labour Relations Court at Nyeri ELRC Misc E004 of 2021 made the following orders:
 - i. That the decision by the Public Service Commission made vide letter dated 14th April 2021 reinstated into service the applicants be and is hereby recognized, adopted and enforced as a judgement of the Court.
 - ii. That a decree on this determination do issue forthwith.
 - iii. That the preliminary objection by the Respondent is disallowed.
 - iv. That the costs of the Applications shall be borne by the Respondents.
 - b. That this Honourable Court in a ruling delivered on 12th April 2023 and in consideration of the Commission's decision dated 28th March 2023 which is subject matter of this application stated that the Court is functus officio on the matter as the Honourable Court had recognized, adopted and enforced the Commission's decision dated 14th April 2021 as judgement of the Court.



- c. That the Honourable Court is functus officio and the Applicant herein can only approach the Court of Appeal for the orders it seeks as directed by the Court on 12th April 2023.
 - d. That the Application filed herein is incompetent, fatally defective, an abuse of Court process and should therefore be struck out with costs to the 1st Respondent.
4. The 2nd Respondent also raised Preliminary Objection on grounds that:
- a. The Application and the entire suit is incompetent and Res Judicata as it offends the provisions of section 7 of the [Civil Procedure Act](#) Cap 21.
 - b. The entire suit is incompetent and sub judice as it offends the provisions of section 6 and 8 of the [Civil Procedure Act](#) Cap 21
 - c. The Application and the entire suit offend the provisions of Order 53 Rule 2 of the Civil Procedure Rules.
 - d. That the Court has no jurisdiction to hear, entertain and determine this suit.
 - e. That the application is premature, bad in law and offends mandatory provisions of the law.
 - f. That the suit is not properly before the Court and the omission is fatal to its validity.
 - g. That the entire suit is fatally defective and the ex-parte applicant has no lawful cause against the 2nd Respondent.
 - h. That the Application is otherwise frivolous, vexatious and an abuse of process of the court.
5. The 2nd Respondent further response, filed a replying Affidavit sworn by Davji Bhimji, its secretary on 6th October 2023. He deposed that the leave order of 20th July 2023 was obtained on false and misleading evidence by the Applicant in support of the application. He stated that there was concealment of the fact that Nyeri ELRC Misc No. E004 of 2021 was in relation to the decision of 14th April 2021, which was heard and determined. The Application was therefore termed as an abuse of court process and intended at delaying the execution of the decree. He deposed that the Applicant filed Appeal number E002 of 2023 in respect of the said decree and which is pending hearing and determination. He also accused the Applicant of concealing the said appeal.
6. The Applications were canvassed by way of oral submissions. The Applicant's counsel submitted on two issues; jurisdiction and the merit of the application. On jurisdiction, she relied on the case of *Teleposta Pension Scheme v AG & 5 Others* [2014 eKLR where it was held that the Court had supervisory power over public bodies donated by Article 165 (5) of [the Constitution](#). Reliance was also placed on *County Government of Mandera & another v AG* [2020] eKLR in submitting that the impugned decision was subject to review although the Court had already adopted it as its judgement as the decision to review was parallel to that of adoption. It was submitted that all that mattered was whether the decision was unreasonable.
7. On merits, it was submitted that administrative decision ought to be reasonable and fair as required under Article 47 (2) of [the Constitution](#). It was submitted that the PSC decision was unreasonable and procedurally unfair as it failed to consider relevant and material facts and the Applicant was denied fair hearing. It was further submitted that the 2nd Respondent filed its appeal before the PSC one year and four months after the dismissal of its members. It was also submitted that the PSC failed to consider that the grievants were essential service providers and that the Applicant could not remain without doctors for over a year.



8. It was further submitted that although the PSC Act gives the discretion of extending time for filing appeal after the lapse of 90 days, the same ought to be guided by the circumstances of the case. It was urged that, in this case, the circumstances for accepting the late appeal were never indicated. Besides, the grievants were in contempt of court at the time of filing of the appeal.
9. It was submitted that the Applicant followed due process before dismissing the grievants as they were served with show cause which they defied. That the evidence of the due process had been filed but the PSC sat on the Applicant's Application for review of the decision for 2 years before dismissing it. It was submitted that the Applicant was only ambushed with the decision in violation of its right under Article 50 of *the Constitution*. As a consequence of the foregoing matters, the Court was thus urged to allow the Application with costs.
10. The 1st Respondent, on the other hand, urged the court to allow its Preliminary Objection that it lacks jurisdiction because Marete J considered the matter in Misc E004 of 2021 and recognized the PSC decision and ordered the issuance of decree for enforcement. It was submitted that the Court is being asked to find that Marete J was wrong in his decision and then set aside the decision which is unprocedural. It was further submitted that on 12th April 2023, this Court in the said Misc E004 of 2021 stated that it was functus officio because the Court could not sit on appeal over its own decisions.
11. It was further submitted that there was a matter in the Court of Appeal challenging the said decision and thus the Applicant could not be before this Court for the same matter. It was also submitted that the ruling of 19/9/2022 considered the same issues raised in the application on whether the PSC considered the issues before extending time of appeal.
12. The 2nd Respondent associated itself with the submissions of the 1st Respondent and added that the leave to apply for orders of certiorari was sought over 2 years after the decision on the review application was rendered on 28/3/2023 contrary to the statutory procedure under Order 53 Rule 2 of the Civil Procedure Rules. Besides, the Court had already adopted the decision 10 months before this application.
13. It was submitted that the application was filed after the Applicant had moved to the Court of Appeal challenging the same decision and the appeal is still pending. A copy of the Memorandum of Appeal was attached to the Respondent's replying Affidavit.
14. Finally, it was submitted that the application is res judicata as the issues herein were all raised and determined by the court in the previous applications. The Court was therefore urged to dismiss the application with costs.

Analysis

15. Having considered the Application, the Preliminary Objections, responses and the rival submissions, the issues that arise for determination are as follows:
 - a. Whether or not the Court has jurisdiction.
 - b. Whether or not the Application is res judicata.
 - c. Whether the applicant has laid any basis upon which the Court can review the decision by the PSC.

Jurisdiction

16. The issue of jurisdiction in the circumstances of this case was raised in Nyeri Judicial Review No. E003 of 2023 and I rendered myself on the same in a ruling delivered on 20th December 2023 that



the court is clothed with jurisdiction. The basis of the said conclusion was section 9(2) of the Fair Administrative Actions Act and section 87(2) of the *Public Service Commission Act* which expressly codifies the doctrine of exhaustion. It bars a person from filing court proceedings and the court from entertaining such proceedings before the alternative mechanism provided by *the constitution* or a statute is exhausted.

17. Section 87 (2) of the PSC Act provides that: -

“A person shall not file any legal proceedings in any court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from County Government Public service unless the procedure provided for under this part has been exhausted.”

18. Section 9 (2) of the FAA Act then provides that:

“The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under that Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law were first exhausted.”

19. I gather support from the case of the speaker of the National Assembly v James Njenga Karume (1992) eKLR, where the Court of Appeal held that:

“..... where there was a clear procedure for redress of any particular grievance prescribed by *the Constitution* or Act of Parliament this procedure should be strictly followed.”

20. The effect of the said express provision is not to extinguish the jurisdiction of the courts but rather to postpone the same to a later date after the proceedings in the alternative mechanism has exhausted. Two questions arise from the objections by the respondents, firstly, whether the adoption of the said decision as judgment of the Court bars this court from exercising its supervisory power of reviewing the decision of PSC; and secondly, what would then happen, if after the court adopts the decision, the PSC reviews and sets aside the same decision?

21. These questions should be given a deep thought because, in my view the legislature did not contemplate the court to rush into entering judgment before the alternative mechanism is exhausted. The court should allow the PSC to finalize with the pending review proceedings before the decision on the appeal is adopted by the court.

22. The law, having expressly postponed the jurisdiction of the court to review the decision of the PSC until the statutory appeal mechanism is exhausted, I reiterated that this Court is clothed with the jurisdiction to hear and determine the instant application. I need not say more on that point because I am made aware that the matter is now before the Court of Appeal and soon a decision binding on this court will be rendered.

Res judicata

23. The doctrine of res judicata is codified under section 7 of the *Civil Procedure Act* which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court



competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

24. The courts have discussed the said doctrine in a legion of cases including *C.K. Bett Traders Limited & 2 others v Kennedy Mwangi & another* [2021] eKLR where it was held thus:

“32. The provision is on the fundamental doctrine that there should be an end of litigation. The doctrine of *res judicata* may be pleaded by way of estoppel so that where a judgment has been given future and further proceedings are estopped. The rationale for the doctrine of *res judicata* exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.

33. *Res judicata* is normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier judgment, which may have determined the questions of law as well as of fact between the parties. In other words, *res judicata* will successfully be raised as a defence if the issue(s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction.”

25. In that respect, the Court of Appeal held in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR, that:

“For the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

26. The Court went on to state on the role of the doctrine:

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and



brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

27. The Respondents contended that the matter went to full trial, and being dissatisfied with the outcome, the Applicant proffered the Appeal under Nyeri E002 of 2023. I note that the Applicant’s Preliminary Objection was on the basis that there was pending review of the decision of 14th April 2021 before the PSC thus the application for adoption was defective.
28. My interpretation of section 7 is that the issues raised in a matter must have been litigated upon and determined by a court of competent jurisdiction. In the instant case, it is apparent that what was sought by the Applicant in the said preliminary Objection and in this Application are different. In this application, the Applicant seeks judicial review of the decision of the PSC on ground that it is tainted with procedural impropriety, illegality and irrationality. I am therefore not convinced that the said is res judicata as the issues herein were not tried directly and substantively determined in the previous decision.

Basis for judicial review

29. It is important to note that the Application is similar to two other applications brought by the applicant to challenge decisions rendered by the 1st respondent on 14th April 2021. The decision resulted from similar circumstances, namely dismissal of the health workers for participating in an unprotected strike. In Nyeri Judicial Review No. E003 of 2023, I rendered judgement on 9th August 2024 in respect of Clinical Officers and Laboratory Officers. For the said reasons, the reasoning on the question of procedural impropriety, irrationality and illegality of the PSC decision shall apply to this matter mutatis mutandis.
30. In the said judgment, I reached the conclusion that, the impugned decision was not tainted with procedural impropriety and illegality because the PSC had mandate to admit a late appeal and that the applicant was accorded a chance to file a response to the appeal but it defaulted. I also found that the impugned decision was not tainted with irrationality/unreasonableness because it was reached after considering relevant factors, that is, failure to accord the doctors a hearing before dismissing them for the offence they had committed. Although I noted that the PSC failed to consider the practicability of reinstatement, I concluded that the applicant had not filed response to the appeal before the PSC raising the same.

Conclusion

31. I have found that the preliminary objections raised by the respondents have no merits and they are overruled. Further, the impugned decision rendered by the 1st respondent on 14th April 2021 is not tainted with procedural impropriety, irrationality and illegality. Consequently, I hold as I did in Nyeri ELRC JR E003 of 2023, aforesaid, that the applicant has failed to demonstrate sufficient grounds upon which this court can review the impugned administrative decision by the 1st respondent. Accordingly, I decline to grant the orders sought and instead dismiss the application, dated 7th August 2023. I will not award costs because of the special circumstances surrounding the proceedings before this court and the commission especially the fact that the 2nd respondent’s members disobeyed court orders declaring their strike unprotected and requiring them to resume work.

DATED, SIGNED AND DELIVERED AT NYERI THIS 18TH DAY OF OCTOBER, 2024.

ONESMUS N MAKAU

JUDGE



ORDER

This judgment 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

