



**Kenya National Union of Nurses v Public Service Commission; County
Public Service Board Kirinyaga County (Interested Party) (Judicial Review
E001 of 2020) [2023] KEELRC 54 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 54 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
JUDICIAL REVIEW E001 OF 2020
ON MAKAU, J
JANUARY 20, 2023**

BETWEEN

KENYA NATIONAL UNION OF NURSES APPLICANT

AND

PUBLIC SERVICE COMMISSION RESPONDENT

AND

**COUNTY PUBLIC SERVICE BOARD KIRINYAGA COUNTY INTERESTED
PARTY**

JUDGMENT

1. The suit herein was settled by the parties outside court save for the issue of costs which they have asked the court to determine. Both parties have filed written submissions on the said issue.
2. The undisputed facts are that following a decision by the Interested Party to dismiss 219 members of the applicant (herein called the grievants), the applicant appealed against the said dismissal to the respondent commission *vide* the letter dated 25th October 2019. The appeal was brought under section 77 of the [County Government Act](#).
3. The respondent wrote the letter dated 13th December 2019 to the interested party and gave it 14 days within which to respond to the appeal. Thereafter nothing happened and the applicant wrote to the respondent on 29th April 2020 requesting for a decision on the appeal. The respondent responded by the letter dated 7th May 2020 stating that a hearing was needed before making a decision on the appeal. The letter also gave notice that the hearing would be held on 26th May 2020 at the Respondents office in Nairobi.



4. The hearing did not take place because the hearing notice reached the applicant late. A new hearing was scheduled on 10th November 2020, but a day before the hearing date the respondent wrote to the applicant postponing the hearing to unspecified later date. The reason cited for the turn of events was, ‘unforeseen circumstances’.
5. The said letter aggrieved the applicant and it sought leave to apply for mandamus to compel the respondent to expedite the hearing and determination of the said appeals. The leave was granted and the applicant filed the motion to seek the order of mandamus against the respondent. The respondent filed Replying Affidavit to oppose the motion.
6. In the meanwhile the respondent heard and rendered its decision on the appeal by the applicant. As per the court record, the matter came up for mention to report on the progress of the appeal and the counsel reported to the court that the appeal was heard and a decision rendered on 3rd March 2021. Again on 14th February 2022 the matter was mentioned before the court and the applicant’s counsel told the court that the motion dated 16th November 2020 had been settled because it was only seeking to compel the respondent to conclude the appeal. However the issue of costs of the suit remained outstanding and the parties agreed to dispose of the same by written submissions.

Submissions

7. The applicant placed reliance on section 27 (1) of the *Civil Procedure Act* and a number of judicial precedents including *Orix (K) Ltd v Paul Kabuu & 2 others* (2014)eKLR to support its submissions that costs follows the events subject to the unfettered discretion of the court. It urged the court to exercise its discretion in its favour because there is no reason to deny it costs. Besides the court was urged to consider the chain of events that provoked the filing of the suit.
8. The respondent submitted that the judicial Review proceedings herein were unnecessary and the applicant filed the same while fully aware that there were pending active appeal proceedings. It was further submitted that the respondent gave the said appeal proceedings priority and rendered its decision on 3rd March 2021. Consequently, the respondent argued that it would be unfair to condemn it to pay costs of the suit which was filed in abuse of the court process.

Determination

9. The question to answer is whether costs of the suit should be awarded to the applicant. From the facts set out above, the appeal which is the basis of this suit was filed on 25th October 2019 and a hearing was fixed on 26th May 2020. The hearing could not take place because the hearing notice was received late. The applicant appreciated by its letter of 25th June 2020 that during that period, it had directed its staff to work from home in line with Government guidelines regarding Covid-19.
10. The court finds that the delay in concluding the said appeals was not deliberate and it was justifiable in face of the Covid-19 pandemic and the guidelines by the Government to curb its spreading. Considering all the facts of the case the court agrees with the respondent that the suit herein was brought by the applicant while fully aware that the appeal proceeding were actively progressing save for those factors which were beyond control of both parties.
11. In view of the foregoing observations, the court finds that the suit herein was brought in abuse of the process of the court and as such costs will not be awarded to the applicant. In any event none of the parties succeeded in the suit as it was overtaken by events when the appeal before the respondent was promptly concluded. Consequently each party will bear its own costs.



DATED, SIGNED AND DELIVERED AT NYERI THIS 20TH DAY OF JANUARY, 2023.

ONESMUS N MAKAU

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties 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.

