



**Barasa & another v Panyako, Secretary General Kenya National Union of Nurses & another
(Miscellaneous Application 3 of 2022) [2023] KEELRC 779 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 779 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
MISCELLANEOUS APPLICATION 3 OF 2022**

**JW KELI, J
MARCH 23, 2023**

BETWEEN

GEORGE BARASA 1ST APPLICANT

FELIX WASIKE 2ND APPLICANT

AND

**SETH PANYAKO, SECRETARY GENERAL KENYA NATIONAL UNION OF
NURSES 1ST RESPONDENT**

KENYA NATIONAL UNION OF NURSES 2ND RESPONDENT

RULING

1. The Respondents raised Notice of Preliminary Objection in the instant suit by way of judicial review on the grounds:-
 - a. That, the Applicants have failed to apply the doctrine of exhaustion and thus offends the mandatory provisions of Article 159 (2) (c) of the [Constitution of Kenya 2010](#), and Chapter XX1 (1) (b) and 3 of the Union Constitution.
 - b. That in accordance to Section 9(2) of [Fair Administrative Action Act](#), a Judicial Review should not be allowed where other appropriate remedies provided for by the law are not exhausted.
 - c. That, a writ of mandamus is availed when a public officer/state officer or government/statute has done some act which violates the fundamental right of a person. The interpretations in accordance to Article 260 of the [Constitution](#), the Fair Administrative Act Section 2 and the [Labour Relations Act](#) Section 2, the 1st and the 2nd Respondents do not fall within the principals of a writ of mandamus.
 - d. That, the application as filled is frivolous, vexatious and bad in law.



2. The court considers that only ground 1 fits for consideration as a preliminary objection based on doctrine of exhaustion. The Objector states that the suit offends doctrine of exhaustion offends mandatory provision of Article 159 (2) (c) of the *Constitution of Kenya* & Chapter XX1 (1) (b) and 3 of the Union Constitution.

Chapter XX1 (b) reads:-

“ A member of the Council or an officer may be interdicted, suspended or expelled from the Union as may be determined by the National Executive/Governing Council if:-

- (a) She/he fails within fourteen days of demand in writing by the Secretary General to pay subscription which are more than six months in arrears or, he infringes any of the terms and conditions of this constitution or acts in manner which is detrimental to the interests of the Union, provided that any member or officer interdicted, suspended or expelled shall have the right of appeal against such suspension or expulsion to the first National Governing Council following such action by the National Executive Council.
 - (b) Notice of an appeal shall be forwarded or handed to the General Secretary, in writing within fourteen days of the date on which the decision of the National Executive Council was communicated to the member or officer concerned”.
3. The court found that the provision provides for expelled member like Exparte Applicants right of appeal to the first National Governing Council following such action by the National Executive Council. The Notice of appeal to be handed to the General Secretary, in writing within 14 days of the date on which the decision of the National Executive Council was communicated to the member or officer concerned.
 4. The Exparte Applicant states that the court had granted leave to institute suit to operate as stay on the 13th October, 2022 hence the Respondent ought not to have expelled them. That the order was served on same date.
 5. The 1st Respondent stated they were not in contempt as there is no court order dated October 13, 2022 at all against decision of National Executive Council of October 13, 2022. That the court order dated October 14, 2022 did not stop actions of the National Executive Council.

Decision of the Court

6. The court considered the position of the parties in the matter. It is true the doctrine of exhaustion requires where there is a clear procedure of redress the same be exhausted in the first instance – see *Speaker of the National Assembly -vs- James Karume* (1992) eKLR. In the instant case the court (Justice D K Kemei) on October 13, 2022 granted leave to file the judicial review suit. In order 2 the Judge ordered:-

“The leave so granted herein shall operate as stay of the decision of the 2nd Respondent to suspend the Applicant as communicated in his letter of October 6, 2022 pending the determination of the substantive Notice of Motion to be filed by the Applicant”.

(Annexure SP -12)
7. The court finds there was a stay order against the Respondent’s action of expelling the Exparte Applicants. The Court finds the facts are not settled even on the question of the process and even on the court order hence the instant preliminary objection is not raised properly.



8. Secondly, the court having granted leave to file the suit, it is late to raise the Notice of Preliminary Objection. The proper application would have been to apply to set aside the ex parte leave for the order on stay. The Notice of preliminary Objection dated January 20, 2023 is found to be improper and it is dismissed with costs to the ex parte applicants in the cause.
9. The court was not able to consider the suit in this decision as the court found the Respondents' annexures missing specifically SP12- SP 18. The Respondents are ordered to file paginated annexures 12-18 within 7 days of this order.
10. Judgment in the suit on the April 27, 2023.
11. It is so ordered.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 23RD DAY OF MARCH, 2023

JEMIMAH KELI,

JUDGE

In the Presence of :-

Court Assistant: Lucy

Ex parte Applicants:- Present

Respondent:- Chisengo

