Republic v Public Service Commission & another; Kirinyaga County Government (Exparte Applicant) (Judicial Review E001 of 2022) [2023] KEELRC 1066 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 1066 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

JUDICIAL REVIEW E001 OF 2022

ON MAKAU, J

APRIL 27, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

PUBLIC SERVICE COMMISSION ..... 1ST RESPONDENT

KENYA NATIONAL UNION OF NURSES ON BEHALF OF JUDITH GATHONI MWANGI & 187 OTHERS ..... 2ND RESPONDENT

AND

KIRINYAGA COUNTY GOVERNMENT ..... EXPARTE APPLICANT

JUDGMENT

1. In May 2019 the 2nd Respondent's members (nurses) went on strike complaining of poor working conditions. The strike went on despite an interim court order declaring it unprotected on May 24, 2019. The said order was confirmed after hearing in a ruling delivered on July 4, 2019 which found the strike to be unlawful and unprotected. The nurses appealed against the said ruling but the appeal was dismissed.

2. 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 June 16, 2019. The Nurses failed to attend the hearing and 188 Nurses were dismissed from service by the Board.

3. The 2nd respondent appealed to the Public Service Commission on January 18, 2021 and after hearing the parties, the PSC found that the dismissal of the 188 Nurses was irregular, unfair and unlawful,

and ordered them their reinstatement. The decision was rendered on March 3, 2021 and on March 31, 2021, the applicant applied 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. Issuance of Notice to show cause.

c. Replacement of the dismissed workers.

4. In the meanwhile on May 25, 2021 the 2nd Respondent filed Misc.Application No 1 of 2021 asking this court to adopt the decision by the PSC as judgment of the court. On October 13, 2021 and before the court adopted the decision of the PSC as judgment, the PSC rendered its decision on the review application declining to reverse its earlier decision but only acknowledged that the Nurses had indeed been served with show cause letters before they were dismissed. The new development prompted the 2nd Respondent to file a Motion in Misc.Application 1 of 2021 on December 10, 2021 seeking to introduce the new decision by the PSC.

5. On March 15, 2022, the applicant herein sought leave to file Judicial Review proceeding against the decision by the PSC dated October 13, 2021. The application for leave and the Misc.Application by the 2nd Respondent were consolidated under this file on March 24, 2022. On the same date leave was granted to file Judicial Review proceeding to quash the decision by the PSC dated October 13, 2021 and prohibit enforcement of the impugned decision.

6. The applicant filed the Notice of Motion dated March 25, 2022 seeking the following orders:-

    1. That an order of certiorari do issue, to remove and bring to the High Court for the purposes of quashing, the decision by the 1st Respondents dated October 13, 2021 declining to vary its earlier decision of March 3, 2021 reinstating the 188 members of the 2nd Respondent.

    2. That an order of prohibition do issue, directed against the Respondents, prohibiting them through their servants and/or agents or directly from in any way enforcing the said decisions or occupying the premises of the Applicant.

7. The motion is premised on the grounds and facts set out in the statutory statement, and verifying Affidavit filed with the application for leave. In brief the application stands on the grounds that the decision is tainted with an error of law and fact; that the commission failed to take into account relevant considerations; and that the decision is unreasonable and irrational.

8. The 1st respondent filed Replying Affidavit sworn on May 24, 2022 maintaining that the dismissals of the Nurses is irregular because despite issuance of show cause letters, they were never invited to a disciplinary hearing. Further, the decision by PSC was reasonable and not tainted with error of law and facts. Also no evidence was adduced to prove the said error.

9. The 2nd Respondent filed Grounds of opposition and a replying affidavit contending the Application herein is an appeal against the decision of the PSC dated March 9, 2021 disguised as a Judicial Review application against the second decision of the PSC dated on October 13, 2021; that the applicant has come to court with unclean hands as it has failed to reinstate the dismissed 188 nurses; that the reason why the nurses absented themselves from work is justified under section 14 of the *Occupational Safety and Health Act*; that the show cause letters admitted by the PSC during the review proceedings is an extraneous consideration and it does not alter the fact that the disciplinary process was irregular, unfair and unlawful; that the allegation of new nurses recruited was not verifiable and does not rebut the evidence tendered during the hearing that nurses on permanent and pensionable terms were not

replaced; that the PSC acted fairly and within its powers, jurisdiction and mandate under section 80-89 of the *PSC Act*, and Regulation 18 of the *PSC (County Government Public Service Appeals Procedure) Regulations 2016* by setting aside the dismissal of the nurses and reinstating them to work; that the alleged irrationality and unreasonableness are unfounded; that the alleged financial constraints is a mere excuse to frustrate implantation of the decision by the PSC as funding for the applicant comes from the National Treasury; and that the application is frivolous and vexatious as nothing new has been shown to the court to warrant review of the decision by the PSC.

10. The applicant filed further affidavit sworn on June 7, 2022 by Caroline Kanyina, contending that the PSC reversed the dismissal of the nurses and reinstated them to employment on ground that the nurses had not been invited to a disciplinary hearing but when evidence of such invitation (show cause letters) were presented to the PSC during the review application, the commission failed to reverse its earlier decision that ordered reinstatement of the nurses.

Applicants' submissions

11. The applicant submitted on four issues: whether it has the right to institute judicial review proceedings; whether the impugned decision is tainted with an error of law; whether the PSC failed to take into account relevant considerations and whether the impugned decision is irrational and unreasonable.

12. On the first issue it was submitted that the applicant has every right to institute the instant proceedings since the decision of the PSC affects it. Further it denied that the proceedings are an appeal in disguise and contended that the application seeks specific Judicial Review remedies.

13. As regards the issue of error of law of law as a ground for judicial review, it was submitted that indeed the decision was tainted with an error of law. Two authorities which defined error of law were cited including *Republic v Public Procurement Administrative Review Board & 2 others, exparte Pelt Security Services Limited* (2018) eKLR and *JHG Marine A/S Western Marine Services Ltd, CNPC Northeast Refining & Chemical Engineering Co.Ltd/Pride Enterprises v Public Procurement Administrative Review Board & 2 others* (2015) eKLR where the court defined an error of law as an action by a public body that breaches fundamental human rights, misinterprets a statute or any other legal document, or rule of common law, makes an order that is *ultra vires* or fails to take into account relevant consideration or takes into account irrelevant consideration or rejects admissible and relevant evidence or takes a decision or no evidence among others.

14. It was submitted that, in the impugned decision, the PSC confirmed that the dismissed nurses had indeed been served with show cause letter and further they were invited to disciplinary hearing before disciplinary committee on June 6, 2019. The PSC had in its decision of March 21, 2021 captured the admission by the 2nd Respondent that none of its members had attended the disciplinary hearing.

15. Accordingly, it was submitted that the PSC made an error of law by failing to reverse its earlier decision that the dismissal of the nurses was irregular, unfair and unlawful, on the basis of the said evidence that fair process was followed but the nurses failed to attend the hearing. It was argued that the mismatch between the law applicable and the findings of the commission is a manifest error of law which ought to be cured by Judicial Review.

16. It was further submitted that the PSC committed an error of law and fact by completely ignoring evidence tendered by the applicant showing that indeed the applicant had already recruited other nurses to replace those dismissed. The PSC further committed an error of law by making a finding that health workers had not been recruited without any evidentiary basis. Consequently, it was submitted that the PSC could have arrived at a different decision, that is, the dismissal was fair and lawful, but for the error of law and facts committed by the PSC highlighted above.

17. For emphasis, the applicant cited *JHG Marine A/S Western Marine Services Ltd* case, *supra*, where it was held that the court will quash a decision or order made by a public body in error of law.

18. Finally, it was submitted that the PSC made an error of law by ordering reinstatement of the nurses and later failed to vary the same contrary to established case law principles that reinstatement is not automatic and that it is only allowed only in very exceptional circumstances. For emphasis, the applicant cited the case of *Kenya Airways Ltd v Aviation & Allied Workers Union & 3 others* (2014) eKLR, *Lawrence Onyango Oduosi v Kenya Commercial Bank Ltd* (2014 eKLR and *National Land Commission v Munubi & 4 others* (2022) KECA 391 (KLR).

19. As regards the alleged failure to take into account relevant considerations meaning of failure to take into account relevant consideration given in the case of *Republic v Public Procurement Administrative Review Board & 2 others, exparte Pelt Security Services Limited*, *supra* was adopted, that is, ignoring relevant considerations or taking into account of irrelevant ones renders the decision unreasonable and reviewable.

20. It was submitted that that PSC ordered reinstatement of the dismissed nurses without taking into account the fact that due process was followed including court protection from unlawful strike by the nurses but they refused to resume work; that the governor extended olive branch to the striking nurses to resume work they defied even over a court order; that the nurses were served with show cause letter inviting them to attend disciplinary hearing before a committee on June 6, 2019 but they failed to attend; that a public notice dated June 7, 2019 was published notifying the striking nurses that show cause letters were dispatched via email and that they could go for hard copies from the office; that the health sector is critical and cannot operate without nurses and the applicant had to hire new nurses to replace the dismissed ones; that the particulars of the newly recruited nurses was presented to the PSC; and that Kenya Medical Practitioners and Dentist Board, by a letter dated May 30, 2019 gave a clean bill of health on the working conditions in the County Health sector and therefore as of May 31, 2019 whom show cause letters were issued there was not lawful justification for the nurses to be absent from work.

21. Accordingly, it was submitted that by the PSC disregarding the above relevant considerations, it arrived at the unreasonable decision that the dismissal of the nurses was irregular and that the dismissed nurses had not been replaced and therefore ordered for their reinstatement. Further, the PSC declined to vary the decision even after more evidence was presented during the application for review.

22. It was also submitted that the PSC failed to take into account the effect of an order for reinstatement when the employer and the employees relationship was already constrained. Besides, the employees having been out of work for over three years, reinstatement was not proper under Section 12 (3) (vii) of the *ELRC Act* which bars this court from reinstating an employee after the lapse of three years from the date of separation.

23. In view of the matters highlighted above, it was submitted that had the PSC taken into account the cited relevant factors, it would have arrived at a different conclusion and would not have insisted that the dismissed nurses to be reinstated.

24. As to whether the decision was irrational and unreasonable, reliance was placed on the case of *Republic v Public Procurement Administrative Review Board & 2 others, exparte Pelt Security Services Limited*, *supra* where the court held that the test for rationality is the basis of justifying the connection made by the decision makers between the material presented and the conclusion arrived at. The court went on to hold that reaching a decision based on irrelevant considerations, or by disregarding relevant considerations, is one of the manifestations of irrationality.

25. The applicant reiterated that failure to vary the order of reinstatement upon presentation of evidence of newly recruited nurses who replaced the dismissed nurses was irrational and any tribunal presiding over the same would not have reached the same conclusion. It was also unreasonable for the PSC to maintain that the dismissed nurses should be reinstated without loss of benefit without considering the financial implication on the County Government as dismissed nurses were not factors in the budget allocation for two years.

26. Consequently, the court was urged to find that the failure by the PSC to vary its earlier decision ordering reinstatement of 188 nurses is tainted with an error of law, that the commission failed to take into account relevant considerations and that the decision is irrational and unreasonable. Further and without prejudice to foregoing, the applicant contended that, had the PSC considered all the relevant considerations and exercised reasonableness, it would have arrived at a different decision such as compensation/damages for the termination and not reinstatement.

Respondents submissions

27. The 2nd respondent submitted two issues: whether the decision of the PSC is flawed and merits a review; and whether the orders sought ought to be granted.

28. On the first issue, the court was urged, to follow the decision in *Municipality Council of Mombasa v Republic & Umoja Consultants Ltd* (2002) eKLR where the Court of Appeal held that in Judicial review the court would be concerned about the process leading to the decision including whether parties were heard before the decision and whether in making the decision relevant matters were taken into account. Further that a review court should not act like an appeal court which considers the merits of the decision like whether or not there was sufficient evidence to support the decision.

29. The court was further urged to follow the decision in *Republic v Public Procurement Administrative Review Board & 2 others, exparte Pelt Security Services Limited* (2018) eKLR where it was held that an administrative decision is flawed if it is illegal, that is, if

    (a) it contravenes or exceeds the terms of the power given to make the decision,

    (b) pursues an objective other than that for which the power to make the decision was conformed;

    (c) is not authorized by any power;

    (d) contravenes or fails to implement a public duty.

30. It was submitted that the application is not raising issues within the Judicial Review province but rather matters of merits of the impugned decision which essentially are matters of appeal. That the alleged error of law and fact, failing to consider relevant considerations, and that the decision is unreasonable and irrational all point to the merits of the decision and not the province of Judicial Review.

31. It was therefore submitted that the decision of the PSC is justified and reasonable as the PSC, while hearing the appeal, acted within its jurisdiction, mandate and powers as donated by the *PSC Act*, and the Regulation thereunder and Article 234(2) of the *Constitution*. It invited the parties to the hearings and all the parties filed their respective documents. Thereafter they all got fair chance to make their submissions. The PSC was then persuaded by the Nurses case and granted the prayer for reinstatement to employment without loss of benefits.

32. With respect to the application for review, it was submitted that the PSC was not persuaded by the applicants' case to reverse its earlier decision. All what the PSC noted was that, admission of the new evidence, that is, service of show cause letters did not warrant a review. In the respondents' view, the

said decision does not manifest any error of law and fact, irrationally or unreasonableness, and was therefore correct to uphold that the disciplinary process was irregular, unfair and unlawful and the new evidence admitted did not warrant review of that earlier decision.

33. As regard the issue of the orders sought, it was submitted that the application is frivolous and the reliefs sought are unwarranted. It was argued that, as social partner, the applicant should engage the 2nd respondents with a proposal on how to implement the decision of the PSC instead of seeking to overturn it in court. Therefore, the court was urged to dismiss the suit with costs because the 188 nurses were unjustly dismissed and have been without means of livelihoods.

Analysis and Determination

34. The issues for determination are;

    a. Whether the applicant has laid any basis for the court to review the impugned decision.

    b. Whether the reliefs sought are merited.

    c. Whether the decision of PSC should be adopted as judgment of the court.

Basis for Judicial Review

35. The applicant contends that the decision manifests an error of law and facts; failure to take into account relevant consideration, and irrationality and unreasonableness, which renders the decision reviewable and fit for invalidation. However, the respondent's case is that the said issues are not within the province of Judicial Review but appeal because they relate to the merits of the decision for questioning the sufficiency of the supporting evidence and failure to take into account relevant considerations.

36. I have considered the submissions presented by the two sides. The way I understand Administrative law, is that there are three grounds for judicial review, namely: illegality, irrationality and procedural impropriety. However, the said grounds are not exhaustive as jurisprudence in public law continue to advance.

37. Illegality, occurs when the decision maker acts beyond his powers (acts *ultra vires*) as prescribed by the establishing law. It is also an illegality when the decision maker fails to make the decision or delegates the responsibility. It is further an illegality where the decision maker misdirects himself in law. Illegality also occurs when the decision maker in exercise of his discretionary power takes into account irrelevant considerations, or disregards relevant considerations.

38. Irrationality or unreasonableness speaks to the logic in the decision. For an applicant to succeed, he must show that the decision is so outrageous in its defiance to logic that no sensible person, properly applying his mind could arrive at the same decision. Again an applicant must show that the impugned decision was influenced by irrelevant considerations taken into account or by failure to take into account relevant considerations.

39. Finally, procedural impropriety refers to rules of natural justice which are two pronged, that is, rule against bias and the right to be heard. The first refers to impartiality or independence of the decision maker while the latter refers to the right to be informed, the reason for administrative action and the right to be accorded fair opportunity to air a defence.

40. Having carefully considered the pleadings, evidence and the submissions by the applicant, it is clear that the application is brought under only two of the three grounds of review, namely illegality and irrationality. The procedure followed by the PSC in arriving at the impugned decision has not been faulted.

Illegality

41. The applicant does not say that the PSC lacked jurisdiction to make the decision but rather that the PSC made an error of law. In the case of *IGH Marine A/S Western Marine Services Ltd & 2 others v Public Procurement Administrative Review Board & 2 others* (2015) eKLR, the court held that:-

> " The evidence placed before this court show that the review Board committed an error of law by completely failing to consider the criteria provided in the Tender Document. In so doing, it also ended up considering irrelevant material. The review Board's action amounted to acting without jurisdiction."

42. The applicant contends that the PSC committed an error of law by failing to vary its decision after admitting evidence which showed that the fair procedure was followed before dismissing the 188 nurses after deliberately persisting in absenting themselves from work even after court order and an olive branch from the governor. Further the applicant faults the PSC for disregarding the principles of reinstating employees established by case law and the statutes. Finally, it was contended that the PSC disregarded the evidence that other nurses had been recruited to replace the dismissed ones.

43. The power by the PSC to review its own decision is donated by section 88 (1) of the *Public Service Commission Act* which 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.

44. In this case, the PSC admitted new evidence which it had not considered in its earlier decision. The evidence had been filed at the submission stage before the initial decision, but had not been considered in the decision. The evidence was prove that the dismissed nurses were served with show cause letters which also invited them to a disciplinary hearing on June 6, 2019. The unconsidered evidence also included list of nurses who were recruited to replace the dismissed ones.

45. While making the initial decision, the PSC observed as follows in finding number (iv):-

> " The respondent was however unable to show proof of service of the show cause letters even after being specifically requested to do so through their final submissions, nor did it avail minutes of the disciplinary hearing to show that there was indeed a disciplinary process where the appellants membership failed to appear resulting to their dismissal."

46. In finding number (vi) the PSC observed that:-

> " The commission thus finds that the CPSB may not have replaced the dismissed nurses since their employment status was permanent and pensionable terms of service and not on contract terms like those it has recruited."

47. Based on the foregoing observations the PSC reached the decision that the disciplinary process against the dismissed nurses was irregular, unfair hence unlawful and ordered for the reinstatement of the 188 dismissed nurses.

48. As already indicated above, the applicant had indeed filed the said evidence with its submission but it was not considered in the initial decision. In the application for review the applicant hoped that the PSC would vary its earlier decision based on the new evidence and hold that the dismissal was procedurally fair and therefore reverse the order for reinstatement, especially now that there was evidence of a list of nurses appointed to replace the dismissed ones.

49. However, the PSC merely admitted the new evidence and held that the evidence did not warrant varying of the earlier decision. The jurisdiction of the PSC in reviewing its own decision is a power that must be exercised on the basis of the law and facts as presented by the parties. It should not be exercised capriciously. The PSC in the circumstances of this case was under a duty to consider the new evidence it had admitted during the review proceedings to see if it exonerated the employer from the allegation of unfair dismissal.

50. What did the PSC do in its new decision? It stated as follows:-

> " The commission therefore admits the new evidence and varies its finding that the respondent had not been able to show proof of service of the show cause letters despite after being requested to do so.
>
> However, the admission of the new evidence does not warrant a review of the commission's earlier decision in the matter."

51. The foregoing manifests caprice on the part of the PSC. It also manifests a deliberate refusal to exercise a jurisdiction which was donated by an express provision of statute and the regulations made thereunder. With the new evidence on record, the PSC was duty bound to make a determination whether the evidence established that fair procedure was followed before the dismissal of the 188 nurses. It was not enough just to say we admit the evidence but it does not warrant review of the earlier decision.

52. The PSC was bound to exercise the review power fairly by showing the basis upon which it formed the decision that the new evidence did not warrant review of the earlier decision. The failure to show the basis upon which the said decision was granted amounted to an error of law.

53. In addition the PSC failed to consider the new evidence admitted during the review proceedings and held that:-

> " The commission relied on the evidence of appellant made across the bar in holding that the respondent may not have employed workers to replace the dismissed workers. These were raised by the appellant in the appeal stage in the presence of the applicant, yet the same was not rebutted during the hearing or even through further affidavit filed after the hearing. The commission therefore upholds its earlier finding."

54. I will say much about the above statement later, but suffice it to say that the PSC committed an error of law by failing to consider the new evidence which had been filed before the initial decision, but not brought to the attention of the commission. Having admitted the evidence (list of replacement nurses) during the review proceedings, the PSC ought to have considered it in determining whether indeed the dismissed 188 nurses had been replaced. However, the said evidence was disregarded and the PSC upheld its earlier decision based on "the evidence of the appellant made across the bar" whatever that means.

55. Finally, on the issue of error of law, it was submitted that the PSC failed to consider the legal principles applicable to reinstatement of dismissed employees as established by case law and statues. The

substantive law to consider was section 49 of the *Employment Act* which provides that reinstatement of a dismissed employee should be done only on exceptional circumstances and where it is practicable.

56. In the case of *Kenya Airways Ltd v Aviation & Allied Workers Union & 3 others* (2014) eKLR the Court of Appeal held that:

> " ... in Kenya, reinstatement is one of the remedies provided for in section 49(3) as read with section 50 of the *Employment Act* and Section 12(3) (vii) of the Industrial Court Act that the court can grant. Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance, the traditional common law position is that courts will not force parties in a personal relationship to continue in such relationship against the will of one of them. That will engender friction, which is not healthy for businesses...
>
> Under the Kenya *Employment Act*, the factors to be taken into account when considering reinstatement are enumerated in Section 49(4) of the *Employment Act*. Those relevant to this appeal include the wishes and expectation of the employee; the common law principle that there should be no order for specific performance in a contract of service except in very exceptional circumstances; the practicability of reinstatement; and chances of the employee securing alternative employment."

57. The applicant's case during the appeal and review proceedings was that reinstatement was not practicable considering that the positions left by the dismissed nurses had been filled and that there was no budgetary provision for the dismissed 188 nurses. Had the said principles of law above been considered as opposed to the "evidence made by the appellant from the bar", the PSC could have arrived at a different decision. Hence the PSC committed an error of law in that regard.

Irrationality/Unreasonableness

58. The applicant submitted that the impugned decision is irrational/unreasonable because the PSC failed to take into account relevant considerations including evidence that the dismissed nurses were served with show cause letters and were also invited to a disciplinary hearing but they declined that opportunity to defend themselves.

59. In the earlier decision the PSC held that the procedure followed to dismiss the 188 nurses was irregular, unfair and unlawful because the applicant had failed to adduce evidence to prove that the nurses had been served with show cause letters as alleged during the hearing of the appeal. However, when it was shown the evidence which was filed before the said decision, it held that the evidence has been admitted and the earlier finding varied on lack of evidence. However, it failed to consider the evidence to reverse the earlier decision that the process followed was irregular, unfair and unlawful.

60. The said action was not logical and no reasonable tribunal properly applying its mind to the facts before it and the legal principle attendant to review of decision could have arrived at the same decision. If a decision is arrived at because important evidence filed was not brought to the tribunal's attention, the tribunal should arrive at the decision it would have arrived at had the said evidence been brought to its attention before the impugned decision. In the instant case, had the PSC seen the evidence of service of the show cause letters, it would not have reached the decision that the procedure followed to dismiss the nurses was irregular and unfair. Now that the evidence of service of the show cause letters

was placed before it at the review stage, the PSC should have logically reversed its earlier finding. The failure to do so was not only illogical but absurd.

61. Likewise, with respect to the order of reinstatement, the PSC failed to consider documentary evidence availed to it during the review proceedings, showing that other nurses had been employed to replace the dismissed ones and instead relied on the unsubstantiated allegations made from the bar by the appellant to retain its earlier decision of reinstating the dismissed nurses.

62. Even without the evidence of replacement of the dismissed nurses, the PSC had a duty to consider the legal principles established by case law and statutes, to determine whether reinstatement was the appropriate remedy in the circumstances. In the final analysis on this issue, I have arrived at the considered view that the decision by the PSC of refusing to review its earlier decision based on the new evidence placed before it by the applicant, was irrational and unreasonable. I say so because it was without any justifiable reason and was influenced by the failure to take into account relevant consideration and/or by taking into account irrelevant ones.

63. Having found that the decision by the PSC dated October 13, 2021 was tainted with illegality in the form of error of law, and irrationality, I am satisfied that the applicant has laid before the court sufficient basis for judicial review of the said decision.

Reliefs

64. It must be clear by now that the impugned decision is now within the four walls of judicial review since it has been established by evidence that the decision is tainted with illegality and irrationality. Therefore, I allow the notice of motion dated March 25, 2022 by granting prayer 1 and 2 as prayed. I further award costs to the applicant.

Adoption of Decision dated March 3, 2021

65. The foregoing orders leaves us with the decision by the PSC dated March 3, 2021 for enforcement. However, my attention was drawn to the acknowledgment by the PSC that the 2nd Respondent and its members went on strike and persisted in defying court orders which required them to report back to work. The PSC as a creature of the law must appreciate that court orders are not suggestions to any party or even itself. How on earth could the PSC entertain proceeding brought before it by a party who is in contempt of court, and even go as far as granting the contemnors reliefs it seeks on the basis of a disciplinary action taken for their contempt of court? Is the PSC in competition with this court regarding Employment and Labour Relations disputes? How can the court on one hand declare a strike unprotected and order workers to resume work and on the other hand PSC welcome the same employees to bring parallel proceedings while in defiance of the court orders which the PSC is fully aware of? This state of affairs is untidy, uncalled for and a reason for a conversation in order to tame the unbridled zeal by adjudicators which in the long run becomes counter productive.

66. Having made the foregoing observations this court believes that the 2nd Respondent and its members do not respect court orders and therefore they should first purge the contempt before seeking orders from the court.

DATED, SIGNED AND DELIVERED AT NYERI THIS 27TH DAY OF APRIL, 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 April 15, 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.

ONESMUS N MAKAU

JUDGE