



**Kenya Association of Health Administrators v Salaries and Remuneration Commission  
& 3 others; Kenya Health Professionals Society & another (Interested Parties)  
(Petition 77 of 2020) [2023] KEELRC 1004 (KLR) (26 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1004 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION 77 OF 2020  
NZIOKI WA MAKAU, J  
APRIL 26, 2023**

**BETWEEN**

**KENYA ASSOCIATION OF HEALTH ADMINISTRATORS ..... PETITIONER**

**AND**

**SALARIES AND REMUNERATION COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**MINISTRY OF HEALTH ..... 2<sup>ND</sup> RESPONDENT**

**MINISTRY OF FINANCE ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**KENYA HEALTH PROFESSIONALS SOCIETY ..... INTERESTED PARTY**

**COUNCIL OF GOVERNORS ..... INTERESTED PARTY**

**RULING**

1. The petitioner/applicant seeks, vide its notice of motion application dated February 21, 2023 for various orders the main of which is that this honourable court be pleased to issue an order to set aside the ruling and order made on April 20, 2021 in respect of the petitioner's notice of motion dated October 30, 2020. The application was supported by the affidavit of Emily Orina sworn on February 21, 2023.
2. The application was opposed by the respondent who- filed grounds of opposition dated March 13, 2023. It was asserted that the application seeks to set aside a ruling of the court delivered almost 2 years ago and that the motion is scandalous, frivolous, vexatious and abuse of the court process.



3. The motion was argued by counsel for the petitioner Mr Kibe. He argued that when the Ruling of April 20, 2021 was delivered, there was an application dated April 12, 2021 that among other things sought for the Ruling not to be delivered on grounds that the Petitioner had not responded to that Application on account of misleading directions resulting into the absence of all the parties on the date that the application seeking to set aside the findings and decree came up. He stated that is the thrust of the application of April 12, 2021.
4. He submitted that the second reason the Petitioner was dissatisfied was that a substantive Ruling was issued without hearing and for no fault of the Petitioner or her Advocates. He argued that this has a bearing on the right to equal protection under the Constitution and the right to fair hearing and concerns natural justice. It is the submission of the Petitioner that if the Court had heard and considered the motion of 12<sup>th</sup> April 2021 the prejudice caused by the patent procedural impropriety that arose would not have been occasioned. He submitted that as a result of all that the Petitioner had a miscarriage of justice which would have been corrected if the Notice of Motion of April 12<sup>th</sup> 2021 had been heard and a Ruling thereon delivered. He argued that the third point is that the miscarriage of justice suffered is best corrected by setting aside the Ruling of the Motion on April 21, 2021. The Petitioner argued that would necessitate the hearing of Motion of April 12, 2021 and give way for hearing of the Petitioner's Notice of Motion of October 30, 2020. Mr Kibe submitted that in saying this, it will be noted for purposes of the motion of October 30, 2020 that Application did not have substantive directions that had been given before it was placed for hearing save for Ruling on April 20, 2021. He submitted that Miss Wangechi Gichangi State Counsel was the only person who was logged on when this matter was fixed for Ruling. He argued that in good faith they all were unaware that the matter would be online on that day. He stated that procedural issues capable of being rectified ought to be rectified. He asserts that issue 4 and 5 arose rose from issues raised by his colleague as they raise the issue of not being properly on record. He stated that on September 7, 2020, a consent was signed between the Petitioner's current Counsel and the previous Advocate the present firm came on record. He argued that the final issue is that the application is said to be an afterthought and filed with undue delay. He submitted that the fact that the Application of April 12, 2021 has been pending for hearing despite being certified urgent and no affidavit has been placed on record alleging prejudice, there is no basis to assert this motion has been filed later. He stated that there were a few instances where the attempt of listing arose. He said that there is also the statement that this Motion was overtaken by events. He urged the Court as submitted earlier to let the Motion of April 12, 2021 be heard first.
5. Mr Wahome for the 2<sup>nd</sup> respondent opposed the motion. He placed reliance on the grounds of opposition. He gave a brief chronology as follows:-

On August 7, 2020 Justice Radido rendered judgment dismissing the entire Petition. On October 30, 2020, the Petitioner filed a motion seeking to review the judgment and in response thereto, the Hon. Attorney General and the Council of Governors raised Preliminary Objections with regard to the Applicant's Motion of October 30, 2020 and parties appeared on February 24, 2021 where Court directed the Preliminary Objection be considered first. Parties were directed to file submissions in regard to the two Preliminary Objections. The Applicants did not comply with directions of February 24, 2021. They did not file their submissions. Instead on March 3, 2021 the court directed it would deliver Ruling on April 20, 2021. The Applicants waited till the last minute and instead filed a Motion seeking to set aside the directions of March 3, 2021. They did not bother to comply with directions of February 23, 2021. The court found merit in the preliminary objections raised as a result, the Notice of motion of October 30, 2020 was dismissed. He submitted that upon the delivery of ruling of April 20, 2021, this court became functus officio and motion of April 12, 2021 died a very natural death. He urged the Court to note from the record that the Applicant has moved almost 2 years late seeking



to set aside the Ruling of April 20, 2021. He submitted that a review application under rule 33 has to be made within reasonable time, the key word being reasonable time. He submitted the applicant has not moved within reasonable time and delay of 2 years is not reasonable. He stated that they have not given sufficient reasons for the delay and submitted that this Motion is an afterthought. He said that litigation must come to an end. He submits that the Motion is scandalous, fictitious, vexatious and abuse of court process and should be dismissed with costs. He conceded that the Petitioner did in deed file a consent and he therefore dropped his second limb which was to the effect that they are not properly on record.

6. In brief reply, Mr Kibe submitted that Counsel was not in court when the date for Ruling was given and these were subject of the April 12, 2021 Motion. He said that his colleague never responded to the Motion. Rather his client never responded. He asserted that these were matters to be raised and handled substantively having been raised in the Motion. He argued that the chronology is subject of Motion of April 12, 2021. He stated that the Respondent to the motion argues that the Ruling of April 20, 2021 rendered the Application of April 12, 2021 redundant or that it was overtaken by events. He submitted that to the best of his knowledge all applications filed in court must be heard and determined one way or another. He submitted that an application filed to stop a certain action should be heard and if the Application is not heard that party would have a grievance. He stated that the party must go to court and state they are aggrieved. He posed the question – What is the position of the Motion of 12<sup>th</sup> April? He submitted that if all parties had brought it out, the Applicant is certain the court would have vacated the Ruling of April 20, 2021. He submitted the issues need to be addressed so as to remove the hurdles that led to the decision of March 3, 2021. He asserts that in view of the foregoing, the Petitioner did not concede there was an order that the Petitioner did not comply. He stated that the date they did not appear is when the events happened and these are set out. He said that they came for the other steps which did not happen. On the aspect of delay and since there is no affidavit it would explain his position as the Motion cannot be heard. He did agree, no doubt, there must be an end of litigation and submitted that litigation comes to an end when procedural fairness and substantive justice is served. The petitioner submits the procedural issues are subject to the Motion of April 12, 2021 and that the substantive issues are on the October 30, 2020 which was not heard on merit due to unhappy circumstances subject to Motion of April 12, 2021. He argued that what is important in his view was caused by a misunderstanding and is capable of being corrected. He urged the Court to do so and grant the motion and vacate the proceedings made as the Petitioner/Applicant is said not to have been given a hearing.
7. The Petitioner seeks to reopen the suit and has used an innovative way to do so. The Petitioner suggests that because the motion of April 12, 2021 was not heard, justice was not served. It is also suggested that the failure to place a reply on the record vitiates the proceedings that took place subsequently. This cannot be the case. Many a time an application is either withdrawn, abandoned or becomes otiose on account of effluxion of time as it is overtaken by events. The motion of April 12, 2021 is one such application. It was overtaken by events. It sought the halting of the determination of the application subject of the Ruling which the Petitioner has sought review and failed. Now the Petitioner seeks the same orders in a different way. The right to fair trial applies equally to the parties before the court and the fact that the Petitioner did not attend the mention or have the application to stop a Ruling heard does not mean there was no fair trial. The court considered the law and came to the determination it did and rendered justice to the case before it.
8. All things must come to an end and litigation is no exception. A party cannot litigate *ad infinitum* as to do so would be antithetical to justice and good order. When a final decision is given, one cannot go back and reopen a case merely because their attempt to halt a Ruling failed. The Application by the petitioner is so devoid of merit that it must suffer the singular fate befitting an application



that is scandalous, frivolous, vexatious and an abuse of the court process; dismissal with costs to the respondents.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF APRIL, 2023**

**NZIOKI WA MAKAU**

**JUDGE**

