



Kenya National Union of Nurses v Garissa Public Service Board (Cause E001 of 2022) [2023] KEELRC 1946 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1946 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E001 OF 2022
ON MAKAU, J
JULY 28, 2023**

BETWEEN

KENYA NATIONAL UNION OF NURSES CLAIMANT

AND

GARISSA PUBLIC SERVICE BOARD RESPONDENT

RULING

1. By the Notice of Motion dated May 29, 2023, the Respondent (in the suit) seeks the following orders:-
 - a. Setting aside of order (i), (iv) and (vi) of the judgment delivered on October 21, 2022 and any consequential orders thereof.
 - b. Leave be granted to the respondent to defend this suit and the same be heard and determined on merits.
 - c. Costs of the Application be provided for.
2. The Application is supported by an Affidavit sworn on even date by the Respondents' Legal Advisor Ms.Khadija Ahmed Mohamed. The gist of the applicant's case is that the respondent was never served with court summons, pleadings, hearing notice or any document relating to the instant suit; that it only learned about the suit when its officers were personally served with court orders dated 4th April 2023 requiring them to appear in court in respect of a judgment delivered on October 31, 2022; that the judgment was entered without the court having the benefit of all the facts; that there is misdirection and concealment of material facts; that the respondent has a water tight defence to the claim; that there is a sufficient cause warranting the orders sought; and that it is in the best interest of justice that the application be allowed as prayed.
3. The claimant opposed the application vide the Replying Affidavit sworn on June 27, 2023 by Tyson Kinoti in which he deposes that the court record is evidence that the respondent was served with the



pleadings, hearing notices and even notice of the judgment; that there are Affidavits of service returning the documents duly stamped by the respondent; that the impugned judgment was properly entered; and that the application lacks merits.

Submissions

4. Mr. Dayib, learned counsel for the applicant argued the motion. In brief he urged the court to consider the grounds raised for the application including lack of service, and the draft defence and allow the application as prayed.
5. Mr. Kinoti for the claimant relied on his Replying Affidavit to oppose the application. He submitted that the respondent was duly served via email and Courier service and Affidavits of service were filed in court. He referred to letter dated October 13, 2022 from the respondent's CEO indicating that they were aware of the judgment and the suit. Another letter from one Mary Kanario indicating that she had been promoted after the judgment was also cited. He also referred to the draft defence filed which indicates that the award to Felix Mokandu Angasa was being processed for payment. Finally, he submitted that the application is an afterthought and it offends the *functus officio* rule.
6. In his rejoinder, Mr. Dayib submitted that there is a difference between service of summons and pleadings, and service of orders. He maintained that the claimant never served the respondent with summons and the pleadings but only orders and letters.

Analysis

7. I have carefully considered the application, Affidavits and submissions by counsel. The issue for determination is whether the applicant has shown sufficient cause for setting aside the judgment
8. I have perused the court record and noted that the suit was filed on January 25, 2022 together with a notice of motion dated January 21, 2022 under certificate of urgency. The court fixed the motion for hearing on 2nd February, 2022 and directed that the respondent be served on or before January 27, 2022.
9. On 1st February 2022, the claimant filed an Affidavit of service sworn by Mr. Kinoti confirming that he had served the respondent via email on 26th January 2022 and again via G4S courier services on 28th January 2022. He annexed to the Affidavit, copy of email sent to the respondent showing two attachments, namely court order and claim. He further annexed copy of shipment waybill for a parcel sent by the claimant herein to the Applicant.
10. It seems that motion was not heard on the 2nd, 9th and 14th February 2022, despite repeated service of hearing notices via email and court directed claimant to dispose the suit by written submissions. On 3rd March, 2022 the claimant filed Amended Statement of claim and written submissions. Thereafter the court rendered the impugned judgment on 31st October, 2022.
11. The respondent has not disowned the email address used by the claimant to effect service. Further, the respondent never refused to implement the judgment after it was notified of the judgment through the same email address. In fact by a letter dated 9th March 2023, the respondent promoted one of the grievants in compliance with the impugned judgment. The foregoing fact was confirmed by Mr. Dayib Advocate for the respondent on 2nd May, 2023 when he asked the court to give the parties 21 days to settle the matter amicably.
12. Having considered the matter herein, I wonder why such a small matter degenerated into a suit. Suffice it to say that there is sufficient evidence on record in the form of Affidavits of service showing that the respondent was made aware of the suit herein and failed to appear or in any manner respond to the



- suit. Service was done via email and courier service. The service included court order, pleadings and letters. Consequently the impugned judgment was a regular judgment.
13. The respondent has acted on the judgment by promoting Mary Kanario Mpekethu as ordered by the court. What remains is payment of the withheld salary for the two grievants.
 14. The applicant has annexed a draft defence stating that the grievants' salary were withheld for absenting themselves from work without permission. The applicant has annexed letters to support the alleged absence or desertion. The claimant did not respond to the above allegation in the Replying Affidavit.
 15. However, there is on record a letter dated 26th February, 2019 by Mary Kanario Mpekethu seeking for a paid study leave for one year starting 19th March 2019. There is also on record a letter dated 29th February 2019 by the Nursing officer- in- Charge releasing her to maternity leave and distance learning class up to 22nd June, 2019. The said letters were filed as exhibits in the main suit and are still in the court file. Nothing was said about them by the applicant during the hearing of the instant application. The letter accusing the grievant of absence from work was written on 12th June 2019 while the letters for the stoppage of her salary were written on 17th and 21st June 2019.
 16. Having considered the aforesaid letters, I am satisfied that the claimant has established by evidence that the grievant (Mary Kanario Mpekethu was lawfully on leave up to 22nd June 2019. It follows that the alleged desertion or absence from duty from 12th June 2019 to 21st June 2019 when her salary was stopped was not factual.
 17. Besides the order for promotion of Mary Kanario Mpekethu has already been implemented and the respondent has admitted the claim for Mr.Felix Mokandu Angasa as awarded by the court. This reduces the dispute to the claim for withheld salary for Mary Kanario Mpekethu as awarded by the court. As observed above, the withholding of her salary was done prematurely and any purported defence is just otiose as it does not raise any triable issues.
 18. In view of the finding above that the respondent was made aware of the suit herein and failed to respond before the judgment; that the respondent has already implemented part of the impugned judgment; and that the intended defence does not raise any triable issues, the court holds that the applicant's motion dated 29th May, 2023 lacks merits and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 28TH DAY OF JULY, 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 ruling 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

