



**Kenya Union of Clinical Officers v Kirinyaga County Public Service Board;
Public Service Commission & another (Interested Parties) (Miscellaneous
Application E002 of 2021) [2023] KEELRC 1914 (KLR) (1 August 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1914 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
MISCELLANEOUS APPLICATION E002 OF 2021
ON MAKAU, J
AUGUST 1, 2023**

BETWEEN

KENYA UNION OF CLINICAL OFFICERS CLAIMANT

AND

KIRINYAGA COUNTY PUBLIC SERVICE BOARD RESPONDENT

AND

PUBLIC SERVICE COMMISSION INTERESTED PARTY

ATTORNEY GENERAL INTERESTED PARTY

RULING

1. The application before the court is the claimant’s notice of motion dated May 19, 2023 brought under articles 41, 50 and 159(2) (d) of the [Constitution](#) of Kenya, rules 24(5), 25(2) and 32(1)(a) of the [Industrial Court \(Procedure\) Rules](#). The applicant prays for orders that:
 - a. The court does vary the order of stay made on February 15, 2023
 - b. The court does proceed to render its decision on the main application dated June 23, 2021 seeking to have the decision of the Public Service Commission made on April 14, 2021 in county appeal No 03/20/2021 save for the paragraph ii of the decision recognized, adopted and enforced as a judgement of the court.
 - c. The cost of this application be borne by the respondents on full indemnity basis.



2. The application is supported by an affidavit sworn on the even date by the applicant's General Secretary, Mr George Maroah Gibore in which he deposed that the Court granted a stay of proceedings in this matter pending the appeal in Nyeri COACA 037 of 2023 in order for the respondent to pursue a review application that was pending before the Public Service Commission, hereinafter referred to as the commission. Further that the commission rendered its decision on March 28, 2023 dismissing the application for review and upheld its earlier decision of April 14, 2021. Consequently, the affiant contended that the circumstances that necessitated the granting of the stay orders on February 15, 2023 have been altered by the delivery of the said decision by the commission.
3. He contended that as things stand now there is no substantial loss to be suffered by the respondents if the stay order is lifted. He contended that the aforesaid appeal was consequent to the court's refusal to grant stay of proceedings orders to enable the respondent to pursue the review and therefore, the delivery of the commission's decision rendered the appeal moot.
4. He further deposed that the stay was pegged on the condition that the respondents filed a record of appeal within 60 days from the date of the order, which condition was not satisfied by them.
5. He contended that the stay order should be lifted because the applicant's members have continued to suffer in poverty, hopelessness and deprivation due to unemployment and lack of an income for the last 4 years. Finally, he contended that that the court is the only one with the power to review its own orders. The applicant relied on rule 33 of [Employment and Labour Relations Court Procedure Rules](#) to urge that point.
6. The respondent on the other hand opposed to the application *vide* replying affidavit sworn by Caroline Kinyua, the County Attorney of the respondents. The respondent emphasizes that this application should not be allowed as it will offend its right to be heard as the appeal filed in the Court of Appeal is pending and awaiting directions.
7. The respondents contend that the decision of the commission to uphold its earlier decision does not sanitize the irregularity in Justice Marete's decision against which it appealed. It went further to argue that granting this application would not only amount to the court sanitizing an irregularity and giving credence to an irregular and improper decision but also render the appeal nugatory.
8. It is the respondent's argument that this court lacks the jurisdiction to vary the orders pending the appeal as the same were granted pending the hearing and determination of the appeal; and also because this court cannot pronounce itself on the merit of the appeal.

Submissions

9. Mr Ataka for the applicant made oral submissions in the open court but Mrs Beacco for the respondents chose to file written submissions.
10. Mr Ataka submitted that the court has jurisdiction to review its on orders under rule 33 of the [ELRC Procedure Rules](#) and that it is not correct to say that only an appellate court can vary stay orders.
11. It was submitted for the respondents that the court lacks jurisdiction to vary, set aside, vacate or interfere with the order of stay pending appeal in this case as that is the power reserved to the appellate court. For emphasis, reliance was placed on the provision of order 42 rule 6(1) of the [Civil Procedure](#)



Rules and further on the case of Mohamed Khamis Hemed v Almasi Beverages Limited [2020] eKLR, where the learned judge held as follows:

“The court has considered the material on record and the parties’ respective submissions. The court finds that if the applicant is dissatisfied with the order of stay of execution pending appeal, then the procedure is to apply to the Court of Appeal as per order 41 rule 6 (1) of the Civil Procedure Rules. The court finds that in view of that provision the court is clearly functus officio and it was misconceived for the applicant to invoke the court’s inherent jurisdiction. It is also clear that the respondent has taken steps towards filing the record of appeal and the application would fail in alleging that the respondent has failed to take such steps.”

Issues For Determination And Analysis

12. Having considered the application, affidavits, grounds of opposition and the rival submissions, the following issues commend themselves for determination:
 - a. Whether this court has the jurisdiction to vary an order for stay of proceedings pending appeal.
 - b. Whether the order of stay of proceedings made by this court on February 15, 2023 should be varied to pave the way for adoption and enforcement of the decision made by the commission on April 14, 2021.

Jurisdiction To Vary Order Of Stay Pending Appeal

13. The applicant contended that the court has jurisdiction to review and vary its decision including an order of stay pending appeal. Rule 33 of Employment and Labour Relations Court Procedure Rules which states as follows:

- “(1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
 - (a) If there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
 - (b) On account of some mistake or error apparent on the face of the record;
 - (c) If the judgment or ruling requires clarification; or
 - (d) For any other sufficient reason.
- (2) An application for review of a decree or order of the court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the court station.
- (3) A party seeking review of a decree or order of the court shall apply to the court by way of notice of motion supported by an affidavit and shall file a copy of the judgment or decree or ruling or order to be reviewed.
- (4) The court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.



- (5) Where an application for review is granted, the court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.
- (6) An order made for a review of a decree or order shall not be subject to further review.”
14. The respondents, however contented that the proper law to consider is order 42 rule 6(1) of the [Civil Procedure Rules](#) which provides that:
- “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.” [emphasis added]
15. There is no dispute that the court stayed proceedings in this matter pending the respondents appeal against the ruling of Marete J which had the effect of denying the respondent a right to hearing of their application for review of the decision of the commission dated February 14, 2021. The stay was on condition that a record of appeal was filed within 60 days from the date of my ruling. It has not been shown that the appeal was not filed within the stated time of 60 days. Therefore, I am satisfied that the appeal COACA No 037 of 2023 was properly filed and the impugned stay order is still in force.
16. The order of stay was mainly granted to protect the respondents’ right to hearing with respect to the review application before the commission. The said right had been denied by this court and the respondent appealed against that denial. The respondents’ application has since been determined by a decision made by the commission on March 28, 2023. In that regard the appeal before the court appeal may just be an academic exercise since the right to be heard was granted after I issued the impugned stay order.
17. I believe in the circumstances of this case, I have jurisdiction to review and vary the order of stay of proceedings issued on February 15, 2023 by dint of rule 33 of the [ELRC Procedure Rules](#) in order to meet the ends of justice. No prejudice will be suffered by the respondents because they were heard on their application for review. If they feel like pursuing the pending appeal to correct any error of judgment by Marete J, that is within their right, but that should not delay the proceeding in this matter any further since all the proceedings before the commission have now been exhausted. I believe that stay of proceedings should be distinguished from stay of a decision under order 42 rule 6 aforesaid.
18. In exercising the power of review of its decision under rule 33 of the [ELRC Procedure Rules](#) to vary the order of stay of proceedings, the court cannot be said to be *functus officio* as alleged by the respondents. As such the authorities cited by the respondents to urge that the court is *functus officio* with respect to the instant application are distinguishable.

Whether the order of stay order should be reviewed and varied.

19. I have already made a finding of fact that the pending appeal is properly on record unless decided otherwise by the appellate court. The said finding was based on the fact that the applicant has not tendered any evidence to substantiate its allegation that the appeal was filed out of time.



20. I have also made a finding of fact that varying or lifting the stay order altogether will not prejudice the pending appeal because the substantial loss that was to be suffered by the respondents, namely, denial of the right to be heard on their application for review before the commission, is no longer there anymore. They were heard on the said application and a decision was rendered. As already observed above, the process before the commission has ended and the battles must shift to the courts for adoption of the decisions of the commission or otherwise.
21. In conclusion, I find that the application is merited and it is allowed by varying the order of stay of proceedings in this matter made on February 15, 2023 to the extent that it is lifted to pave the way for hearing of the main application herein dated June 23, 2021 which seeks for the adoption and enforcement of the decision made by the commission on April 14, 2021 in county appeal No. 03/02/2021. Costs of the instant application shall abide the outcome of the main application. This ruling shall apply to Nyeri ELRC Misc. E003 of 2021 which was affected by the same order of stay of proceedings.

Dated, signed and delivered at Nyeri this 1st day of August, 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

4 | Page

