



**Kenya Union of Clinical Officers v Kirinyaga County Public Service Board;
Public Service Commission (Interested Party) (Miscellaneous Application
E002 of 2021) [2023] KEELRC 3349 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3349 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
MISCELLANEOUS APPLICATION E002 OF 2021
ON MAKAU, J
DECEMBER 20, 2023**

BETWEEN

KENYA UNION OF CLINICAL OFFICERS APPLICANT

AND

KIRINYAGA COUNTY PUBLIC SERVICE BOARD RESPONDENT

AND

PUBLIC SERVICE COMMISSION INTERESTED PARTY

RULING

1. This ruling relates to the Applicants' Notice of Motion dated 23rd June 2021 which is basically brought under section 89(1) of the [Public Service Commission Act](#) of 2017, and seeking the following orders: -
 - a. Spent
 - b. Spent
 - c. That, the decision of the Public Service Commission made on 14th April 2021 in the County Appeal No 03/20/2021 save for paragraph (ii) of the decision be recognized, adopted and enforced as a judgment of this court and a decree to issue forthwith;
 - i. Allowing County Appeal, No 03/20/2021, Kenya Union of Clinical Officers vs Kirinyaga County Public Service Board; and
 - ii. Directing the Respondent to forthwith reinstate all the members of the Applicant who were dismissed from employment on 8th July, 2019 on allegation of absconding duties.
 - d. That, an order of declaration be made under section 89(2) of the [Public Service Commission Act](#) that the currently serving members of the Kirinyaga County Public Service Public Board are



liable to be removed from office and are otherwise unfit to hold office for refusing, neglecting or otherwise failing to implement the decision of the Public Service Commission made on 14th April, 2021 with in County Appeal No.03/20/2021.

- e. Costs of the application be paid by the respondent.
2. The motion is supported by the affidavits sworn by George Maroah Gibore on 23rd June, 2021 and his further Affidavit sworn on 5th May, 2023. The respondent opposed the motion vide the Replying Affidavit sworn on 6th July, 2021 by its County Attorney Ms.Caroline Kinyua.

Factual background

3. The applicant's members (grievants) participated in a strike in May, 2019 and the County Government of Kirinyaga sued it in Nairobi ELRC case No.340 of 2019. Despite the court issuing injunction against the strike and further declaring it unprotected, the applicant never called off the strike and the grievants continued with the strike. Therefore, the respondent dismissed the 46 grievants from service and they appealed to the Public Service Commission (PSC). The PSC invited the respondent to make a response to the appeal but none was filed. Consequently, the PSC rendered a decision on 14th April 2021 in which it found that the dismissal was done without due process and reinstated the grievants to employment. It further directed that the period between the dismissal and the date of resumption of duty will be treated as unpaid leave.
4. The respondent was aggrieved and applied to the PSC to review the decision. In the meanwhile, the applicant filed the instant motion requesting the court to adopt and enforce the said decision of the PSC as its judgment. It also requested the court to declare that the respondent's members were liable for removal from office for refusing, neglecting and failing to implement the said decision of the PSC.
5. The PSC has since heard and determined the application for review vide a decision rendered on 28th March, 2023. The gist of the decision is that the application by the respondent was dismissed and the earlier decision of 14th April, 2021 was upheld. As a result, the applicant urged the court to allow the instant application as prayed.
6. The respondent's case is that the grievants went on strike in contempt of court order issued on 24th May 2019 and extended on 29th May 2019 which directed them to resume work. They further refused to resume work after the County Government issued a media statement to all the striking workers asking them to resume work. Some workers resumed work but the grievants refused. They were then served with show cause letters dated 31st May 2019 but they refused to resume duty. As a result, the respondent dismissed the grievants and recruited new health workers as a measure to prevent loss of lives and render services to the patients.
7. It is further respondent's case that the term of four (4) members of the Board expired on 26th September, 2020 leaving only the chairman alone in office and as such the Board was not properly constituted at the time when the letter by PSC dated 27th October, 2020 was received at the respondent's office on 30th October, 2020. A new Board was installed on 12th January, 2021 and thereafter received the decision of the PSC dated 14th April, 2021 against which it applied for review by the PSC on 30th April 2021.

Submissions

8. Mr. Ataka submitted that the powers of the court under Section 89 of the PSC Act is only limited to adoption of the decision of the PSC and nothing more. He cited the case of *County Government of Mandera v Hussein Dayow* [2020] eKLR where Ongaya J held that the procedure under section 89(1)



- of the PSC Act is a summary and non-litigious process. Consequently, Mr. Ataka urged the court to be guided by the said decision.
9. Mr. Ataka further submitted that section 88(4) of the Act is instructive that a decision of the PSC must be complied with and implemented notwithstanding any application for review. He further submitted that section 89(2) of the Act prescribes consequences for non-compliance with a decision of the PSC being, removal from the office. Therefore, the counsel prayed for declaration that the members of the respondent are liable for removal from office.
 10. For emphasis, he cited the case of *Patrick Nyaga v Kenya Forest Services & PSC* [2021] eKLR and County Government of Mandera case, supra and urged that failure to comply or implement a decision by PSC amounts to unfair labour practices, and that the purpose of section 89(2) of the PSC Act is to uphold the rule of law by allowing for declaration that a Board is liable for removal from office.
 11. As regards the issue of contempt of court and why PSC heard the applicant, Mr. Ataka submitted that the same issue was raised after the PSC had rendered its decision on 14th April 2021. He further submitted that the principle emerging from the case of *Olive Mugenda v Okiya Omtatah* [2016] eKLR is that a finding of contempt lies with the court that made the order which is alleged to have been disobeyed. Further he submitted that in the case of *Tetra Radio v CCA* [2013] eKLR, the Court of Appeal has held that a party cannot be denied audience until there is a finding that a party is in contempt.
 12. Mr. Ataka further submitted that the alleged contempt did not warrant the PSC to deny the applicant audience and cited the case of *Rose Ndetbo v Ratial Automobile* [2010] eKLR where the Court of Appeal held that a party will be excluded only if the alleged contempt impedes the matter before the court or the tribunal.
 13. Mr. Odongo, who has similar application in ELRC Misc.No.E003 of 2021, asked the court to adopt as Judgment the decision of the PSC dated 14th April, 2021 as prayed in the Notice of Motion dated 29th June, 2021. In brief he asked that the ruling in this suit applies in ELRC Misc.No.E003 of 2021.
 14. Ms. Wangeci Advocate for the interested party also supported the application herein and also in ELRC Misc.No.E003 of 2021. She submitted that the PSC determined the appeals by dint of Article 234 (2) (1) of the *Constitution*, section 77 of the County Government Act and part 15 of the PSC Act. Further, the PSC was guided by the PSC (County Appeals Procedures) Regulations, 2016.
 15. She submitted that the PSC invited the respondent to respond to the appeal but it did not until the secretary to the Board wrote on 28th January, 2021 stating that the Board failed to respond on time since the Board was not reconstituted. By letter dated 5th February 2021, the PSC requested the respondent to respond to all the appeals pending before it but no response was filed except for the nurses' case where a lawyer appeared and the matter was settled.
 16. Ms. Wangeci further submitted that the PSC considered that the dismissal of the grievants for illegal strike was a valid reason but found that the respondent never followed a fair procedure before the dismissal as the grievants were never given an opportunity to defend themselves. She urged the court to find that the PSC followed a fair process set out in the PSC (County Appeals Procedure) Regulations by giving the respondent an opportunity to be heard but it failed to defend itself.
 17. Ms. Small Advocate opposed the application on behalf of the respondent. She submitted that the court lacks jurisdiction to adopt and enforce the decision of the PSC, if the decision is impugned. She submitted that the decision by the PSC is facing challenge for being rendered before service of any notice of Appeal.



18. She further submitted that section 89 of the PSC Act cannot be read in isolation from section 86 of the Act which allows an aggrieved party to apply for review of the decision by the PSC. She submitted that the decision of the PSC had been stayed pending the outcome of the review application.
19. She urged the court not adopt the decision of the PSC because it was illegal and irrational since the grievants were invited to disciplinary hearing but they declined. She argued that the allegation that the dismissal was done without following fair procedure was not true.
20. In his rejoinder Mr. Ataka submitted that the allegation that the decision dated 14th April 2021 stands challenged is not substantiated since the respondent has not filed any other affidavit after its Replying Affidavit sworn on 6th July 2021. Further, the allegation that show cause notices were served ought to have been made before the PSC. Finally, he submitted that there is a decision on merit by the PSC and the matter cannot be relitigated before this court.

Issues for determination and analysis

21. The issues for determination are:-
 - a. Whether the decision by the PSC dated 14th April 2021 stands challenged.
 - b. Whether the court should adopt as judgment the decision by the PSC rendered on 14th April, 2021 as prayed.
 - c. Whether the court should make declaration that the respondent's members are liable for removal from office as prayed.

Jurisdiction when the PSC's decision is impugned

22. The respondent submitted that the decision of the PSC dated 14th April 2021 stands impugned and therefore the court lacks jurisdiction to adopt the decision as prayed by applicant. The respondent dismissed the respondent's submission as an allegation since there is no affidavit or evidence to that effect.
23. I must agree with the applicant that the respondent has not filed any affidavit or evidence to substantiate the allegation that the decision by the PSC stands impugned. However, I am certain that the applicant is very much aware that the decision has been challenged by the respondent by way of Judicial Review.
24. I say so because, the record herein shows that on 1st August 2023 after I delivered a ruling lifting the stay orders, Ms Wangeci observed that the respondent had filed a fresh application for Judicial Review and asked that it be consolidated with the instant application. Mr. Odongo and Ms. Small agreed but Ms. Ochieng for the applicant sought for time to seek instructions. On 20th September, 2023, Mr. Ataka appeared for the applicant and objected to the proposed consolidation. In the end the court directed that this application and the preliminary objection in the Judicial Review application would be heard separately on the 9th October 2023.
25. Having found that all the parties herein are aware that the decision of the PSC stands impugned by the respondent by way of Judicial review, the question that begs for answer is whether the court lacks jurisdiction to adopt the decision before the determination of the Judicial Review case.



26. The jurisdiction to adopt the decision is provided by section 89(1) of the PSC Act in the following terms:-
- “Any person who is affected by the decision of the Commission made under this Part may file the decision for enforcement by the Employment and Labour Relations Court provided for under Article 162 (2) (a) of the Constitution.”
27. The above provision is clear that the party who is affected in the appeal proceedings before the PSC has the right to apply to this court for enforcement. The question that arises is whether the court ought to adopt and enforce the decision blindly. I think not, because our administrative law under the new constitutional dispensation clearly entitles any party aggrieved by an administrative decision to approach courts of law after the internal process is exhausted.
28. Section 9 (2) of the Fair Administrative Actions(FAA) Act provides that:-
- “The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanism for appeal or review and all remedies available under any other written law are first exhausted.”
29. Section 87 (2) of the PSC Act Provides that:-
- “A person shall not file any legal proceedings in any court of law with respect to matters within the jurisdiction of the commission to hear and determine appeals from County Government Public Service unless the procedure provided under this part has been exhausted.”
30. The principle emerging from the foregoing provisions is that any party aggrieved by a decision made in local process provided by statute or constitution, can challenge the decision by Judicial Review in courts of law. However, he can do so only after the alternative process and the remedies provided thereunder have been exhausted.
31. The applicant’s case is that the decision dated 14th April 2021 was made on merit and the same should just be adopted and enforced. He has cited the case of County Government of Mandera v Hussien Daywo where Ongaya J held that this court’s jurisdiction is summary and non-litigious. However, my view is that even where there is no contest, a court of law is obliged to consider whether a decision or a local remedy is consistent with legality, rationality and procedural fairness tests before adopting it.
32. The principle emerging from the new constitutional dispensation is that, while courts are to exercise deference vis-à-vis alternative remedies, the court has the inherent jurisdiction to review the same to ensure that they meet the test of legality, rationality and procedural fairness. It follows that where an administrative decision has been challenged by judicial review like in this case, the court should not enforce it until the challenge on the decision is heard and determined.
33. If the courts were to ignore such challenges, it would contradict and defeat the letter and spirit of law in section 9 of the FAA Act and section 87 (2) of the PSC Act. Ultimately, it would be contrary to the right to fair administrative action under Article 47 of the Constitution.
34. On the other hand, withholding the prayers sought in the application would not be prejudicial to any part since they all will have a chance to present their case for determination by the court in the Judicial Review suit. Further if the review suit fails, the application herein will sail through and all the parties will be satisfied that they were fairly heard as contemplated by the law. This is what Ms.Wangeci had in



mind when she proposed that this matter be consolidated with the Judicial Review suit and be heard together.

35. In view of the foregoing, I postpone my decision on adoption and enforcement of the decision of the PSC dated 14th April, 2021 until the Judicial Review Application No.ELRC No.E002 of 2023 is heard and determined. The Judicial Review suit will be concluded within 90 days from today. This is the fairest orders I can make in the circumstances.
36. The orders herein shall apply to Nyeri ELRC Misc. Application No.E003 of 2021 Kenya National Union of Medical Laboratory Officers v Kirinyaga County Public Service Board.

DATED, SIGNED AND DELIVERED AT NYERI THIS 20TH DAY OF DECEMBER, 2023.

ONESMUS N MAKAU

JUDGE

ORDER

This ruling has been delivered to the parties via Teams video conferencing with their consent, 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

