



**Kenya National Union of Nurses v County Public Service Board  
of Nakuru & another (Employment and Labour Relations Cause  
E029 of 2023) [2023] KEELRC 3374 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3374 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E029 OF 2023  
HS WASILWA, J  
DECEMBER 19, 2023**

**BETWEEN**

**KENYA NATIONAL UNION OF NURSES ..... CLAIMANT**

**AND**

**COUNTY PUBLIC SERVICE BOARD OF NAKURU ..... 1<sup>ST</sup> RESPONDENT**

**NAKURU COUNTY GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The claimant instituted this suit by a memorandum of claim dated 29<sup>th</sup> June, 2023, agitating for alleged unfair labour practices by the Respondents who have purportedly retained nurses on casual and contract employment, failed to absorb the casual/ contract nurses that were in employment by 2019 on permanent and pensionable terms and the underpayment of the nurses on casual and contract terms. Contemporaneously, the Applicant filed a notice of Motion, pursuant to Rule (17(3), 28(1), 33(1) of the Employment and Labour Relations Court(Procedure) Rules, 2016, Article 41,43,47,50, 53(1) of *the Constitution*, Section 37(4) of the *Employment Act* and all other provisions of the law, seeking for the following Orders; -

1. Spent.
2. Spent.
3. That upon inter parte hearing of the application this honourable court be pleased to issue an order staying implementation of the circular reference DOHS/COMHS/31/5/1 dated 31<sup>st</sup> May, 2023 and the casual/ contract nurses to continue rendering services pending hearing and until determination of the claim annexed to the application.



4. That the Court be pleased to issue any other order it may deem just and fit for the purposes of meeting the ends of justice.
5. Costs in the cause be provided for this application.
2. The application is based on the ground that the Chief Officer, Medical services, Dr. Murima John, issued a memo reference number DOHS/COMHS/31/5/1 dated 31<sup>st</sup> May, 2023, terminating the contracts of all persons engaged on casual basis on the 30<sup>th</sup> June, 2023 and advising them to apply for contractual engagements through the County Public Service Board once the vacancies are advertised.
3. It is averred that there are no job vacancies that have been advertised by the County, as such the move to terminate the services of the Casual employee, would create a vacuum of more than 500 medical professionals, that is not only economically detrimental to the Applicant's members but also to the county ability to promote primary health care for Nakuru residents as envisaged under Part II and Article 43(1)(a) of the Constitution.
4. It is averred that save for the memo, the Respondent did not issue termination notice to the 538 health professionals as provided for under section 35 of the Employment Act.
5. It is stated that the Respondents through the Chief officer of medical services, are engaging in unfair labour practices by treating the said health workers as casuals contrary to the definition of 'casual employee' at section 2 of the Employment Act.
6. Further that the memo is in contravention of section 59 of the County Government Act, as it is usurping functions of the County Public Service Board and directing unauthorized persons to act contrary to the law.
7. The Applicant states that the Memo further contradicts the circular reference number PSC/ADM/13/[18] dated 3<sup>rd</sup> August, 2021 which the Public Service Commission(PSC) stated inter alia that employees appointed at certificate, diploma and graduate entry level on contract terms from May, 2019 to date be translated to permanent and pensionable terms with effect from the date of their appointments, have the period of service preceding 1<sup>st</sup> January, 2021 on implementations of PSSS Act be deemed to have been served under the non-contributory pension scheme and join the public service superannuation Scheme with effect from 1<sup>st</sup> January, 2021 and the employer and employee contributions to the scheme be recovered over a period of 12 months.
8. Additionally, that in September, 2020, after a petition was presented to Nakuru County assembly on the issue of contracted medical staff, it was resolved and documented in the report dated 28<sup>th</sup> October, 2020, that all contracted nurses be absorbed on permanent basis, however that the Respondents have refused to implement the report.
9. It is stated that since none of the nurses was employed on permanent basis, the claimant reported a dispute to the cabinet secretary on the said non-conversion of the nurses' contracts to permanent terms and non-harmonization of salaries and allowances of contractual basis.
10. In response, a conciliator was appointed who presided over the matter and submitted a conciliatory report dated 9<sup>th</sup> June, 2023 recommending for the absorption of all employees employed between 2016-2023 on permanent and pensionable basis and their salaries harmonized with those of their counterparts.
11. The Applicant stated that the move by Respondents through the memo is in violation of Articles 27, 41(1),(2)(a) and 47 of the Constitution. Also that the Memo violates section D20 of the Public Service Commission, HR manual.



12. It is averred that the termination of the nurses on casual basis without cause, amounts to unfair termination under section 43 of the Employment Act. Additionally, that the nurses on contract period have been operating on short term contracts of 3 years, 1 year and current three months. Cumulatively, some of the nurses have served the Respondent continuously for more than 7 years, as such their reference as casual and eventual termination is unfair. Furthermore, that they are paid less than their counterparts, when they perform similar duties.
13. The Application is also supported by the Affidavit of Eudias Nyambura, the Industrial relations officer of the claimant, who reiterated the grounds of the Application.
14. The application is opposed by the 1<sup>st</sup> Respondent, who raise a Notice of Preliminary Objection dated 6<sup>th</sup> July, 2023, based on the following grounds; -
  1. That this Court lacks jurisdiction under the law to hear the application and indeed the entire suit.
  2. That the application and indeed the entire claim is premature and has been filed contrary to the provisions of section 73 of the Labour Relations Act and Rule 5 of the Employment and Labour Relations Court (Procedure) Rules, 2016.
  3. That the application and the entire claim has been filed contrary to section 87 of the Public Service Commission Act.
  4. That the claimant Union lacks the locus standi owing to the court pronouncement by the Employment and Labour Relations Court in Nakuru in ELRC No. 61 of 2018; Kenya Engineering Workers Union Vs Rift Valley Engineering Limited [2022] eklr.
  5. That the Application is bad in law, fatally defective and an abuse of the Court process.
15. On 27<sup>th</sup> July, 2023, the Court was informed that the Respondents had not filed any response to the Application and based on that the claimant's Counsel requested to be granted prayer 3 to the effect that; "That upon inter parte hearing of the application this honourable court be pleased to issue an order staying implementation of the circular reference DOHS/COMHS/31/5/1 dated 31<sup>st</sup> May, 2023 and the casual/ contract nurses to continue rendering services pending hearing and until determination of the claim annexed to the application." which the Court granted pending hearing of the application interparties on 3<sup>rd</sup> October, 2023.
16. It is these Orders that triggered the filing of two applications on 31<sup>st</sup> July, 2023, one by Francis Kihoro, the County Attorney, for the 1<sup>st</sup> Respondent and the other one by Prof. Tom Ojienda and Associates for the 2<sup>nd</sup> Respondent.
17. The application by the County Attorney sought to vacate, discharge, review and or set aside the Orders of this Court issues on 27.7.2023.
18. The basis upon which the application is made is that the Court proceeded to make orders on the premise that no response had been made when the Respondent had raised a preliminary Objection dated 6<sup>th</sup> July, 2023, which was on record.
19. He stated that the court proceeded to issue orders without addressing itself to the question of jurisdiction, which had been raised in the Preliminary Objection. That had the Court perused the record, it could have discovered a preliminary objection had been filed and addressed itself on that issue in the first instance.



20. The Application is further supported by the affidavit of Joyce Njeri Ndegwa, the secretary of Nakuru County Public Service Board, deposed upon on the 31<sup>st</sup> May, 2023, that reiterated the grounds of the Application.
21. The second Application by the 2<sup>nd</sup> Respondent, sought for similar orders as the application by the 1<sup>st</sup> Respondent, as it sought to vacate, review and or set aside the orders of the Court issued on 27.7.2023. The grounds in support of this Application are on the face of the Application and the supporting affidavit of Dr. John Murima, the Chief officer in charge of medical services at Nakuru County Government, sworn on 31<sup>st</sup> July, 2023.
22. Dr. Murima avers that the Court issued orders for stay of implementation of circular reference number DOHS/ COMHS/ 31/5/1 dated 31<sup>st</sup> May, 2023, which orders is final in nature, when all parties have not been heard inter partes.
23. He stated that granting of the said orders is self-defeating as they negate the need to comply with further orders of the Court on filing of response to the application since the application has been determined summarily. Moreover, that the said orders were granted regardless of the fact that the 1<sup>st</sup> Respondent had raise a preliminary objection dated 6<sup>th</sup> July, 2023. Importantly that the orders being granted are incapable of being complied with because the actions being sought to be stopped have already taken place and the nurses in question have already severed ties with the Respondent and even received their terminal dues. Further that their positions have already been filed by other health workers on contractual terms.
24. It is averred that the implementation of the orders sought brings about financial implications which are subject of budgetary allocation which is out of the purview of this Court.
25. Based on the foregoing, the affiant stated that it is important that the orders issued by this Court on 27<sup>th</sup> July, 2023 are reviewed and or set aside to avoid contempt proceedings that will be detrimental to the Respondents.
26. The Applicant opposed this Application and filed a replying affidavit deposed upon by Eudias Nyambura, on the 25<sup>th</sup> August, 2023. The deponent denied all the contents of the Application and in particular stated that the orders being sought are interlocutory and were granted inter partes.
27. The Affiant maintained that despite taking directions in court for responding to the Application, the Respondents failed to put in a response and instead chose to adjudicate the matter in the public eye through a publication in the Standard Newspaper dated 24<sup>th</sup> August, 2023, which publication may prejudice the proceedings before this Court.
28. He admitted that the 1<sup>st</sup> Respondent had indeed filed a Preliminary Objection dated 6<sup>th</sup> July, 2023, which the Court directed the parties on 24<sup>th</sup> July, 2023 to submit on it, however that the Respondents did not make any submissions.
29. The Affiant stated that this Court has jurisdiction granted to it by Article 162 and 165 of *the Constitution* to hear and determine this application and case.
30. The affiant denied the allegations that the nurses that were terminated were paid their terminal dues and maintained that the termination was unjustified. Further that indeed a few nurses were re-employed by the Respondent to the exclusion of other which move is discriminatory, contrary to Article 27 of *the Constitution* as read with section 5 of *Labour Relations Act*.



31. The deponent stated that the counsel for the Respondent had clearly indicated that it does not intend to file a response to claim in this case as such does not deserve the orders sought in the interim.
32. She stated that the application by the Respondent does not meet the threshold for review of orders as no sufficient grounds have been demonstrated for the Court to review its orders. On that basis, she urged this Court to dismiss the Application for Review and allow the Application of 29<sup>th</sup> June, 2023 as prayed.
33. On 22<sup>nd</sup> August, 2023, the 1<sup>st</sup> Respondent, filed a replying affidavit deposed upon on 21<sup>st</sup> August, 2023 by Dr. John, Murima, the Chief Officer in charge of Medical services. The deponent stated that by a letter dated 31<sup>st</sup> March, 2023, he communicated the decision of the Respondents that granted medical superintendents and Sub-County lead teams the authority to engage the Hospital on short term contracts for technical staff for a fixed term period of 3 months effective 1<sup>st</sup> April, 2023 to 30<sup>th</sup> June, 2023. Pursuant to this circular, the workers were to be engaged by the respective hospital boards on short term contracts.
34. On 31<sup>st</sup> May, 2023, he wrote another letter addressed to the medical superintendents and the Sub-County lead teams of the imminent expiry of the short-term contracts. Consequently, upon the expiry of the said contract and after their performance appraisal, 166 nurses were retained, while others were terminated. In any event that there is no obligations in law to renew a fixed term contract neither is there an obligation to explain the reasons for the failure to renew such contracts.
35. He stated that the circular is not in contravention of the Public Service Circular reference number PSC/ADM/13/[18] dated 3<sup>rd</sup> August, 2021, because the PSC direction does not apply to the County Government. Also that the PSC Act does not apply to the County Government workers, as the constitutional mandate for staffing of the counties rests with the various organs of the County Government as per Article 235 of *the Constitution*. Therefore the argument that the nurses ought to be converted to permanent and pensionable terms in line with the PSC circular is misplaced.
36. On the failure to comply by the recommendations of the Conciliator in the report dated 28<sup>th</sup> October, 2020, the affiant maintained that the Respondents are acting in the best interest of the people of Nakuru County as regards healthcare and any recommendations made for absorption of the health workers is not binding on the Respondent, so that non-adherence is not unlawful.
37. The affiant stated that the grievants positions have already been filed and the application dated 29<sup>th</sup> June, 2023 is overtaken by events thus the implementation of the orders being sought is impractical.
38. The Applications and the Preliminary Objection was canvassed by written submissions which were highlighted on the 30<sup>th</sup> October, 2023.

### **1<sup>st</sup> Respondent's Submissions.**

39. Mr. Kihoro Advocate submitted from the onset that its Application of 31<sup>st</sup> July, 2023 was not responded to as such it is not opposed and should therefore be allowed as prayed.
40. With regard to that Application, he argued that Order 45 rule 1 gives this court power to review its decree or order. It provides that;

“Any person considering himself aggrieved(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could



not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order may apply for a review of judgement to the court which passed the decree or made the order without unreasonable delay.”

41. Based on Order 45 and with regards to the first ground, the Respondent argued that there was a preliminary objection on record dated 6th July 2023 which raised among other issue; the question of the jurisdiction of this honourable court, the right of the Claimant to appear and be heard and the failure by the Claimant to exhaust alternative dispute resolution mechanisms before filing this suit.
42. Accordingly, that the court ought to have decided on the jurisdiction question from the outset. On this he relied on the decision of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR where Justice Nyarangi of the Court of Appeal held as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.”

43. Secondly, that the court has unfettered discretion to discharge or vary or even set aside its order particularly where there are material concealment and non-disclosures such as in this case. He elaborated on the non-disclosure and submitted that the Claimant failed to inform this court that the nurses who were the subject of their application were not in employment of the Applicant by the virtue that their contracts had come to an end on 30<sup>th</sup> June 2023.
44. It was argued that when the orders were issued, the claimant weaponized it against the Applicant by ordering the subject nurses to resume back to work with the aim of creating disruption and confusion in the very critical health facilities. It’s for that reason that counsel, urged this Court to allow the Application with costs.

## **2<sup>nd</sup> Respondent’s Submissions.**

45. Mr. Okere Advocate submitted that the Court failed to consider the 1<sup>st</sup> Respondent’s Preliminary Objection, when the said P.O raised the issue of jurisdiction which is a point of law. He argued that the Preliminary Objection ought to take effect first and be determined by the Court before the Court proceeds to the substantive suit or any other interlocutory application within the suit. To support this arguments, Counsel relied on the case of Mukisa Biscuit Manufacturers Ltd –vs- Westend Distributors Ltd, (1969) E.A. 696 page 700 where the Court observed as follows: -

“,..so far as I am aware, a preliminary objection consists of pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a



preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation.”

46. It was submitted that the question of whether jurisdiction is a point of law was set out clearly by the Supreme Court in Petition No. 7 of 2013 *Mary Wambui Munene v. Peter Gichuki Kingara and 6 others* [2014] eKLR where the Learned Judges stated that:

“jurisdiction is a pure question of law’ and should be resolved on priority basis”.

47. In consideration of the above, Counsel submitted that the Preliminary objection on jurisdiction raised by the 1<sup>st</sup> Respondent herein passes the propriety test and should therefore have been considered by this Honourable Court before proceeding to determination of other interlocutory applications filed by parties within the suit.

48. It is submitted that the Court erred in issuing final orders without hearing the Respondents because it is trite that a court should not grant final orders at the interlocutory stage when the substantive suit has not been heard. He submitted further that to make such orders is to deny parties the right/opportunity to be heard. To buttress this argument, the applicant cited the case of *Kenya Airports Authority Vs Paul Njogu Muigai & 2 Others* Civil Application No. NAI. 29/97, where the Court held that;

“An order which results in granting a major relief claimed in the suit, which may not be granted at final hearing, ought not to be granted at an interlocutory stage.”

49. The Respondent also relied on the case of *Ashok Kumar Bajpai –Vs- Dr. (smt) Ranjama Baipai*, Air 2004, All 107, 2004 (1) AWC 88 at paragraph 17, where the Indian Court expressed itself as follows:

“,..it is evident that the Court should not grant interim relief which amounts to final relief and in exceptional circumstances where the Court is satisfied that ultimately the petitioner is bound to succeed and fact-situation warrants granting such a relief, the Court may grant the relief but it must record reasons for passing such an order and make it clear as what are the special circumstances for two which such a relief is being granted to a party.”

50. They also cited the case of *Olive Mwhiki Mugenda & Another v Okiya Omtata Okoiti & 4 others* [2016] Eklr, where the court in its analysis spoke this issue and stated:

“We are convinced and satisfied that the learned Judge erred in law in granting final orders at an interlocutory stage when the main petition had not been heard...if a trial court is inclined to grant final orders at the interlocutory stage, this can only be done in exceptional circumstances and the reasons for granting such final orders must be stated...Nowhere in the ruling does the trial judge give reasons for granting final orders at the interlocutory stage; no special circumstances have been explained to warrant the grant of final orders...”

51. Similarly, that by granting the orders of 27<sup>th</sup> July, 2023, the court determined the application summarily hence eliminating the need for hearing of the application. Which determination is in violation of the principle that ‘final orders cannot be issued at the interlocutory stage’ and Article 50 of [the Constitution](#) on the right to fair hearing. To support this, Counsel cited the case of *Sangram Singh Vs Election Tribunal Kotch* AIR 1955 SC 664 to where the Court remarked that:

“There must be ever present to the mind; the fact that our Laws of Procedure are guided on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their



lives and property should not continue in their absence and that not be precluded from participating on them.”

52. It was also submitted that the Orders granted are incapable of execution as they seek to stay action that has already taken place. He argued that the court on 27<sup>th</sup> July 2023 issued orders for stay of implementation of circular reference DOHS/COMHS/31/5/1 dated 31st May 2023, when the said circular had taken effect on 30<sup>th</sup> June 2023 and the Applicant subsequently retained other health workers who have already taken up their places in service of the people of Nakuru on Contractual terms.
53. Based on the foregoing, the Respondent submitted that this Honourable Court ought to urgently set aside its orders failure to which contempt proceedings may be brought against the Respondents. He added that reasonable grounds for review have been raised and as such this Honourable court ought to allow this application as prayed. Further, that it is in the interest of justice and in furtherance of the Respondent’s right to be heard that their Application is allowed.
54. Moreover, that there is no obligations in law to renew a fixed term contract, neither is there an obligation to explain the reasons for the failure to renew such contracts as was held in Civil Appeal No. 81 of 2018; Transparency International-Kenya -Vs- Teresa Carlos Omondi.

#### **Applicant’s Submissions.**

55. Ms. Nyambura Advocate submitted first on the Preliminary objection and stated that the Preliminary Objection is not based on pure points of law but on grounds and allegations of facts that requires calling for proof, or seeks to adduce evidence and must be examined to ascertain the validity of the same. He argued that the grounds are against the nature of a Preliminary Objection which are clearly defined by the landmark case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1996) EA 696 at page 701.
56. She argued that the Preliminary Objection raised is defective and a ploy by the Respondents to delay justice and should be dismissed with cost.
57. She cited the decision by the Supreme Court of Kenya in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others [2012] eKLR that stated as follows: -

“ A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its Jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”
58. Accordingly, that this court has Jurisdiction as defined by Articles 162(2)(a) and 165(3)(b) of *the Constitution* to hear and determine this case.



59. Counsel submitted that the Respondents filed an application to set aside orders issued by this court and the Preliminary Objection raised is not a ground for review of orders as intended in Order 45 of the Civil Procedure Rules and Rule 33 of Employment and Labour Relations Court Procedure Rules 2016. In any event that the Respondents have not demonstrated discovery of new and important evidence and that there is no error apparent on the face of record or sufficient reason to warrant the review of this court's order.
60. The Applicant maintained that the orders issued by this Court are not final but interlocutory issued at the inter-parte hearing of the Application dated 29<sup>th</sup> June, 2023 with all parties present and that the Orders were intended to conserve the status quo by staying the impugned Circular dated 31st May, 2023.
61. It was submitted that the Respondents' allegations that the orders cannot be executed and the failure to demonstrate how the order is impracticable to execute at the time the orders were issued by the court is an attempt to avoid the substratum of the matter. To support this, they relied on the case of Kenya Airline Pilots Association (KALPA) Vs Co-operative Bank of Kenya Limited & another [2020] e KLR, where the court found that:
- “By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision.”
62. Furthermore, that the Respondents admitted to discriminatively retaining some of the health workers, an indication that this order is practical and cannot again claim impracticability in the same sentence.
63. In conclusion, it was submitted that the application to review or set aside the order is defective as it does not meet the threshold of Order 45 of the Civil Procedure Rules and Rule 33 of Employment and Labour Relations Court Procedure Rules 2016. Further that this is a matter of public interest that entails nurses who offer nursing services and facilitates in promotion of primary health as intended in the Fourth schedule of *the constitution* and allowing this Application shall negatively prejudice the nurses and the community at large in a way that cannot be restored thereby rendering the Claim dated 29<sup>th</sup> June, 2023 nugatory.
64. Accordingly, the Applicant called upon this Court to exercise its discretion to uphold the dignity of this court, uphold the constitutional rights at Articles 13, 43 (1), 159 by upholding the Order issued on 27<sup>th</sup> July, 2023.
65. I have examined the averments and submissions of the parties herein in response to the preliminary objection filed by the respondent herein.
66. The respondents have averred that this court lacks jurisdiction to handle this claim and the application thereof on the grounds that this claim was filed contrary to Section 89 of the *Public Service Commission ACT* and that it is also contrary to Section 73 of the *Labour Relations Act*.
67. The applicants also averred that the union lacks locus standi to bring this claim as held in ELRC Nakuru No. 61 of 2018 (eKLR 2022).
68. In considering whether this application offends Section 89 of PSC Act, I note that Section 89 of the Public Service Act states as follows;
- “89. Enforcement of appeal decision



- (1) 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*.
- (2) Any person who refuses, fails or neglects to implement the Commission's decisions is liable to disciplinary action in accordance with the applicable laws including removal from office.”

69. This section envisages that an appeal may be made to the ELRC after a decision is made by the Public Service Commission. I do not see the correlation between that provision and this application because the claim herein is not an appeal of a decision made by the Public Service Commission.

70. Section 73 of the *Labour Relations Act* states as follows;

“Referral of dispute to Industrial Court

- (1) If a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the Industrial Court in accordance with the rules of the Industrial Court.
- (2) Notwithstanding the provisions of subsection (1), if a trade dispute—
  - (a) is one in respect of which a party may call a protected strike or lock-out, the dispute may only be referred to the Industrial Court by an aggrieved party that has made a demand in respect of an employment matter or the recognition of a trade union which has not been acceded to by the other party to the dispute; or
  - (b) is in an essential service, the Minister may, in addition, refer the dispute to the Industrial Court.
- (3) A trade dispute may only be referred to the Industrial Court by the authorised representative of an employer, group of employers, employers’ organisation or trade union.”

71. This matter has already been subjected to a conciliation process as stated in the application before court. The claim is therefore properly before court the conciliation process having been exhausted.

72. On issue of locus, the applicants have not explained why the union lacks locus having brought this claim on behalf of their members.

73. The preliminary objection as set out lacks merit accordingly.

74. I dismiss the preliminary objection and order the main claim to proceed.

75. Costs in the cause.

**RULING DELIVERED VIRTUALLY THIS 19<sup>TH</sup> DAY OF DECEMBER, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

