



**Republic v Public Service Commission & another; Kirinyaga County  
Government (Exparte Applicant) (Judicial Review E001 of 2022)  
[2022] KEELRC 4061 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4061 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
JUDICIAL REVIEW E001 OF 2022**

**DKN MARETE, J**

**SEPTEMBER 28, 2022**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO  
APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION  
ACT AND IN THE MATTER OF THE PUBLIC SERVICE  
COMMISSION ACT AND COUNTY GOVERNMENT ACT**

**AND**

**IN THE MATTER OF THE DECISION BY THE PUBLIC  
SERVICE COMMISSION DATED 13TH OCTOBER, 2021.**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**PUBLIC SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**KENYA NATIONAL UNION OF NURSES ON BEHALF OF JUDITH GATHONI  
MWANGI & 187 OTHERS ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**KIRINYAGA COUNTY GOVERNMENT ..... EXPARTE APPLICANT**



## RULING

1. This is a Judicial Review application dated 9th March, 2022 and seeks the following orders of court;
  1. That this application be certified urgent and service thereof be dispensed with in the first instance.
  2. That the Applicants herein be granted leave to apply for an order of certiorari, to remove and bring to the High Court for the purposes of quashing, the decision by the 1st Respondents dated 13th October, 2021 to declining to vary the decision of 3rd March, 2021 reinstating the 188 members of the 2nd Respondent.
  3. That the Ex-parte Applicants herein be granted leave to apply for an order for prohibition directed against the Respondents, prohibiting them through their servants and/or agents or directly from in any way enforcing the said decisions or occupying the premises of the Ex-parte Applicant.
  4. That the leave granted do operate as a stay of decision and/or of the intended enforcement proceedings against the Ex-parte Applicants at the Nyeri Misc.Application No.1 of 2021 (KNUN v Kirinyaga County Public Service Board or of any such action founded on the 2nd Respondent's Notice of Motion dated 24th May, 2021 or on any of the reasons.
  5. That costs be provided for.
2. It is grounded on the following factual basis;
  - g) This then led to issuance of summary dismissal letters to its membership. The 2nd Respondent's members. Being aggrieved by the same , they appealed to the Public Service Commission (hereinafter referred to as the Commission) vide Memorandum of Appeal dated 18th January, 2021 seeking inter alia the following prayers:-
    - i. That the dismissal letters issued by the respondent to the members of the union and the Appellants be quashed, nullified and revoked.
    - ii. That all health works who have appealed herewith be reinstated back to their service and paid all their dues without loss of any privileges and benefits.
  - h. The commission delivered its decision on the appeal on 3rd March, 2021 arriving at the following findings;
    - i. That the health concerns raised by the health workers were legitimate and the CSPB should not have sunk its head in the sand or resort to dismissals, but instead should have improved workings conditions of the appellant's membership;
    - ii. That although the respondent had rushed to court and obtained orders, the respondent should have addressed the grievances raised by the appellant's members;
    - iii. That even after the court had cleared the strike unprotected the governor had extended an olive branch to the appellant's members to resume duty but they did not resume work claiming that it was extended by the wrong arm of government. That they should have taken advantage of the same to resolve the issues between its membership and the Respondent.



- iv. The respondent was unable to show proof of service on the show cause letters even after requesting to do so through their financial submissions nor did it avail minutes of the disciplinary hearing to show that there was indeed a disciplinary process where the appellant membership failed to show up resulting in their dismissal.
    - v. That the CSPB may not have replaced the dismissed nurses since their employment status was permanent and pensionable terms of service and not on contract terms like those it had recruited.
3. The Ex-parte Applicant being aggrieved by the said decision of the Commission filed application for review of the said decision vide its application dated 31st March, 2021 seeking review of the decision as well as stay of its decision pending determination of the application on grounds that:-
  - i. The commission failed to distinguish the roles of the CSPB and the county executive.
  - ii. Issuance of the notice to show cause letter.
  - iii. Replacement of the dismissed workers. (A copy of the Application for review is attached hereto and marked as CK-7)
4. I am advised by the Ex-parte Applicant's Advocates on record whose advise I verify belief to be true that the refusal by the commission to review its earlier decision is a decision that is tainted with an error of law and fact for the following reasons:
  - i. The Ex-Parte Applicant had sufficient proof that the 2nd Respondent's membership had been duly served with the Notice to show cause letters on why they should not be dismissed and inviting them for a disciplinary hearing that the 2nd Respondent's membership ignored thus leading to their dismissal, but the commission in error of law and fact declined to vary its earlier decision.
  - ii. Failure to attend the disciplinary hearing by the 2nd Respondent was a fact that was admitted by them during the hearing, but despite the overwhelming evidence showing that due process was followed, the Commission in further commission of an error in law and fact declined to vary its earlier decision.
5. I am further advised by the Ex-parte Applicant's Advocates on record whose advise I verify believe to be true that were it not for the apparent error of law and facts in coming to the said finding and conclusion, the commission would have arrived at different conclusion and dismissed the 2nd Respondent's appeal in its entirety.
6. I am further advised by the Ex-parte Applicant's Advocates on record whose advise I verify to be true that the commission failed to take into account relevant consideration thus arriving at an unreasonable and irrational decision based on the following:
  - i. In addition to the above listed reasons, the Commission ignored evidence tendered by the Ex-parte Applicant showing that indeed the Ex-parte Applicant had already recruited other nurses to replace those dismissed and relied on the 2nd Respondent's documents which are not official document of the Ex-parte Applicant in arriving at the conclusion the nurses had not been replaced.
7. The 1st Respondent in her Grounds of opposition dated 19th April, 2022 argues and submits inter alia that this is an appeal against the decision of the Public Service Commission disguised as a Judicial Review of its decision dated 13th October, 2021 and therefore should be disallowed.



8. The 2nd Respondent in her Replying Affidavit sworn on 19th April, 2022 also brings out a case of opposition to the application and prays that this be disallowed.
9. This Judicial Review is only concerned with the process of a public body making the decision.
10. The 1st Respondent affirms this by relying on the authority of *Municipal Council of Mombasa v Republic Umoja Consultants Ltd*, Nairobi Civil Appeal No.185 of 2007 [2002] eKLR, the court held thus;

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who make the decision have the power i.e. the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself- such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review.”

11. She further had this to say;

I verily believe that the 2nd Respondent Appeal to the 1st Respondent was based on the decision of the Kirinyaga County Public Service Board to dismiss 188 nurses on the ground of being absent from duty without leave or lawful cause. The 2nd Respondent’s appeal was based on the fact that her members were subjected to deplorable and deteriorating working conditions at the health facilities in Kirinyaga county that the county had refused, failed and or neglected to address contrary to section 14 of the *Occupational and safety Health Act, 2007* and instead resulted to dismissals contrary to above law which states;

- a) Every employee shall report to the immediate supervisor any situation which the employee has reasonable grounds to believe presents an imminent or serious danger to the safety or health of that employee or of other employee in the same premises, and until the occupier has taken remedial action, if necessary, the occupier shall not require the employee to return to a work place where there is continuing imminent or serious danger to safety or health.
- b) An employee who has left a work place, which the employee has reasonable justification to believe presents imminent and serious danger to life and health shall not be dismissed, discriminated against or disadvantaged for such action by the employer.
- c) It shall be an offence for a person on whom a duty is imposed under this section to fail to carry out that duty.

12. Based on the above, I verily believe that the Ex-parte Applicant and the Kirinyaga County Public Service Board breached the legitimate expectation of its employees, specifically the 188 members of the 2nd Respondent to take immediate and necessary action to resolve the issue of deplorable working conditions when notified of the same by its employees.

13. I verily believe and re-affirm the position of Public Service Commission in its findings paragraph (i) and (ii) of the Decision dated 3rd March, 2021 as follows;

- i. That the health concerns raised by the health workers were legitimate and the County Public Service Board should not have sunk its head in the sand or resort to dismissals, but instead should have improved working conditions of the appellant’s membership.



- ii. That although the respondent had rushed to court and had the court declare the strike unprotected and hence unlawful by virtue of that fact that health services are declared essential services under the Labour Relations Act, 2007. The respondent herein (CPSB), should have addressed the grievances raised by the appellant instead of taking advantage of the law to dismiss the appellants members. As the equity maxim says, he who comes to equity, must come with clean hands. It therefore follows that even when the law is on the respondent's side in as far as the right to strike goes, their hands are not clean, for having failed to address the appellant's members grievances and hence should not benefit from a problem it created.
14. I verily believe that reinstatement is the lawful decision in accordance with the power and authority of the Public Service Commission. The public service commission therefore acted within its jurisdiction, mandate and powers in making its decision as provided in
- a. Section 85-89 of the Public Service Commission Act, 2017 provides for hearing and determination of appeals in respect of county government public service.
  - b. Regulation 18 of the Public Service Commission (County Government Public Service Appeals Procedure) Regulation 2016 provides for powers of the commission on appeal. It states:  
The Commission may, in relation to an appeal-
    - a) Uphold the decision of the county government public service;
    - b) Set aside the decision of the county government public services;
    - c. Vary the decision of the county government public services as the commission considers just; or  
give such directions as the commission may consider appropriate.
  - c) Regulation 18 of the Public Service Commission (County Government Public Service Appeals Procedure) Regulation 2016  
The commission may, after considering an application for review of its decision-
    - a. Uphold the decision;
    - b. set aside the decision;
    - c. give such directions as it may consider appropriate.
15. The ex-parte Applicants further Affidavit sworn on 7th June, 2022 avers as follows;
- 3. the 1st Respondent avers in paragraph 6 and 8 its affidavit that the commission made a decision to reinstate the nurses after coming to a conclusion the disciplinary process was irregular and unlawful. It further goes on to state that upon the application for review, the commission varied its earlier findings noting that the workers were duly served with the show cause letters but declined to vary its earlier decision.
  - 4. The 1st Respondent has in paragraph 13 of its affidavit that the irregularity of the process was pegged on the workers not having been invited for a disciplinary hearing. However, this finding by the commission is contrary to the facts that were placed before it.
  - 6. In pages 148 of the documents annexed to the application, is a public notice to all striking workers dated 7th June, 2019 informing them that show cause letters dated 7th June, 2019



had been sent to the emails and advising them to go collect the same physically. Further, the said public notice invites them for a disciplinary hearing to take place on 10th June, 2019 at the County Government's headquarters as from 8.30am.

7. However, none of the 2nd Respondent's members appeared at any of the disciplinary committee hearings that had been scheduled and were duly informed, which thus resulted in their summary dismissal and hence the findings by the Commission that the workers were not invited for a disciplinary hearing is unfounded.
16. The arguments, submissions and cases in this application are controverted and abide in circumlocution. The basis of the application is the Ex-parte Applicant's application for leave to pursue judicial review proceedings with a view to countermanding the decision of the Public Service Commission in reinstating members of the 2nd Respondent.
17. I find that it would be inopportune to deny a party recourse to due process and therefore I award the application as follows;
  - i) That the Applicants herein be and are hereby granted leave to apply for an order of certiorari, to remove and bring to the High Court for the purposes of quashing, the decision by the 1st Respondents dated 13th October, 2021 to declining to vary the decision of 3rd March, 2021 reinstating the 188 members of the 2nd Respondent.
  - ii) That the Ex-parte Applicants herein be and are hereby granted leave to apply for an order for prohibition directed against the Respondents, prohibiting them through their servants and/or agents or directly from in any way enforcing the said decisions or occupying the premises of the Ex-parte Applicant.
  - iii) That the leave granted do operate as a stay of decision and/or of the intended enforcement proceedings against the Ex-parte Applicants at the Nyeri Misc. Application No.1 of 2021 (KNUN v Kirinyaga County Public Service Board or of any such action founded on the 2nd Respondent's Notice of Motion dated 24th May, 2021 or on any of the reasons.
  - iv) That stay as expounded and expressed in (iii) above shall vacate on the Ex-parte Applicant's failure to file and prosecute her application to fruition and finality within one hundred and eighty (180) days of this ruling of court.
18. The sister application in the consolidated cause known as Misc. Cause No. 1 of 2021 seeks leave to enable the 2nd Respondent/Applicant in the intended Judicial Review application to furnish and file an additional document in support of her case. This document happens to be the Public Service decision dated 13th October, 2021.
19. Again, this is not an application to deny. It is simple, straight forward and procedural. I grant the same and adopt the Public Service decision dated 13th October, 2021 as evidence in support of the 2nd Respondent's cause and case.

**DATED AND DELIVERED AT NYERI THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**D.K.NJAGI MARETE**

**JUDGE**

**Appearances**

1. Ms. Wanjiku for the 2nd Respondent union and applicants in the Miscellaneous Application.



2. Mr. Chepng'eno holding brief for Rono instructed by Waweru Gatonye & Company Advocates for the 2nd Respondents.
3. Mr. Oboso holding brief for Wangechi for the Interested Party.

