



**Kenya Medical Practical, Pharmacists and Dentists Union & 23 others v
County Government of Kirinyaga & another (Miscellaneous Application
E004 of 2021) [2022] KEELRC 13218 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13218 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
MISCELLANEOUS APPLICATION E004 OF 2021
ON MAKAU, J
NOVEMBER 17, 2022**

BETWEEN

**KENYA MEDICAL PRACTICAL, PHARMACISTS AND DENTISTS UNION &
23 OTHERS CLAIMANT**

AND

COUNTY GOVERNMENT OF KIRINYAGA 1ST RESPONDENT

KIRINYAGA COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

RULING

1. The Respondents (herein after called the Applicant) brought the Notice of Motion dated 28th September, 2022 under Order 42 Rule 6 (2) and order 51 of the *Civil Procedure Rules* 2010, Section 1A, 1B and 3A of the *Civil Procedure Act* and all other enabling provisions of the law. The application seeks the following the orders:
 - a. That pending hearing and determination of the Application, the Honourable court do issue stay of execution of the Ruling by Honourable Justice D.K.N. Marete on 16th September 2022.
 - b. That pending the hearing and determination of the intended Appeal the Honourable Court do issue stay of execution of the aforementioned Ruling and resultant orders.
 - c. That the cost of this Application be provided for.
2. The application is supported by the Affidavit of the Ms. carolyne Kinyua sworn on 28th September, 2022 and is premised on the grounds set out on the body of the motion. In brief, the applicants contend that they were dissatisfied with the ruling by the court on 16th September, 2022 and have since filed a Notice of Appeal to challenge the decision pursuant to section 77(5) of the *County Governments Act* as read with section 992) of the *Fair Administrative Actions Act* and Regulation 21 of the *Public*



- Service commission (County Government public Services Appeals Procedures) Regulations, 2016; that the Court erred by entertaining a premature application contrary to the doctrine of exhaustion; that the impugned ruling adopted a decision by the public service commission dated 14th April 2021 which was ultra vires and res judicata in relation to this court's decision in ELRC No 17 of 2019 and Court of Appeal Ruling in Nairobi CA No. 270 of 2019; and that the applicants lodged an application for review of the said decision and the same is still pending;
3. The applicants further averred that the impugned ruling is greatly prejudicial to them because the positions held by the 23 doctors were filled after they defied the call to resume work after the strike they had engaged in was declared illegal by this court and the Court of Appeal; that again there is no budget to accommodate the said doctors if they were to be reinstated; that their right under Article 50(1) of the Constitution was violated by not being heard in appeal before the PSC; that for the aforesaid matters, the intended appeal has overwhelming chances of success; and that it is in the interest of justice that the execution of the impugned ruling be stayed pending appeal.
 4. In response to the Application, respondent union relied on the Replying Affidavit sworn on 27th October 2022 by its General Secretary Dr. Davji Bhimji Atella to oppose the application and urged the court to dismiss it with costs. In brief he deposed that the subject matter in this suit is dismissal which differs from the issue of illegal strike in the ELRC no. 17 of 2019 and Nairobi CA. Appeal No. 270 of 2019; that the said doctors were dismissed on 8th July 2019 by the County Public Service Board and they appealed to the Public Service Commission; that the appeal was successful and the applicants were ordered to reinstate the doctors to their employment; the applicants are aware of the said decision but have willfully failed to comply; and that the failure to allow the doctors back to resume work has occasioned loss to them; and that the respondent will suffer no prejudice if the stay order is denied.
 5. The application was argued by the applicants' Counsel Ms. Beacco and the respondent's counsel Mr. Misati on 2nd November 2022.

Submissions.

6. It was submitted for the applicants that the impugned ruling dismissed their request for stay pending review of the decision by the PSC delivered on 14th April 2021 which compelled the applicants to reinstate 23 members of the respondent union to their employment; that the PSC in the said decision failed to appreciate that the matter had been heard and determined conclusively in Nyeri ELRC No.17 of 2019; that the decision was upheld by the Court of Appeal in Nairobi CA. No. 270 of 2019; and that the impugned ruling was therefore *ultra vires* and *res judicata*.
7. It was further argued for the applicants that the decision by the PSC was made in violation of their right to hearing because they were denied hearing by the PSC; that after the decision, the applicants applied for review pursuant to section 77(5) of the County Government Act read with Section 9(2) of the Fair Administrative Actions Act and Regulation 21 of the PSC (County Governments Public Service Appeals Procedures) Regulations, 2016; and that despite knowledge of the pending review application, the respondent went on to apply for the enforcement of the decision by the PSC.
8. It was also submitted that despite the aforesaid decision by the Court of Appeal which declared the doctors' strike illegal, the applicants asked the 23 belligerent doctors to return to work in good faith but they refused and in line with the constitutional right to life, new doctors were recruited to fill the vacancies left by the belligerent doctors; that there are no vacancies left in the applicants' establishment to give to the 23 doctors reinstated by the PSC and there is also no budgetary allocation to cater for their emoluments.



9. It was again submitted that if stay of execution is not granted, the intended appeal will be rendered nugatory but the doctors will not suffer loss; and that the Court of Appeal had earlier made a determination of the dispute by dismissing the doctors' case for reinstatement. To fortify the application, reliance was placed on the case of Michael Nthouthi Mithu v Abraham Kivondo Musau [2021] eKLR, George Masilibai Wafula v Richard Wafula Masinde [2022] eKLR, Kenya Shell Limited v Kibiru & another [1986] KLR and Jessikay Enterprises v John Kabotho Muiruri [2022] eKLR.
10.
11. Finally the court was urged to grant the stay order sought because the applicants have demonstrated they have an arguable appeal which will be rendered nugatory if the order is declined. It was also argued that the application has been made without unreasonable delay.
12. On the other hand, it was submitted for the respondent that the cause of action in the present proceedings is the dismissal of the doctors while in the previous proceedings in ELRC no.17 of 2019 which was determined on 4th July 2019; that the union then appealed to the Court Appeal in Nairobi 270 of 2019 but the appeal was unsuccessful.
13. It was further submitted that the dismissal of the doctors done on 8th July 2019 and it was never the subject matter in the cause ELRC No. 17 of 2019; that the foregoing fact was confirmed by the Court of Appeal in paragraph 23 of its ruling in the said Nairobi CA. 270 of 2019 when it observed that the dismissal letters were issued after determination of the ELRC No 17 of 2019 by an independent person who was not a party to suit; and that the decision by the PSC directing that the doctors be reinstated was therefore not *res judicata*.
14. The court was urged to dismiss the application considering that the doctors have been out of job without pay since 2019. Finally it was contended that granting stay would seriously prejudice the dismissed doctors who need to earn a living.
15. In her rejoinder, Ms Beacco reiterated that after the Court of Appeal declared the aforesaid strike illegal, the applicant requested the doctors to resume work but they declined. Thereafter they served the doctors with show cause letters twice but they declined to respond as a result of which their positions were advertised and given to new doctors to protect patients' lives.
16. The counsel further reiterated that they were never heard in the appeal before the PSC but they were only served with the decision, and as such their right to be heard was violated. Besides the impugned ruling condemned them without being heard after their preliminary objection was dismissed and the respondent's application for adoption of the decision by the PSC was allowed. She prayed for the stay of execution because dismissed doctors' positions have since been filled by new doctors.

Analysis and determination.

17. I have considered the material presented to the Court by the parties herein. The main issue for determination is whether the Applicants have met the legal threshold for the grant of an order of stay pending appeal.
18. Grant of stay of execution by the trial court pending appeal is set out under Order 42 Rule 6(2) of the Civil Procedure Rules, as follows:-

“No order for stay of execution shall be made under sub rule (1) unless—



- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

19. In *Butt v Rent Restriction Tribunal* [1979], the Court of Appeal observed that the power of the court to grant or refuse an application for a stay of execution is discretionary, and it should be exercised in such a way as not to prevent an appeal or render it nugatory.
20. With the background set out by the above Rule and the Court of Appeal decision, I proceed to consider each of the said three factors for granting stay order set out above.

Undue delay.

21. It is not in dispute that the Application herein was filed timeously as the impugned ruling was delivered on 16th September 2022 and the application for stay was filed on 30th September 2022. A delay of two weeks in the circumstances of this case cannot be described as unreasonable delay.

Substantial loss.

22. The Applicants’ case is that they would suffer substantial loss should the stay order be denied because they will have been condemned without hearing on their application for review which is pending before the PSC. They further contended that the impugned decision of the PSC as adopted by the Court cannot be implemented because the positions held by the dismissed doctors have already been given to other doctors. Besides, there is no budgetary allocation for the dismissed doctors’ emoluments if the stay order is denied. Further, the applicant contends that the impugned decision was made ultra vires and is res judicata as the dispute was conclusively determined by the Court.
23. However, the respondent’s case is that the proceedings herein are not *res judicata* since the subject matter is dismissal which occurred after the determination of the issue of illegal strike in the previous suits. It denies that the applicants’ right to hearing was violated and averred that they were served with the appeal but they ignored. It maintains that the decision by the PSC has not been set aside and therefore granting a stay of the impugned ruling would prejudice the dismissed doctors seriously considering that they have been out of job without pay since 2019.
24. I have carefully considered the court record, the rival affidavits and submission. I have also considered the draft Memorandum of Appeal annexed to the Application for stay and formed the opinion that the intended appeal is not frivolous. It raises arguable points of law especially the applicants’ right of being heard by the PSC on their application for review dated 29th April 2021. The said right springs from Article 50 and 234 of the *Constitution of Kenya* and amplified by section 77(5) of the *County Government Act*, thus: -

“Any person dissatisfied or affected by a decision made by the Commission in a disciplinary case may apply for review and the Commission may admit the application if-

- a. the Commission is satisfied that there appear in the application new and material facts which might have affected its earlier decision, and if adequate reasons for the non-disclosure of such facts at the earlier date are given; or
- b. there is an error apparent on record of either decision”



25. Section 87(2) of the *Public Service Commission Act* of 2017 on the other hand postpones the right to access court on any matter within the jurisdiction of the PSC until the procedure there is exhausted. The provision states: -

“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 for under this Part has been exhausted.”

26. The foregoing is an amplification of the doctrine of exhaustion provided under section 9(2) of the *Fair Administrative Actions Act* thus: -

“The High Court or subordinate Court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanism including internal mechanism for appeal or review and all remedies available under any other written law are first exhausted.”

27. In view of the above express provisions of the law and the established doctrine of exhaustion, and the applicants’ right to be heard by the PSC in their application for review dated 29th April 2021, I am constrained to hold that the applicants has satisfied the court that they stand to suffer substantial loss if the stay order sought is withheld. They made the application for review of the decision by the PSC within the statutory period and therefore they were entitled to a hearing.

28. The applicants brought the existence of the pending review application to the attention of the court and the respondent but the court exercised its jurisdiction by dismissing their preliminary objection and adopting the decision by the PSC for enforcement. In the circumstances of this case, it is apparent that the court’s jurisdiction was invoked prematurely since the decision filed for adoption sprung from the internal process which had not been exhausted.

29. The other ground that has persuaded me to find merits in the application for stay is the argument that the dismissed doctors have since been replaced by new doctors and as such there is neither vacancy nor budgetary allocation if the dismissed doctors are reinstated. Under section 49 of the *Employment Act*, reinstatement of a dismissed employee is not automatic and is at the discretion of the court based on express statutory parameters. The foregoing position has been upheld in a legion of judicial precedents including the *Kenya Airways limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR where the Court of Appeal held that the court ought to consider the practicability of reinstating a dismissed employee.

30. Again in the case of *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] eKLR the Court of Appeal had this to say:-

“Reinstatement is provided for under Section 49(3) (a) of the Employment Act as one of the remedies that a Court, by virtue of Section 50, shall be guided by. It is couched in Mandatory terms and requires the Court to take into account any of the following matters, which have been set out in Section 49(4)(a) to (m) before it can order reinstatement;

- a. The wishes of the employee;
- b. The circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
- c. The practicability of recommending reinstatement or re-engagement;



- d. The common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
- e. The employee's length of service with the employer;
- f. The reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
- g. The opportunities available to the employee for securing comparable or suitable employment with another employer;
- h. The value of any severance payable by law;
- i. The right to press claims or any unpaid wages, expenses or other claims owing to the employee;
- j. Any expenses reasonably incurred by the employee as a consequence of the termination;
- k. Any conduct of the employee which to any extent caused or contributed to the termination;
- l. Any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
- m. Any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee."

31. The circumstances obtaining in this case is such that ordering deposit of security for the due performance of the impugned decree is not applicable. I also did not find the authorities cited by the applicant relevant to this suit because they dealt with application for stay of a money decree which is not the case herein.

Conclusion.

32. For the forgoing points I reiterate that the intended appeal is not frivolous and it should be protected from becoming nugatory by granting stay of execution. However, in consideration of the prolonged period that the dismissed doctors have remained out employment, I will give a conditional stay. The condition is that the stay of execution is granted subject to the applicant preparing and filing the record appeal within 60 days from the date of this ruling. In default, the stay order granted herein shall lapse automatically after the expiry of the 60 days window. Costs shall be in the appeal.

DATED, SIGNED AND DELIVERED AT NYERI THIS 17TH DAY OF NOVEMBER, 2022.

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

