



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

JUDICIAL REVIEW MISC.APPLICATION NO.2 OF 2020

(Before D.K.N.Marete)

REPUBLIC.....APPLICANT

VERSUS

PUBLIC SERVICE COMMISSION.....RESPONDENT

AND

COUNTY GOVERNMENT OF LAIKIPIA.....EX-PARTE APPLICANT

AND

LAIKIPIA COUNTY PUBLIC SERVICE BOARD.....1st INTERESTED PARTY

KENYA MEDICAL PRACTITIONERS, PHARMACISTS

AND DENTISTS UNION.....2nd INTERESTED PARTY

JUDGMENT

This is a Judicial Review application dated 18th August, 2020.

The Respondent in a Respondent's Replying Affidavit sworn on 5th October, 2020 denies the application and prays that the same be dismissed with costs.

The 2nd Interested Party in a Replying Affidavit sworn on 5th October, 2020 also denies the application and prays that the same be dismissed with costs.

The Applicant prays for the following orders;

- a) *A declaration that the Respondent conducted the Appeal lodged by the 2nd Interested Party, against the Applicant and the 1st Interested Party in an illegal, unlawful, unfair, biased and unacceptable manner causing great prejudice to the Applicant.*
- b) *An ORDER OF CERTIORARI to remove into the High Court and quash the decision of the Respondent made on 12th August, 2020 in its entirety setting aside the decision of the Applicant together with the 1st Interested Party to dismiss members of the 2nd Interested Party from duty and further ordering their reinstatement and payment of remuneration.*
- c) *An ORDER OF PROHIBITION prohibit the Respondent and the 2nd Interested Party from enforcing and/or applying for enforcement of the decision of the Respondent dated 12th August, 2020.*
- d) *Any such other Orders as this Honourable Court shall deem just.*
- e) *Costs of this Application.*

The Applicant's case is that this Judicial Review application is challenging the proceedings in the matter of an Appeal dated 23rd October, 2019 filed before the Respondent by the 2nd Interested Party against the Applicant and the 1st Interested Party that led to the impugned decision delivered on 12th August, 2020. The application seeks quashing of the proceedings before the Respondent and the resultant decision as well as prohibition from enforcement of the decision on basis of manifest bias and unfairness against the Applicant in all the proceedings.

The Applicant's further case is that the genesis of the dispute is that on 24th May, 2019, the 2nd Interested Party being a union that represents doctors, including most of those employed by the Applicant, issued an unlawful seven (7) days strike notice threatening to desert their work stations unless their demands were met.

Her further case is that despite obtaining orders from court suspending the strike notice in Nyeri ELRC Cause No. 20 of 2019, some of the doctors made good of their threat in the strike notice and absconded work. Their services were therefore terminated for so doing.

The Applicant's other case is that the 2nd Respondent alongside her members who were terminated from employment lodged Judicial Review Cause No. 9 of 2019 where they sought orders against the Applicant and the Interested Party for reinstatement to work. Here, the Respondent was an Interested Party in the case. By a consent *inter partes* in this application, the issue was referred to the Public Service Commission, hence this Appeal.

The Applicant avers that the Respondent failed to accord her an opportunity to be fairly heard and clearly displayed a pre-determination of the matter before it was heard.

It is her further case that she opposed the Appeal before the Respondent and maintained her case of lawful termination and no reinstatement for these members. In any event, the issue of reinstatement had to be settled before consideration of the terms of return to work.

The Applicant's other case is that they were not properly or adequately involved in the proceedings on the Appeal before the Respondent as communication intended for them was not addressed to their advocate therefore causing them to miss in action. This resulted in a denial of their rights to be represented by advocate and the Applicant being denied a right to be heard. Protests on this by the Applicant's County Attorney fell on deaf ears or were side lined.

Her further case is that the Respondent also stated that they had considered the Appeal preliminarily and decided that this be done through conciliation. This decision was *ex parte* and the issues raised have not been addressed to date. The Respondent and the 2nd Interested Party involved a conciliator to preside over the dispute without involving the Applicants.

The Applicants aver that on 18th May, 2020, at a meeting at the Respondent's offices in Nairobi, the Applicant's advocates lodged a preliminary objection and a letter of objection dated 18th May, 2020. This was grounded as follows;

a) The current Applicant, the KENYA MEDICAL PRACTITIONERS PHARMACISTS AND DENTISTS BOARD lacks locus standi to institute proceedings before the 1st Respondents on their own behalf or on behalf of other parties subject to the provisions of Section 86 of the Public Service Commission Act and Regulation 9 of the Public Service Commission (County Government Public Services Appeals Procedures) Regulation 2016.

b) These proceedings have been brought in the interest of multiple aggrieved servants contrary to the express provision of the said Regulation 9 of the Public Service Commission (County Government Public Services Appeals Procedures) Regulation 2016 allows an individual Public Officer AND NOT a group of public officers to lodge a complaint against the County Public Service Board.

This was ignored and the Applicant further avers that the Respondent repudiated procedure in ignoring the preliminary objection and letter of protest above.

The Applicant was later to be served with the written submissions of the 2nd Interested Party and required to respond thereto regardless of the Respondent not issuing directions on this as would be the case.

Her further case comes out thus;

- It is through the 2nd Interested Party's submission that she established that information on her withdrawal from the conciliation process was notified to the participants.
- The Respondent involved herself on the issue of legality of the strike leading to termination which was outside her scope.
- The Respondent ignored the Applicant's numerous requests to address her issues as raised towards or recuse herself. This raised suspicion of a pre-determination.
- The Chairperson of the 1st Respondent hails from Laikipia County and is therefore interested in the matter. He should have stood down from presiding over the matter due to conflict of interest. This failure flawed the process.
- The upshot is that the 1st Respondent manifested lack of impartiality, sound judgment and fairness in its approach to the matter and the Applicant is apprehensive that the Respondent was biased in favour of the 2nd Respondent and that she did not receive justice from these proceedings.

- The impugned decision of the 1st Respondent resulted from a flawed process and is therefore a nullity, material from quashing by this court.

The Respondent's case is that on 4th November, 2020 she received an appeal dated 25th October, 2019 from the 2nd Interested Party. This was an appeal filed on behalf of twenty seven (27) doctors who are members of the 2nd Interested Party.

The Respondent's further case is that pursuant to the provision of Regulation 11(4) of the Public Service Commission (County Government Public Service Appeals Procedures) Regulations, the County Appeal Committee of the Respondent held a preliminary meeting at which the Committee considered the appeal and made preliminary observations which were then presented to the full commission. This is as follows;

- The Respondent's other case is that during the meeting of the Respondent at which the preliminary observations were made, it was resolved to invoke the powers of conciliation under Article 252(1)(b) of the Constitution of Kenya, 2010. A decision to involve the parties on their willingness to partake this process was also made.

Her other case is as follows;

- The Respondent wrote to the 1st and 2nd Interested Parties and invited them to a meeting on this.
- The Commission did not seek the views of the Applicant on the proposal as it was guided by Section 59(1) of the County Government Act which provides that the County Public Service Board undertakes its functions on behalf of the County government.
- Upon receiving the consent of the Applicant and the 2nd Interested Party on the issue of conciliation the Respondent identified conciliation and facilitated the commencement of the process.
- The conciliation process would not move to the second meeting as the 1st Interested Party withdrew from the process after a letter dated 13th May, 2020 in which the Applicant made several unfounded allegations against the Respondent.
- These allegations were answered vide a letter dated 20th May, 2020 by the Respondent.
- Following the collapse the Respondent on the same letter issued the Applicant a notice to submit documents per Regulation 10 and 11(1) of the Public Service Commission (County Public Service Board Appeals Procedure) Regulations.
- This request was not complied with.
- The Respondent subsequently decided to proceed on the hearing of the appeal through written representations with communication to all the parties to furnish their submissions.
- On receipt of the 2nd Interested Party submissions, these were forwarded to the Applicant with a request to respond accordingly.
- Contrary to the allegations by the Applicant the Commission communicated to her at all stages and such correspondence was sent through the email address on the Applicant's letter head and also by registered post to the postal address on the letter head.
- All allegation of mala fides – backdating of communication, can only be malicious and vexatious as is demonstrated by her documentary evidence.
- Due the failure of the Applicant to respond, the appeal was considered on the Applicant's affidavit in response to the court matter in Nyeri ELRC Judicial Review No. 9 of 2019, the 2nd Interested Party's submission and minutes presented by the 1st Interested Party in response to the Appeal.
- A determination was made as such and delivered on 12th August, 2020.

The Respondent therefore denies not awarding the Applicant an opportunity to heard or even the allegation of bias on her part in the hearing and determination of the appeal.

The Respondent further and vehemently denies the allegation that the Chairman of the Respondent hails from Laikipia County and dismissed these as malicious and vexatious. It is her case that the Chair is not a member of the County Appeals Committee or any other committee of the Respondent and only presides at meetings of the Respondent in which committee reports containing reports of the committees are discussed and either adopted or declined.

The County Appeals Committee considered the appeal and presented a decision to the full commission of the Respondent on 12th August, 2020 and this was adopted pursuant to Regulation 16, 17 and 18. The issue of the Chair hailing from Laikipia County is therefore peripheral and scape goating.

The 1st Interested Party did not file a Replying Affidavit to the application.

The 2nd Interested Party's case is that the decision of court in Nyeri ELRC Cause No. 20 of 2019 that the 2nd Interested Party industrial action was illegal an unlawful does not justify the Applicant's and 1st Interested Party's unfair termination of the employment of her

members.

The 2nd Interested Party further case is that the Applicant and the 1st Interested Party filed a joint Replying Affidavit to the appeal and this affidavit was sworn by the Acting County Secretary on 20th January, 2020.

Her further case is that the Applicant and 1st Interested Party were awarded sufficient opportunity to be heard as is demonstrated by the annexures KN4 and KN6 of the Respondent at pages 79 – 80 and 89 to 90 of the Applicant's bundle of documents.

Her case further comes out as follows;

- The appeal to the Respondent was on behalf of sixty one (61) employees, thirty four (34) of whom were summarily dismissed.
- It is curious that although the Applicant's hearing was never copied in the letter produced as DBA1, the Applicant and the 1st Interested Party filed a joint Replying Affidavit to the appeal in accordance with the said letter.
- This is a clear case of the approbating and reprobating on the proceedings and communication from the Respondent by presenting itself on the same party with the 1st Respondent when it suits them and separation when does not suit them.
- Communication from the Respondent to the Applicant and 1st Interested Party was made to the principals and not their counsels.
- The Respondent invited the parties to conciliation through a letter dated 30th March, 2020 as they had agreed and conceded.
- That the 1st Interested Party requested for a reconstitution of the Laikipia team at the first meeting on 4th March, 2020 due their not representative attendant.
- Leave was granted and a meeting rescheduled for 18th May, 2020.
- On 30th May, 2020, the Senior Legal Advisor of the Applicant wrote a lengthy letter sighting erroneous allegations of impartiality against the Commission when even an independent conciliator had been appointed.
- The letter also called for recusal on grounds of bias.
- On 18th May, 2020, we were notified that the Applicant and 1st Interested Party had withdrawn from the conciliation process.
- There was no representation by the appointed conciliators and only Mr. Majimbo and Mr. Muriithi as counsels attend the meeting.
- The Applicant had opportunity to prosecute its preliminary objection but failed to do so.
- The meeting of 18th May, 2020 was meant to confirm the constitution of the parties as earlier requested by the 1st Interested Party's chairlady and also set out terms of reference but was intended to deliberate on the issues as alleged by Karanja Njora. He was not even present at the meeting.
- Communication on written submission as a method of disposal was made and passed to all parties.
- The Applicant failed to move the Respondent on issues it felt needed to be addressed as no formal application was ever filed on this.
- We were not in a position to respond to the allegations made against the Respondent.
- A decision on the appeal was made by the Respondent on 12th August, 2020 directing that;

i) The decision of the Respondent to summarily dismiss the doctors listed in the appeal dated 25th October, 2019 from the Laikipia County Public Service is hereby set aside.

ii) The doctors listed in the appeal dated 25th October, 2019 are hereby reinstated to the position that they held in the Laikipia County Public Service prior to the decision of the Respondent to summarily dismiss them on 21st June, 2019.

iii) The doctors listed in appeal dated 25th October, 2019 are not entitled to remuneration and benefits between the period 3rd June and 20th June, 2019 when they participated in a strike that was declared by court to be unlawful and unprotected.

iv) The doctors listed in the appeal dated 25th October, 2019 are entitled to all their remuneration and benefits, save as otherwise stated in this decision, in the same manner as other members of the Appellant who were not terminated.

v) The Respondent do pay the doctors listed in the appeal dated 25th October, 2019 all and any withheld remuneration and benefits

save as ordered in this decision, upto and including the date the Respondent shall reinstate them back to the County Public Service.

vi) Upon reinstatement the Respondents do continue to pay the doctors listed in the appeal dated 25th October, 2019 in accordance with their terms and conditions of service.

- The 2nd Interested Party's members on receiving this ruling immediately returned to their various work stations and remained there.
- That parts of the decisions like reinstatement are self executing and do not require the involvement of the Applicant and 1st Interested Party in interpretation.
- That in Nyeri ELRC JR Misc. 9 of 2019 a status quo was *inter alia* ordered by this court.
- The status quo remains and no replacements have been made of the reinstated employees.

In the penultimate the 2nd Respondent avers that this application does not raise any administrative action capable of review but only legal issues that should be subjected to an appeal process. Again, the Applicant is her own worst enemy for failing to file submissions to the 2nd Interested Party's appeal thus denying herself an opportunity to be heard in full.

The matter came to court variously until the 15th of December, 2020 when the parties decided on a determination and disposal by way of written submissions.

The issues for determination therefore are;

1. Whether the Respondent was biased in the process and determination of the appeal by the 2nd Interested Party.
2. Whether the Applicant is entitled to reliefs sought.
3. Who bears the cost of the cause?

The 1st issue for determination is whether the Respondent was biased in the process and determination of the appeal by the 2nd Interested Party. The parties hold diametrically oppose positions on this. The Applicant and 1st interested party submit a case of bias and pre-determination of the 2nd Interested Party's appeal.

It is also their case and submission that the entire appeal process was flawed in that the applicant was not awarded any or adequate opportunity to ventilate and present his case.

The Respondent and 2nd Interested Party deny and rebuff the applicants case and submissions. They aver that the applicant was awarded all the opportunity to work down the process of the appeal but declined or failed to heed. She totally defied written and communicated instructions from the Respondent to participate in the process of appeal.

The Respondent fault the applicant for her mischief in the conduct of the appeal which led to a situation where she was largely out of the picture. She should not have anybody to blame for this.

I agree with the cases of the Respondents and 2nd Interested Party. They have ably demonstrated their place and role in the appeal process. They have also established a case of a viable free and fair appeal process where all parties were involved and offered an opportunity to participate in the process. The applicants cannot therefore be heard to complain after the event. They squandered the chance and place of participation by choice. I therefore find a case of a free and fair appeal process that was not riddled with any bias and hold as such. This answers the 1st issue for determination.

The 2nd issue for determination is whether the applicant is entitled to the relief sought. She is not. Having lost a case of unfair, biased and unlawful process of the appeal, she becomes disentitled to the relief sought.

I am therefore inclined to dismiss the application with costs to the Respondent and 2nd Interested Party.

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF JULY, 2021.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr.Majimbo instructed by Majimbo & Company Advocates for the Applicant.
2. Mr.Muthuri instructed by State Law Office for the Respondent.

3. Mr.Odira instructed by Awour Ramogi & Company Advocates for the 1st Interested Party.

4. Mr.Washika instructed by Wafula, Washika & Associates Advocates for the 2nd Interested Party.