REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 17 OF 2019

COUNTY GOVERNMENT OF KIRINYAGA.....CLAIMANT

KIRINYAGA COUNTY SERVICE BOARD.....INTENDED 2ND CLAIMANT

VERSUS

KENYA MEDICAL PRACTITIONERS,

PHARMACISTS & DENTISTS UNION.....1ST RESPONDENT/APPLICANT

KENYA NATIONAL

UNION OF NURSES.....2NDRESPONDENT/APPLICANT

KENYA UNION OF CLINICAL OFFICERS.....3RD RESPONDENT

KENYA NATIONAL UNION OF MEDICAL

LABORATORIES OFFICERS.....4TH RESPONDENT

AND

THE CABINET ECRETARY,

LABOUR AND SOCIAL PROTECTION.....1ST INTERESTED PARTY

SALARIES AND REMUNERATION

COMMISSION.....2ND INTERESTED PARTY

RULING

1. Before me is the 3rd and 4th Respondents' application dated 23rd March 2020. The 1st Respondent did not oppose the motion by the 3rd and 4th Applicants while the 2nd Respondent did not appear despite service. The 3rd and 4th Respondents (hereafter "Applicants") notice of motion application (hereafter "the application") sought the following orders:-

a. That this honourable Court be pleased to review/set aside the orders made herein on 4th July 2019, on the Claimant/Respondent's notice of motion dated 23rd May 2019, the orders made on 4th July 2019 on the Respondent/Applicants' notice of motion dated 7th June, 2019 and all consequential orders.

b. That this honourable court be pleased to hear *de novo* the Claimant's notice of motion dated 23rd May 2019 and the Respondents' notice of motion dated 7th June, 2019 respectively.

c. That this honourable court be pleased to enjoin the County Public Service Board of Kirinyaga County as the 2nd Claimant.

d. That this honourable court be pleased to enjoin the 5th to 213th Intended Respondents/Counter claimants as additional parties to this suit.

e. That this honourable court be pleased to suspend/stay/set aside/quash purported letters of termination of employment of the 5th to 213th Intended Respondents/Counter claimants dated 8th July, taken pursuant to the said orders made herein on 4th July 2019, pending the hearing and determination of this application.

f. That this honourable court be pleased to order that the Intended 5th to 213th Respondents/Applicants be paid their salaries and allowances for the period from 1st June 2019 together with interest at commercial/compound rate.

g. That costs of the application be provided for.

The notice of motion is premised on the grounds on the face of the application and supported by affidavits dated 23rd March 2020 sworn by Paul Mwangi Ngiri, the Branch Chairman of the Kirinyaga County Branch of the 3rd Respondent having received authority from the 3rd and 4th Respondents/Applicants to make the affidavit on their behalf.

2. The application was opposed by the Claimant (hereafter "Respondent") and the Respondent filed a Replying Affidavit dated 16th June 2020 sworn by Carolyne Kinyua, the County Attorney. She deponed that the Applicants' application was an abuse of the court process as it is based on misapprehension of the suit or an attempt to mislead this honourable court. She deponed that this Honourable court should decline jurisdiction where the application is brought forth to 'forum shop' and that the current application being a replica of the application made before the Appellate Court, which refused to grant the said orders is undoubtedly made in bad faith and is an abuse of the court process. She deponed that this Court cannot overturn a decision of the Appellate Court and that the Appellate Court having determined the application filed by the Applicants, this court has no jurisdiction to hear and determine yet another similar application brought by the same parties. She deponed that the Application filed by the Respondents is incurably defective to the extent that it seeks to review an order that has not been annexed to the Application and is thus for a dismissal. It was deponed that the Application does not meet the threshold for a review as the Applicants have failed to establish that there is an error apparent on the face of the record or that there is a discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made. She deponed that the allegations that the intended Respondents/Applicants were denied a right to be heard is not a ground for setting aside the decision of this court but rather one that an appeal should be preferred if a party is thereby aggrieved. She deponed that the reasons advanced by the Applicants for the review of the orders of this Honourable Court are matters that were within the court's knowledge and thus cannot be grounds to ask the same court to review its decision. She deponed that the prayers by the Applicants seeking to amend in order to enjoin new parties is unmeritorious and an attempt to hijack a claim by the Claimant. She deponed that as the issue of the dismissal was not a matter before the Court, joining any of the proposed parties would be tantamount to allowing the Applicants to amend both the application and claim filed by the Claimant which would amount to amending the cause of action on behalf of the Claimant by force. She deponed that if the Applicants feel aggrieved by the decision of the County Public Service Board, nothing stops them from instituting their own suit instead of hijacking one filed by the Claimant. She further deponed that the Applicants in making this application misapprehended the Application that was filed in this Honourable Court by the Claimant as they believe that the said application was brought about to seek orders for the dismissal of striking workers. She deponed that however, it should be clear that the said application was only restricted to a determination as to whether the intended strike called by the Applicants' members was protected and lawful. She deponed that at the time of filing that application, the strike had not commenced and the application was thus meant to stop the intended strike and the issue of dismissal was never raised canvassed. She deponed that the court in making its Ruling on 4th July 2019, restricted itself to the lawfulness of the strike and did not dwell on the dismissal of the striking employees. She deponed that indeed as at the time of the delivery of the said Ruling, no employee had been dismissed. She deponed that the dismissal letters were never stated to have been issued on the basis of the orders of this Court but rather because of the absconding from work without a lawful reason. She deponed that this Court has no jurisdiction to stay the termination of the dismissed workers as the Ruling sought to be reviewed had made no orders for their dismissal. She deponed that the Court of Appeal decision in the application filed by the Respondents was of the same persuasion. She deponed that the application being an abuse of the court process and if allowed would be a mockery of the justice system. She urged the dismissal of the motion with costs.

3. The Claimant also filed a preliminary objection to the Application and asserted that Application is *Res Judicata* as the Court of Appeal in Civil Appeal No. 270 of 2019 has made a determination of the prayers sought in the Application. It was stated that this Court has no jurisdiction to overturn the decision of the Court of Appeal made in Civil Appeal No. 270 of 2019 that dismissed the Applicant's application seeking a stay of this Court's decision made on 4th July 2019. It was further stated that the application is an abuse of the court process and an attempt to forum shop as a delay in the delivery of a judgment or a ruling is not a ground to withdraw an appeal and lodge a review. It was also stated that the court has no powers to order the joinder of a party as a claimant who has not shown any interest in joining a suit and that the Court had no jurisdiction to grant prayers relating to the reinstatement of the Applicants in review proceedings as the dismissal was not an issue before it when it made its Ruling on 4th July 2019.

4. The arguments for the Applicants and the Respondent were condensed in submissions they filed on 15th June 2020 and 23rd June 2020 respectively. The Applicants submitted that the main claim in this Cause is yet to be heard and determined and the Intended Respondents/Counter-Claimants, who were not original parties to this suit have had their contracts of employment purportedly terminated by the intended 2nd Claimant on the basis of the orders made herein on 4th July 2019. The Applicant argued that it is a requirement of the rule of law doctrine under Article 10 of the Constitution that no one's rights shall be affected adversely without him being given a chance to be heard. The Applicant argued that is the same thread that runs through Order 1 Rule 10 of the Civil Procedure Rules as well as Order 53 Rule 3 of the Civil Procedure Rules, Rule 75 of the Court of Appeal Rules and Article 50 of the Constitution. The Applicants relied on the case of **James Ndungu Wambu *v* Republic & 7 Others [1995] eKLR** where a judgement which had the effect of cancelling a person's titles deed was set aside as he had not been heard. The Applicant also relied on the case of a **Maharaj *v* Attorney General (1977) 1 All ER 411** where the Privy Council quashed a conviction where an advocate was not given a chance to be heard before he was sentenced by a judge to imprisonment for contempt for seven days. The Applicants submitted that the purported termination took place on 8th July 2019 four days after the Ruling sought to be reviewed was delivered and that they thereafter sought remedies in another forum which they have been compelled by great hardships to leave. The Applicants submitted that the ruling of 4th July 2019 is a product of a hearing in which the Court

did not hear the Unions on account of disobedience of orders made on 24th May 2019 and 29th May 2019 respectively. The Applicants submitted that the rule of law doctrine requires that one be heard before an order affecting him/her is made and that the orders made herein on 4th July 2019 were in the absence of the Applicants following the exclusion of their counsel by the Court from the proceedings on 12th June 2019. The Applicants argue that this was in contravention of the contempt of court procedure applicable and Articles 48 and 50 of the Constitution of Kenya. The Applicants submitted that there was a perception that the Applicants herein were then in contempt of the orders made on 24th and 29th May 2019 but however, no charges of contempt as required by the rule in **Maharaj *v* Attorney General** (*supra*) were framed and presented by the Court to the officers of the Respondents/Applicants specifying the respects in which the orders made on 24th May 2019 and extended on 29th May 2019 had been disobeyed. The Applicants argued that consequently, the Applicants were not heard on either the alleged contempt of Court or the merits of the notice of motion dated 23rd May 2019. The Applicants submitted that their cases on law and facts were not heard or taken into account. The Applicants argued that the application for review in this case is analogous to that of the application for setting aside a judgment entered *ex parte* as stated by the Court of Appeal in **Shah *v* Mbogo (1968) EA 93** where it was held that a judgment would be set aside where it was entered as result of a mistake or oversight and in doing so the court will take into account the relative merits of the parties and the events which occurred both before and after the judgment was made. The Applicants submitted that in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and considerable to set aside or vary the judgment upon terms to be imposed. The Applicants submitted that they did not have an opportunity to bring to the attention of the Court different interpretations of Section 78 of the Labour Relations Act in two decisions of this court namely, **Okiya Omtatah Okoiti *v* Attorney General & 5 Others [2015] eKLR** and **The Kenya Ferry Services Ltd *v* Dock Workers Union (Ferry Branch) [2014] eKLR** which have held that Sections 78 and 81 of the Labour Relations Act are *ultra vires* Articles 25 and 41 of the Constitution. The applicants submitted that in disregard of the rule in **County Government of Nyeri & Another *v* Cecilia Wangechi Ndungu [2015] eKLR**, which forbids a county government from terminating employment without observing the due process of law and adherence to the rules of natural justice in that the intended 2nd Claimant purported to terminate the contracts of employment on 8th July 2019, based on the reasons given for the ruling delivered on 4th July 2019 and not giving the counterclaimants an opportunity to be heard. The Applicants submitted that the intended 2nd Claimant used the ruling of 4th July 2019 to effect an arbitrary, capricious and unlawful termination of employment of the members of the Applicants being the intended 5th to 213th Respondents. The Applicants submitted that they sought conservatory orders from the Court of Appeal and that these employees have been without income since 31st May 2019. The Applicants submitted that the intended 2nd Claimant did not prefer charges against them or issue to them show cause letters and afford them opportunities to defend themselves hence the due process of law was wholly ignored. The Applicants submitted that after going without salaries for 8 months, the Applicants and the intended 5th to 213th Respondents/counter-claimants withdrew the Notice of Appeal so that they may seek reliefs from this Honourable Court under Rule 33 of the Employment & Labour Relations Court Rules. The Applicants submitted that under Order 1 Rule 10 of the Civil Procedure Rules, this Honourable Court has jurisdiction to enjoin as a party any person who is likely to be affected by the orders which it makes. The Applicants submitted that the 1st Claimant wronged the Applicants through its agent, namely the County Public Service Board which by virtue of Section 59 of the County Governments Act is the organ of the County Government with the sole authority to recruit employees and discipline them. The Applicants submitted that the intended 2nd Claimant which was not a party to this suit then is a necessary party to these proceedings to show the procedure used in effecting the termination and also the mandatory hearing of the intended Respondents before that termination. They cited the Court of Appeal decision in **James Ndungu Wambu *v* Republic** (*supra*) where the court reasoned that the registered owners were persons directly affected and ought to have been given a hearing and natural justice demanded that they informed of the allegations made against them or the reasons it was proposed to cancel their title deeds. The Applicants thus urged the Honourable Court to allow the prayers for joinder. The Applicants submitted that they met the requirements for a review in the sense that upon the denial of a chance of being heard the employees dismissed were not heard and the court assumed they were on strike. The Applicants cited the case of **Draft and Develop Engineers Limited *v* National Water Conservation and Pipeline Corporation [2014] eKLR** where the court stated that "*An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case"*. The applicants submitted that the strike was made necessary by actions and omissions of the Claimant and consequently, this was the proverbial case where the Claimant brought this suit to benefit from its own wrongs dating back to 2015. Article 41 (2) (c) of the Constitution guarantees every worker the right to strike and this Honourable Court has held that this is the case in the two decisions of Nduma Nderi J. and Rika J. referred to above. The Applicants submitted that in view of the fact that the Respondents have not filed a response to their application, it is clear that the correct factual position is as stated in their supporting affidavit sworn on 23rd March 2020. The applicants further submitted that the Claimant in this suit continues to contravene the Applicants rights not to be held in servitude contrary to Article 30 of the Constitution hence this Honourable court has inherent jurisdiction to grant the conservatory orders as prayed. They relied on the Supreme Court decision in **Board of Governors, Moi High School Kabarak *v* Malcom Bell & Another [2013] eKLR** where it was held that *a court has power to ensure that its constitutional function is upheld by making ultimate judgments effectual*. The Applicants' submitted that their application for review is of the nature discussed in **Mapala *v* British Broadcasting Corporation [2002] 1 EA 132 (CAT)** where the court held that *first, it is necessary that there is a party which is aggrieved by the decision; second, that there is discovery of a new and important matter of evidence which, after due diligence, was not within the knowledge of the party at the time the judgment and the decree was made; third, that there was an error apparent on the face of the record or any other sufficient reason*. The Applicants submitted on what constitutes an error apparent on the face of the record and cited the case of **Nyamogo and Nyamogo Advocates *v* Moses Kipkolun Kogo (2001) 1 EA 173** where it was stated that an error on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. The Applicants submitted that in the circumstances, the order denying them audience is null and void and consequently, all the actions flowing from it are null and void because of the rule in **Macfoy *v* United Africa Company Ltd (1961) 3 All ER 1179 at page 1172** in which the Privy Council stated that if an act is void, then it is in law a nullity. It submitted that it follows therefore that the purported terminations done by the intended 2nd Claimant are null and void and the Claimant ought not to take benefit of them. The Applicants submitted that the jurisprudence of this Honourable Court shows that it protects the contract of employment by requiring a strict adherence to the provisions of Section 41 of the Employment Act and rules of natural justice and the Claimant breached this. It submitted that the Claimant neither framed charges against the clinical officers and 24 medical laboratory officers nor did it require them to appear before it to show cause why their employment should not be terminated. The Applicants submitted that orders made in contravention of the rules of natural justice are null and void. For this they cited the case of **R *v* Chief Justice of Kenya & 6 Others Ex- parte Moijo Mataya Ole Keiwua [2010] eKLR** where the court stated "*If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision."* It was submitted that it follows, therefore that the order made on 4th July 2019 by this Honourable Court and the decision of the Claimant to terminate the employment of the Applicants are null and void. The Applicants submitted that in view of the case law referred to above, the said ruling of 4th July 2019 was made on account of some mistake or error on the face of the record and that the actions of the Claimants herein amount to a contravention of Articles 29 of the Constitution which

prohibits torture and Article 30 of the same which prohibits holding any person in servitude.

5. The submissions were bolstered by oral arguments made by Dr. Kuria for the Applicants appearing with Mr. Munyori while the Respondent's oral arguments were made by Mr. Rono. For the Applicants it was argued that the Applicants sought *inter alia* prayers for the enjoinment of the intended 2nd Claimant Kirinyaga County Public Service Board; a prayer for the enjoinment of the individual members of the Applicants whose employment was purportedly terminated on 8th July 2019 on the basis of the Court's Ruling of 4th July 2019. It was argued that the basis of joinder of the Intended 2nd Claimant was firstly, that the rule of law doctrine which states that no order can be made against a party who is not given a chance to be heard and secondly, that the specific provisions of the law under Order 1 Rule 10 and Order 53(3) of the Civil Procedure Rules which recognise that the litigant as an interested party. The Applicants' counsel argued that the Court is given authority to *suo moto* to include a party affected by the Order as provided for under Order 53 Rule 3. The Applicants cited the Court of Appeal decision in **Felix Marete Njagi *v* Attorney General [1987] KLR 690** in which the court recognized the right of a party to be heard and allowed the appeal by a person who was affected in a case to which he was not included. The Applicants Counsel submitted that the employees had their employment terminated by the 2nd Claimant in July 2019 without being heard hence contravening Article 41 of the Constitution which guarantees fair labour practices. Counsel submitted that the trade dispute on the terms and conditions of service between the Claimant and the 3rd and 4th Respondents has been there since 2015 and the 3rd and 4th Respondents and their members have done all they could to facilitate dialogue but that failed. Counsel submitted that they were not given an opportunity to be heard on the allegations of contempt of court. He cited the decision by the Privy Council in the case of Marahaj where it was held that the alleged contemnor must be heard. Counsel for the Applicants submitted that the Ruling of 4th July 2019 did not contemplate Article 24 of the Constitution on the right to be heard. Counsel submitted that the Applicants wished to be heard on the merits of the claim. He submitted that the Applicants have a right to collective bargaining which includes the right to strike. Counsel submitted that the Court also has jurisdiction to grant review under Rule 33 of the ELRC Rules as the consequences of not being given a chance to be heard are frightening. Counsel submitted that the Applicants assert that they have been denied medical care, they go without food and face harassment from auctioneers. Counsel submitted that the contracts were not protected as required under Section 41 of the Employment Act and Article 41 of the Constitution. Counsel submitted that the termination of the Applicants employment was therefore arbitrary and capricious exercise of power and against the rules of natural justice. Counsel for the Applicants submitted that the preliminary objection is misconceived as it is on disputed facts and that the objection is based on a fallacy that when a matter is heard and a ruling or judgement reserved a party cannot get out of the proceedings. Counsel submitted that according to the case of **Mukisa Biscuits Manufacturing Co. Ltd *v* West End Distributors (1968) EA 696** as stated by Sir Charles Newbold a preliminary objection is taken on assumption that all facts are as stated but is not taken where facts are disputed or to be ascertained. He submitted that this is not true as a party can apply for arrest of a judgement or ruling and by way of analogy a litigant can withdraw from an appeal. Counsel for the Applicants submitted that the argument that the matter is *res judicata* was misplaced as for *res judicata* to apply there has to be a final determination. He argued that the Claimant makes light of the judicial plight that has been presented. He noted that there was even an exchange between the Chief Justice and the Executive and that the Claimant cannot turn a blind eye to the hindrance of justice. Counsel for the Applicants submitted that with respect, the Claimant has no appreciation of Rule 33 which is analogous to inherent power of the Court. He submitted that Rule 33 envisages a situation where the Court can exercise its jurisdiction to correct errors and mistakes. He submitted that the Court can grant relief under Article 23 and give remedies such as prohibition, *certiorari* and *mandamus*. He submitted that when Rule 33 is invoked the Court has the same jurisdiction and exercises these rights as per the Constitution and it cannot be said that the Court lacks jurisdiction. The Applicants submitted that it is their right to seek review at the Court of Appeal or before this Court hence there is no evidence of abuse of the court process. Counsel submitted that as long as we are governed by the rule of law a person has to be heard before judgment is given and it cannot be wrong to enjoin the party. He submitted that there is no dispute on the substantive parts such as labour disputes and the failure to hear the individual employees. He submitted that it was not disputed that the employees are suffering and the facts are undisputed. He submitted that the Ruling placed reliance on the determination that no strikes are permitted in essential services. He argued that Nduma Nderi J. and Rika J. as well as the Supreme Court of Canada had come to a different conclusion on matter of essential services and stated that the Court did not have all the material before it and that should have been brought to its attention. Counsel thus urged this Honourable Court to allow the Applicant's application with costs.

6. The Claimant/Respondent's counsel Mr. Kibet submitted that the Claimant was opposed to the motion by the Applicants and reiterated that the background is the strike notice of 20th May 2019 issued by the 4th Respondent. He argued that an application was filed by the Claimant seeking to stop the strike or industrial action and interim orders were issued on 24th May 2019 and the cause transferred to Nyeri ELRC. He submitted that when the matter appeared before the Court on 11th June 2019 for *inter* partes hearing, the advocate for the Applicants sought time to file and the Court allowed them to file responses and directed them to resume work. He submitted that when the parties appeared on 18th June nothing had been filed, not even a notice of appointment and the Court allowed them to file an affidavit to confirm compliance with court orders. He submitted that there was nothing filed and the court orders had not been complied. He argued that has not been disputed and that the Court of Appeal record on compliance of the orders is there. He submitted that the Court proceeded to hear the matter and reserved the Ruling for 4th July 2019 and that is what the Applicants seek to review. He submitted that the Ruling did not direct anyone to dismiss any workers and that the Court determined the strike as unlawful and unprotected. He submitted that the letters of dismissal did not emanate from the Ruling as the dismissal was for absconding work. He submitted that after the Ruling of 4th July 2019 the Applicants filed a notice of appeal and proceeded to file an application for stay before the Court of Appeal at Nyeri being Civil Application No. 119 of 2019. He stated that the Court of Appeal did not issue any stay and the Applicants thereafter went to the Court of Appeal at Nairobi and filed Civil Application No. 270 of 2019. He submitted that the motion was heard and during the hearing the Applicants sought orders pending hearing and reinstatement. The Court of Appeal did not issue the orders as these were to await a full hearing and it was then that the motion before me was filed. Counsel for the Respondent submitted that they sought stay in the application before this Court and when they failed to get orders before this Court the Applicants awaited the Court of Appeal determination. He submitted that the Claimant was served on 8th May 2020 after the Court of Appeal made its decision on 27th April 2020. He argued that the motion before the Court of Appeal at Nyeri is still pending. He argued that the Court denied the Applicants a hearing for the reason that they had not purged the contempt. He submitted that the Court found that being essential service workers the Court barred industrial action. He submitted that the Court of Appeal ascertained that the Applicants were not heard because they had not complied with the Court orders issued herein. He submitted that the Court of Appeal affirmed that the failure to purge the contempt was a good reason they were not heard. He submitted that the Court of Appeal dismissed the contention that the right to be heard was denied as the contempt was not purged. He argued that the Applicants were not heard as they had not even filed a single document and that they were the ones who failed to comply with the Court directions and on that ground the application for review is not merited. He argued that the Court was being urged to find that it erred in making a determination of the essential services. He submitted that the decisions by my fellow judges are merely persuasive and the best forum is the Court of Appeal if they are dissatisfied. He argued that the Court had the right to make the decision it made and any party has a

right to appeal if dissatisfied. He submitted that the Respondent was opposed to the joinder of Kirinyaga Public Service Board the intended 2nd Claimant and the prayer was opposed for the simple reason that when the matter appeared in Court the Public Service Board had played no role. He submitted that the prayers sought and the orders issued were not directed against it and it would be tantamount to expanding the application and the claim. He submitted that the prayers sought would necessitate the amendment of the claim to include parties who are not necessary parties. He relied on the case of **Amos Kabiru Kimemia *v* Industrial & Commercial Development Corporation [2008] eKLR** and submitted that a party cannot be forced to sue. He submitted that there had been no dismissal when the Court made against the Intended Respondents and they did not suffer dismissal from court order. He argued that it would be expanding the Claimant's claim to include a prayer for dismissal. He submitted that the Court of Appeal found that prayer was not part of what was application before this Court. The Counsel for the Claimant submitted that when the parties appeared the Respondents had not exhausted all the available avenues as they had not raised an appeal to the Public Service Commission as required under Section 77 of the County Governments Act and that it would be infringing on the jurisdiction of a statutory body if this Court were to make a determination before exhaustion of the remedies available. He submitted that the Applicants had also failed to adhere to the provisions of Sections 62-65 of the Labour Relations Act that compels a party to seek conciliation from the Minister for Labour now, Cabinet Secretary for Labour. He submitted the Applicants had not challenged that and have not produced any evidence that the matter was referred to the Labour office nor have they stated that they exhausted all available avenues. He thus urged the dismissal of the motion with costs to the Claimant.

7. In his reply, Dr. Kamau Kuria submitted that Mr. Rono had despite not being on record or indicating he had instructions to do so submitted on behalf of the Intended 2nd Claimant the County Public Service Board. He submitted that the Board is an agent of the County Government handing personnel issues. He submitted that when on 8th July 2019 the County Public Service Board was purporting to terminate it was exercising a statutory position and the position of the Claimant is artificial. He submitted that Court should disregard what Mr. Rono had said on behalf of the County Public Service Board and hold there is no opposition to the motion. He submitted that the Counsel for the Claimant had misstated facts. He stated that after the Ruling of 4th July 2019 all the 4 Respondents filed the notice of appeal and subsequently notice of motions were filed at the Court of Appeal. He stated that no Ruling was delivered until 27th April 2020 and that the motion before me was filed on 23rd March 2020 long before the Ruling was delivered. He submitted that contrary to the submissions by Counsel for the Claimant, that application was served as per Civil Procedure Rules on 2nd April via electronic means long before the Court of Appeal Ruling was delivered. He submitted that no party can claim not to have been physically served. He submitted that by the application of 23rd March 2020 the Respondents had disassociated themselves from the decision. He submitted that there was procedure for contempt and that where there is a procedure for hearing the Court should frame a charge and call upon the alleged contemnor to plead. He submitted that it appears that there may have been persons who failed to obey a court order and that would have been clear if they were heard and the explanation tendered. He submitted that justice does not contemplate collective punishment and cited the Bible where it is stated that all shall face God individually. He submitted that much reliance had been placed on the Court of Appeal Ruling and Counsel for the Claimant significantly underplays the withdrawal from the proceedings. He submitted that in respect of the action the Applicants could take, the choices are two – you either go to the Court of Appeal or come to this Court for review. He submitted that the position taken by Mr. Rono was wrong in law as this Court can apply Rule 33. He submitted that Mr. Rono was wrong on another score in that he says that in the Ruling of 4th July 2019 no order was made against the County Public Service Board. He submitted that an order made against the principal was an order made against the agent, as there is the principle of separateness but also the principle of parties working hand in hand. He submitted that they serve a common purpose. He thus invited the Court to hold that a compelling case for review of the orders of 4th July 2019 had been made. He submitted that Mr. Rono had indirectly touched on the merits of the case and if one looks at the merits, the Court established under Article 162 establishes this Court to deal with employment disputes. He submitted that Mr. Rono says the County Government is entitled to proceed as it did and the employees should not be joined. He submitted the remedy of the County Government should be read as a whole and the County Public Service Board and the County Government deal jointly as the County Government pays salary and the County Public Service Board recruits. He submitted that it is not correct to state as was stated by Mr. Rono that County Government has no role in the County Public Service Board. He submitted as at the time the matter was filed the dispute was between the Unions and the County Government and that after 4th July 2019 the County Public Service Board came into the picture.

8. The Applicants before the Court assert they withdrew from the proceedings in the Court of Appeal. Under the Court of Appeal Practice Direction of 2015 under Rule 8 thereof, there is provision as follows:

> *8. Withdrawal of Appeals or Applications:*
>
> *a. A party who does not wish to pursue an appeal or application may request the Court to withdraw the application or appeal. Such request may be made in writing by letter copied to the respondent or orally in court.*
>
> > *i. If the other party consents to the appeal or application being withdrawn with no order as to costs, the parties can file a consent letter and the order will be made by the Court pursuant to the consent letter.*
> >
> > *ii. If the other party does not consent to the appeal or application being withdrawn with no order as to costs the party withdrawing can either:*
> >
> > > *(1) Write to the Court stating the wish to withdraw the appeal or application in which case the Court will record the withdrawal and proceed to award costs to the other party; or*
> > >
> > > *(2) Make the application to withdraw orally when the matter is next in Court when the Court will determine the appropriate order as to costs. b. Where a settlement has been reached disposing of an application or an appeal, the parties may file a consent in writing signed by all parties for the application or appeal to be withdrawn by consent.*
>
> *c. Parties are encouraged to file any consents as early as possible.*

Undoubtedly a party is free to resile from an appeal preferred by either withdrawing it or compromising it. The withdrawal dated 23rd March 2019 produced before the Court was served on parties to the proceedings but does not seem to have been filed at the Court of Appeal. No

stamp from the Court of Appeal is visible. Secondly, upon withdrawal there is an order that emanates from the Court of Appeal. There is no order showing the withdrawal of the party or their application before the Court of Appeal after the notice of withdrawal was prepared.

9. The motion herein is by Applicants who assert that their right to be heard under Article 24 of the Constitution was abridged as the Court in giving the Ruling of 4th July 2019 had excluded the Applicants on account of disobedience of Court orders on 24th May 2019. It is argued that the Applicants ought to have been given a charge meaning the court should have framed charges and heard the alleged contemnors before denying them audience. The case of **Maharaj *v* Attorney General** (supra) a Privy Council decision from Trinidad and Tobago was cited in aid. Dr. Kuria for the Applicants made heavy weather of the right to a fair hearing under the rule of law doctrine. The term rule of law loosely interpreted refers to a principle of governance in which all persons, institutions and entities both public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. The rule of law doctrine inherently implies that every person is subject to the law, including lawmakers, law enforcement officials, and judges. In a sense it stands in contrast to tyranny or oligarchy where rulers and kings are held above the law. It refers to the collective obeisance to the law as opposed to fiat. It is therefore expected that there will be measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency. Coming to the matter at hand, when a party deliberately declines to obey a Court order can that party be said to respect the rule of law? Can that party come to Court and assert that having suffered the consequences of the wilful disobedience of Court orders it now must be heard as each of its individual members was not heard or that the party was not heard because they had not purged their contempt? In my considered view, that would be a mockery of the very justice they seek. Article 24 of the Constitution however laudable is not absolute as it is fettered by circumstances as these Applicants before me precipitated. Court orders are not suggestions to be considered for election as to whether you will obey them or not. Since the Applicants failed to obey Court orders and subsequently were justly denied audience before the Court, they cannot review the decision made which they deliberately by design chose to be absent from by disregarding Court orders issued. It was argued that the decision by this Court was made in error, mistake or oversight. The alleged oversight is argued to be the rejection of the notion that the members of the Applicants can 'strike'. In the Court's finding, the strike the Applicants' members participated in was unprotected therefore unlawful. The Court found that the members of the Applicants were essential service providers and as such were in the category of persons exempted from being able to participate in a strike. That can never be called an error, mistake or oversight. The provisions of Section 78 of the Labour Relations Court are very clear. The decisions cited by the Applicants being the case of **Okiya Omtatah Okoiti *v* Attorney General *&* 5 Others** (*supra*) as well as the case of case of **Kenya Ferry Services Ltd. *v* Dock Workers Union (Ferry Branch)** (*supra*) are merely persuasive and I am not bound to follow them. As regards the alleged disregard for procedure by the intended 2nd Claimant, I find that the allegations can only be proved in a suit between the Applicants and the intended Claimant but not in this case as the intention of the legislature in allowing joinder of parties did not involve the forced amendment of pleadings to include an additional Claimant who has neither sought to be enjoined nor shown any interest in the suit. The right to be heard does not include the right to force a joinder. The employees were not denied a chance to be heard as they were given a chance through their Union and the Union declined to file any documents and refused to obey Court orders. Article 41 of the Constitution is not absolute as members of the defence forces and essential service providers are in the category excluded from the blanket application of Article 41. The decision made by this Court on 4th July 2019 is neither null nor void and until reversed by the Court of Appeal is the determination made in the matter. I accordingly find no merit in the motion by the Applicants and hereby dismiss it with costs to the Claimant. By way of obiter, I am incapable of reversing a Court of Appeal decision as was suggested here. The decision of the Court of Appeal in Civil Application No. 270 of 2019 is binding – there was no evidence of compliance with the orders to demonstrate that the contempt had been purged hence the refusal to hear the Applicants. As I stated above, since the Applicants failed to obey Court orders and subsequently were justly denied audience before the Court, they cannot review the decision made which they deliberately by design chose to be absent from by disregarding Court orders issued. The notice of motion application before me is unmerited and is dismissed with each party bearing their own costs.

It is so ordered.

Dated and delivered at Nyeri this 23rd day of September 2020

Nzioki wa Makau

JUDGE