



**Republic v Mungai; Communications Authority of Kenya (Interested Party); Ogogoh  
(Exparte Applicant) (Judicial Review Miscellaneous Application E138 of 2022)  
[2023] KEHC 24402 (KLR) (Judicial Review) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24402 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E138 OF 2022  
JM CHIGITI, J  
OCTOBER 26, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**MARY WAMBUI MUNGAI ..... RESPONDENT**

**AND**

**COMMUNICATIONS AUTHORITY OF KENYA ..... INTERESTED PARTY**

**AND**

**JULIUS OGOGOH ..... EXPARTE APPLICANT**

**RULING**

1. The application before this Court is dated 5<sup>th</sup> December, 2022 and it seeks the following orders;
  1. Spent.
  2. That leave be granted for the ex parte Applicant to apply for the following Judicial Review orders;
  3. An order of Certiorari to remove into this court and quash Gazette Notice No. 14893 of 1<sup>st</sup> day of December 2022 by the President of the Republic of Kenya appointing Mary Wambui Mungai as the Chairperson of the Board of Communications Authority of Kenya effective 2<sup>nd</sup> day of December 2022 for a period of three (3) years.



4. That the grant of leave do operate as a stay of the purported appointment and/or assumption of office by Mary Wambui Mungai as the Chairperson of the Board of Communications Authority of Kenya.
  5. That costs of this Application be provided for.
2. The application is supported by a Statutory Statement dated 5<sup>th</sup> December,2022 and the Supporting Affidavit of Julius Odogoh sworn on even date.
  3. A brief background of the facts in this matter is that, on or about 2<sup>nd</sup> December, 2022, the then President of the Republic of Kenya through Gazette Notice No. 14893 appointed the Respondent as the Chairperson of the Board of Communications Authority of Kenya for a period of three (3) years. The said appointment is stated to have had the effect of revoking the appointment of one Gilbert Kibe who had been appointed to the position on 13<sup>th</sup> May,2022.
  4. The Ex parte Applicant's case is that he, as a concerned Kenyan was astonished with the Respondent's appointment as there have been numerous discussions in the media and other forums on allegations of tax evasion. The Respondent is also said to have for a long time been in the cross hairs of the Kenya Revenue Authority.
  5. The Ex parte Applicant challenges the Respondent's reputation and whether the same lives up to the requirements, as provided for under Chapter Six of *the Constitution* on leadership and integrity.
  6. In response, the Respondent in her Replying Affidavit sworn on 20<sup>th</sup> December,2022 depones that the Application herein is devoid of any factual, logical, or legal foundation; and further that judicial review proceedings are concerned with the decision-making process and not the merits of the decision made.
  7. The Respondent also urges that the Ex parte Applicant has failed to demonstrate any of the known grounds to warrant the grant of judicial review orders as was enunciated in the Court of Appeal case of Republic vs. Kenya National Examination Council Ex parte Gathenji and others Civil Appeal No. 266 of 1996.
  8. It is the Respondent's case that on 9<sup>th</sup> February,2010 vide a special gazette Notice No.1258 the then minister for Medical Services appointed her to be a member of the Board of Kenyatta National Hospital in which position she served up until 6<sup>th</sup> May, 2014 when she voluntarily wrote to the Cabinet Secretary, Ministry of Health, notifying his office of her intentions to resign as a member of the Board of Kenyatta National Hospital effective from the date of the said letter.
  9. The Respondent argues that she has always honored her tax obligations and endeavored to fully comply with the tax requirements of the Kenya Revenue Authority, and that at no point has she ever evaded tax as alleged by the Ex parte Applicant herein.
  10. The Ex parte Applicant, it is argued has failed to meet the threshold for the grant of a stay as the decision he seeks to stay has already been implemented. The Respondent cites the case of Republic v National Transport & Safety Authority & 10 others [2014] eKLR where the court held that "obtaining leave is not in itself evidence of a strong case for issuance of stay orders. In order to obtain leave to commence judicial review proceedings, an applicant only needs to show that he has an arguable case."
  11. The Respondent depones that the Ex parte Applicant has failed to adduce cogent evidence in support of the allegations he is making as is required under section 107,108 and 109 of the *Evidence Act*.
  12. The Respondent also urges that the Application herein is bad in law, as it offends the mandatory provisions of Order 53 Rule 2 (b) of the Civil Procedure Rules, 2010 which provides that an



- application seeking leave to institute judicial review proceedings shall be accompanied by; affidavits verifying the facts and averment that there is no other cause pending, and that there have been no previous proceedings in any court between the applicant and the respondent, over the same subject matter and that the cause of action relates to the applicants named in the application.
13. The proceedings before this court are also said to have been initiated in the name of the Republic, even before the Honorable Court pronounced leave to institute judicial review proceedings and therefore the Application is fatally defective.
  14. The Interested Party that is the Communications Authority of Kenya in response also filed grounds of opposition dated 18<sup>th</sup> January, 2023 in which it raises the following issues;
    1. Judicial review proceedings are targeted at decisions made by public bodies or officials. Neither the Respondent nor the Interested Party made the impugned decision. The Application is therefore incompetent for failure to implead the public body, official or his representative who made the impugned decision.
    2. Leave to institute judicial review proceedings ought not to be granted as the Ex parte Applicant has neither pleaded nor demonstrated any known ground for the grant of judicial review orders at all, or on a prima facie basis.
    3. No evidence has been provided to the Court to support the allegations that the Respondent does not meet the requirements of Section 6A of the [Kenya Information and Communications Act](#) No. 2 of 1998. The Application is based on mere conjecture.
    4. The Applicant's application fails to demonstrate any illegality, irrationality and/or procedural impropriety on the part of the appointing Authority when arriving at the decision.
    5. The substratum of the Applicant's Chamber Summons is not amenable to Judicial Review as it addresses the suitability of the Respondent as Chairperson of the Board of Communications Authority of Kenya as opposed to the process by which this decision was arrived at.
  15. The Application was canvassed by way of written submissions. The Ex parte Applicant filed written submissions dated 10<sup>th</sup> May, 2023. In the submissions he contends that a previous attempt to appoint the Respondent to the Board of Kenyatta National Hospital was also revoked sometime in April 2013.
  16. Further, that to execute its all-important mandate as an impartial regulator of a very sensitive sector that is responsible for the daily safety of Kenyans, it is necessary that the Chairperson and the independent members of the Board are appointed strictly according to The Kenya Information and Communication Act and [the Constitution](#) to ensure its autonomy from vested interests so that all players in the industry can have the full benefit of the law.
  17. The then President is said to have violated [the Constitution](#) when he handpicked and appointed Mary Wambui Mungai to be Chairperson of the Board of Communication Authority of Kenya and also in contravention of Paragraphs 15 and 16 of the Government Circular Ref. No.OP/CAB.9/21/2A/LII/43 of 23<sup>rd</sup> day of November 2004, titled "Guidelines on Terms and Conditions of Service for State Corporations – Chief Executive Officers, Chairmen and Board Members, Management Staff, Unionisable Staff which provides for competitive sourcing of Chief Executives.



18. It is also the Ex parte Applicant's submission that he has the locus standi to institute these proceedings and that this suit qualifies as a public interest litigation. The Ex parte Applicant also submits that Article 22 and 258 of *the Constitution* gives him the locus standi in this matter and that matters in public interest cases encompass more than just the parties to the suit as such suits are meant to benefit the wider public and not the individual directly involved.
19. The cases of *Kiluwa Limited & another v Commissioner of Lands & 3 others* [2015] eKLR and *Albert Ruturi, JK Wanywela & Kenya Bankers' Association vs The Minister of Finance & Attorney General and Central Bank of Kenya* (the Ruturi case) are cited where the courts have addressed the issue of who has the capacity to approach the Court seeking judicial redress for a legal injury caused or threatened to be caused to a defined class of persons represented or for a contravention of *the Constitution* or injury to the nation.
20. The Ex parte Applicant also submits that *the Constitution* contemplates public interest litigation as a tool to implement and defend *the Constitution*, to secure and preserve the rights and fundamental freedoms in the bill of rights to be filled even by persons not directly affected and to further buttress this argument he cites the case of *Dindi Oscar Okumu v Robert Pavel Oimeke & 5 others* [2021] eKLR.
21. In conclusion the Ex parte Applicant submits that the Respondent's appointment to public office was against the public interest, and contrary to the requirements of, inter alia, Articles 10, 27, 47, 73, 75, 201(a), and 232 of *the Constitution*, including non-discrimination, inclusivity, the rule of law, public participation, good governance, and transparency (openness) and accountability and the provision to the public of timely, accurate information according to Articles 10(2) and 35(3) of *the Constitution*. The appointment is said to be illegal and tainted with procedural irregularities and ought to be quashed by way of the order of certiorari.
22. In her written submissions dated 2<sup>nd</sup> June, 2023 the Respondent submits that the application having not been accompanied by a verifying affidavit, essentially means that the facts contained in the statement are worthless and of no evidential value and in support of this argument the case of *Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/ A Marenga Filing Station Civil Appeal No. 45 of 2000* is cited.
23. The case of *Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996* is also referred to on what the reason for leave is.
24. It is the Respondent's submissions that as was held in the case of *Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd* (2002) eKLR the judicial review process does not concern itself with the merits of the decision but it focuses on the process through which decisions criticized of were made.
25. The Respondent reiterates that her appointment was conducted in utmost compliance with Section 6(1) (a) of the *Kenya Information and Communications Act, 1998*.
26. It is submitted that Articles 79 and 80 of *the Constitution* are key provisions which operationalize leadership and integrity principles. Further, that the Ethics and Anti-Corruption Commission (EACC) established under Article 79 of *the Constitution* is the institution with the mandate to ensure compliance and enforcement of Chapter Six of *the Constitution* in the first instance.
27. The Respondent also argues that by virtue of Article 80, Parliament fulfilled its mandate by enacting the *Leadership and Integrity Act* which operationalized Chapter Six of *the Constitution* and that pursuant to this Act it is the EACC to deal with whether she has violated Chapter six of *the Constitution* and not this Court.



28. On failure to present cogent evidence, the Respondent refers to the case of M’Bita Ntiro v Mbae Mwirichia & another (2018) eKLR. The Respondent submits that the general rule under Section 27 of the Civil Procedure Act is that costs follow events. The case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others [2013] eKLR is cited where the Supreme Court affirmed the principle that costs always follow the event albeit at the Court’s discretion.
29. The Interested Party also filed written submissions dated 26<sup>th</sup> June, 2023 and in the submissions it refers to the case of Republic vs. County Council of Kwale & Another Ex parte Kondo & 57 Others Mombasa HCMA No.384 of 1996 where the court discussed what the necessity for seeking leave to institute judicial review is.
30. It is also the Interested Party’s submission that as was held in Meixner & Anor v Attorney General [2005] 2KLR 189 to protect an abuse of the court’s process in instances where leave has been sought, the test applicable is whether or not the applicant has an arguable case. The case of Republic vs. Kenya Revenue Authority, Commissioner Ex parte Keycorp Real Advisory Limited [2019] eKLR is cited on what constitutes an arguable case.
31. The Interested Party submits that the Applicant has not instituted a statutory judicial review application as referred to by the Court of Appeal in the case of Sunchan Investment Limited v. Ministry of National Heritage & Culture & 3 Others [2016] eKLR and therefore this court cannot delve into review the merits of the said decision.
32. On the issue of stay and the decision having already been implemented the case of George Philip M. Wekulo v Law Society of Kenya & Another [2005] eKLR is referred to where the court held that there was no decision to be stayed as the same had already been implemented. The Interested Party also cites the case of Republic vs. National Transport & Safety Authority & 10 Others [2014] eKLR where the Court held as follows; “In a situation where an Applicant seeks to stop the implementation of a law, he must demonstrate that the implementation of the law will cause irreparable harm”.

### **Analysis And Determination**

33. I have considered the Chamber Summons application, Supporting Affidavit and Statutory Statement in support. I have also had due regard to the Responses on record and the learned submissions by counsel. The issue for determination is whether the Application for leave to commence judicial review proceedings is merited.
34. The requirement to seek leave is provided for under Order 53 Rule 1 of the Civil Procedure Rules 2010, which stipulates that an Applicant must seek leave to institute judicial review proceedings.
35. The purpose of this is so as to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious, or hopeless; to ensure that the Applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration; to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error; and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review were actually pending even though misconceived.
36. These reasons for leave were discussed at length in the case of Republic v County Council of Kwale & another ex parte Kondo & 57 others (1998) 1 KLR (E&L).



37. Leave as was held by the Learned Judge in R vs County Council of Kwale Ex Parte Kondo and 57 Others (supra) may only be granted if on the material available the court is of the view that, without going into the matter in depth, the Applicant has an arguable case for the grant of the relief sought.
38. It trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make a cursory perusal of the evidence before it, and make a decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was in this respect explained by Lord Bingham in Sharma vs Brown Antoine (2007) I WLR 780, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.
39. In the application before this Court the Ex parte Applicant seeks leave to apply for an order of certiorari to quash the decision contained in Gazette Notice No.14893 of 1<sup>st</sup> December,2022 by the then President appointing the Respondent as the Chairperson of the Board Communications Authority of Kenya effective 2<sup>nd</sup> Decemeber,2022 for a period of three (3) years.
40. The Applicant challenges the said appointment on grounds that the Respondent does not meet the requirements as provided under Chapter 6 of *the Constitution*. He also challenges the appointment on grounds that the appointee was handpicked in contravention of Paragraphs 15 and 16 of the Government Circular Ref. No.OP/CAB.9/21/2A/LII/43 of 23<sup>rd</sup> day of November 2004, titled "Guidelines on Terms and Conditions of Service for State Corporations –Chief Executive Officers, Chairmen and Board Members, Management Staff, Unionisable Staff which provides for competitive sourcing of Chief Executives.
41. In response the Respondent argues that the Applicant has failed to adduce evidence of the said allegations and further that the issue of whether or not she has complied with Chapter Six of *the Constitution* is one that ought to be determined by the EACC
42. The Interested Party in its response also argues that the Ex parte Applicant has failed to provide evidence before the Court in support of the allegations that the Respondent does not meet the requirements of Section 6A of the *Kenya Information and Communications Act* No. 2 of 1998 also that the Applicant's application fails to demonstrate any illegality, irrationality and/or procedural impropriety on the part of the appointing Authority when arriving at the decision.
43. The Court upon a cursory look at the evidence adduced by the Ex parte Applicant in support of his case notes that the only evidence adduced before this Court is a Gazette Notice dated 2<sup>nd</sup> December,2022 confirming the Respondent's appointment which does not assist the court in determining whether or not the Ex parte Applicant's has made out an arguable case meriting the grant of leave. What the said the said notice proves is that indeed the Respondent was appointed to the said office and nothing more.
44. The Court is not convinced that the applicant has proven that his case meets the threshold of an arguable case, and he is therefore not entitled to the leave sought to commence judicial review proceedings against the Respondent.

#### **Order**

45. In light of the above the application dated 5<sup>th</sup> December,2022 is hereby dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF OCTOBER 2023**

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**J. CHIGITI (SC)**  
**JUDGE**

