



**Guto v Nairobi City County Assembly Service Board & another; Owino
& another (Interested Parties) (Miscellaneous Application E134 of 2023)
[2023] KEHC 25956 (KLR) (Judicial Review) (28 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25956 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E134 OF 2023
JM CHIGITI, J
NOVEMBER 28, 2023**

BETWEEN

DICKSON MIRERI GUTO APPLICANT

AND

NAIROBI CITY COUNTY ASSEMBLY SERVICE BOARD 1ST RESPONDENT

THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY 2ND RESPONDENT

AND

MAURICE OCHIENG OWINO INTERESTED PARTY

MARY NJERI NDEGE INTERESTED PARTY

Time ought not to run when a county assembly is on recess since it conducts its business while in session

The applicant's case was that the respondents breached the Constitution for being; unfair, discriminatory and abusing the rule of law due to absence of fair, and competitive interviews. The applicant's case was about appointments for the posts of External Members of the Nairobi City County Service Board. The court highlighted the distinction between an order of prohibition and an order of certiorari. The court also highlighted the principles that governed a successful invocation of the doctrine of legitimate expectation. The court held that time ought not to run when the county assembly was on recess, since was contemplated and reasonable that the county assembly conducted its business while in session.

Reported by Kakai Toili

Devolution – county assemblies – running of time when county assemblies were on recess - whether time ought not to run when a county assembly was on recess.



Judicial Review - *judicial review orders – prohibition vis a vis certiorari - what was the distinction between an order of prohibition and an order of certiorari - where the remedies were sought to quash a decision made to appoint External Members of the Nairobi City County Service Board and also to stop the swearing in of the proposed holders of those posts - whether the remedies of certiorari and prohibition could issue under the circumstances.*

Constitutional Law – *doctrine of legitimate expectation – principles governing the doctrine of legitimate expectation - what were the principles that governed a successful invocation of the doctrine of legitimate expectation.*

Brief facts

The applicant's case was that the respondents breached the Constitution – for being unfair, discriminatory and abusing the rule of law due to absence of fair, and competitive interviews. The judicial review application filed by the applicant sought to challenge the legality and propriety of the appointments in relation to External Members of the Nairobi City County Service Board. In particular, the applicant alleged that the 1st respondent's actions in selecting the interview panel and the criteria used in recommending the 2nd interested party for the position, was illegal for the reasons that the 1st respondent were State officers, duty bound to comply with the laid down procedures which they failed to.

The application sought for among other orders; an order of *certiorari* to quash the decision of the 1st respondent made vide report dated August 10, 2023; and an order of prohibition prohibiting the 1st and 2nd respondents from swearing in the 1st and 2nd interested parties.

Issues

- i. Whether time ought not to run when a county assembly was on recess.
- ii. What was the distinction between an order of prohibition and an order of *certiorari*?
- iii. What were the principles that governed a successful invocation of the doctrine of legitimate expectation?

Held

1. In order to succeed in an application for judicial review, the applicant had to show that the decision or act complained of was tainted with illegality, irrationality and procedural impropriety.
2. Judicial review was entrenched as a constitutional principle pursuant to the provisions of article 47 of the Constitution, which provided for the right to fair administrative action, and section 7 of the Fair Administrative Action Act in that regard provided that any person who was aggrieved by an administrative action or decision may apply for review of the administrative action or decision. Article 47 as read with the grounds for review provided by section 7 revealed an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court had no mandate to substitute its own decision for that of the administrator.
3. Article 165(6) of the Constitution provided that the court had supervisory jurisdiction over any person, body or authority that exercised a quasi-judicial function or a function that was likely to affect a person's rights.
4. An order of prohibition restrained a public body from acting in the manner specified in the order to restrain a threatened or impending unlawful conduct; while on the other hand, an order of *certiorari* nullified an unlawful decision or enactment. There was no evidence before the court that the interested parties were sworn in on September 12 or 13, 2023. As such, the issued temporary prohibition order was alive, and an order for prohibition could issue in the circumstances, if deemed fit, since the interested parties had not been sworn in by then.



5. Not all expectations constituted legitimate expectations. The principles that governed a successful invocation of the doctrine of legitimate expectation were as follows;
 - a. there must be an express, clear and unambiguous promise given by a public authority;
 - b. the expectation itself must be reasonable;
 - c. the representation must be one which it was competent and lawful for the decision-maker to make; and
 - d. there could not be a legitimate expectation against clear provisions of the law or the Constitution.
6. The legitimate expectation claimed by the applicant did not qualify as legitimate expectation.
7. The issue/question whether the time the county assembly was on recess was counted or the factored time was when the house was in session was best decided by the Speaker of the Nairobi County Assembly. In any case, time ought not to run when the county assembly was on recess, since it was contemplated and reasonable that the county assembly conducted its business while in session.
8. As the respondents had not been shown to have acted illegally, or in abuse of their powers, no grounds had been established for the orders of *certiorari* and prohibition sought by the applicant. In addition, the respondents could not be restrained from undertaking their constitutional and statutory duties.

Application dismissed with no orders as to cost.

Citations

Cases

Kenya

1. *Communication Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* Petition 14, 14A, 14B & 14C of 2014; [2015] KESC 13 (KLR) - (Explained)
2. *Githunguri Dairy Farmers Co-operative Society Ltd v Attorney General & 2 others* Petition 257 of 2015; [2016] KEHC 7104 (KLR) - (Mentioned)
3. *Judicial Service Commission v Mbalu Mutava & another* Civil Appeal 52 of 2014; [2015] KECA 741 (KLR) - (Followed)
4. *Kenya Human Rights Commission & another v Non-Governmental Organisations Coordination Board & another* Petition 404 of 2017; [2018] eKLR - (Mentioned)
5. *Kenya National Examination Council v Republic; Ex Parte Geoffrey Gathenji Njoroge & 9 others* Civil Appeal 266 of 1996; [1997] KECA 58 (KLR); [1997] KLR 480 - (Explained)
6. *Municipal Council of Mombasa v Republic & another* Civil Appeal 185 of 2001; [2002] eKLR - (Mentioned)
7. *Musambayi, Josephat Alusiola v Vibiga County Assembly & another* Petition 17 of 2015; [2016] KEELRC 97 (KLR) - (Mentioned)
8. *Owiro & another v Speaker, County Assembly of Vibiga & 4 others* Constitutional Petition E010 & E011 of 2021 (Consolidated); [2022] KEHC 12780 (KLR) - (Mentioned)
9. *Shavisa, Tom & another v Hazina Mudeizi, Speaker, County Assembly of Vibiga, & 3 others* Petition 66 of 2018; [2021] KEELRC 1653 (KLR) - (Mentioned)
10. *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* Civil Appeal 46 of 2012; [2016] KECA 729 (KLR); [2016] 1 KLR 847 - (Explained)

Uganda

Pastoli v Kabale District Local Government Council & others [2008] 2 EA 300 - (Explained)

Statutes

Kenya

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 53 rule 3, 4 - (Interpreted)
2. Constitution of Kenya, 2010 articles 10(2); 47; 165(6) - (Interpreted)
3. County Assembly Services Act (cap 265D) sections 8, 9; Schedule 1 - (Interpreted)



4. County Governments Act (cap 265) sections 12(3A); 12(3)(d) - (Interpreted)
5. Fair Administrative Action Act (cap 7L) sections 4(1), 5(2)(b); 5(2)(c); 7 - (Interpreted)
6. Kenya National Examinations Council Act (cap 214A) section 10 - (Interpreted)
7. Law Reform Act (cap 26) sections 8, 9 - (Interpreted)

Advocates

None mentioned

JUDGMENT

1. Following granting of leave, the applicant by way of a notice of motion dated 19th September, 2023 – brought under order 53 rule 3 and 4 of the *Civil Procedure Rules, 2010*; and section 8 and section 9 of the *Law Reform Act* – seeks for orders:
 1. An order of *certiorari* to move this honourable court to quash the decision of the 1st respondent made vide report dated August 10, 2023
 2. An order of prohibition prohibiting the 1st and 2nd respondents from swearing in the 1st and 2nd interested parties
 3. An order of prohibition prohibiting the 1st and 2nd respondent from further compromises.
 4. Cost of this application
5. Such further order and other reliefs that the court may deem fit, just and expedient to grant in the interest of justice.
2. The application is supported by statutory statement, and a verifying affidavit sworn by Dickson Mireri Guto, dated September 12, 2023 and 29th August (sic), respectively. Also, filed is a supporting affidavit dated September 19, 2023; and a supplementary affidavit dated October 23, 2023 by the same deponent.
3. In sum, the applicant’s case is that the respondents breached the *Constitution* – for being unfair, discriminatory, and abusing the rule of law - due to absence of fair, and competitive interviews. In particular, that the 1st respondent’s actions in selecting the interview panel and the criteria used in recommending the 2nd interested party [who scored lower marks] for the position, [but were still selected for the same] is illegal, unreasonable, abuse of power, bias, against rules of natural justice and legitimate expectation - for the reasons that they [1st respondent] are state officers, duty bound to comply with the laid down procedures which the respondent failed to.
4. The application is opposed by the respondents: The 1st respondent through a replying affidavit dated October 5, 2023 deponed by Edward O Gichana, their secretary; While the 2nd respondent through a replying affidavit dated October 5, 2023 sworn by Hon Kennedy O Ng’odi, the bearer of the 2nd respondent’s office.
5. The 1st respondent’s case is that they are not privy to the allegations of leakage of interview information to some of the vacancies applicants, and the same claims are unsubstantiated. Also, that the applicant has failed to demonstrate how the appointment of the two (2) successful candidates was in infringement of his [applicant’s] constitutional right to fair procedural practices, and administrative procedure.



6. It is stated that they [1st respondent] followed due process and procedure throughout the recruitment process, thus according all applicants a fair and competitive process. The deponent, in denying knowledge of a memo from the leader of majority in the county assembly, to the 2nd respondent, nominating the applicant for the position of external member of the board; stated that in any case, such conduct would be contrary to the law, manner, and procedure of recruitment and appointment of members of the board.
7. As per the 1st respondent, the alleged resignation of the applicant from his previous job in anticipation of being the successful candidate was presumptuous, misconceived, and misinformed - being that the [County Governments Act](#) at section 12(3A) provides that the external members of the Board shall serve on a part-time basis. Also, that the applicant is on a spree of forum shopping, and has filed a similar matter with the Political Parties Disputes Tribunal being PPDTTC/E018/2023.
8. Further, in opposing the application, on their part, the 2nd respondent reiterated similar averments as of the 1st respondent - as captured herein above.
9. In the end, the respondents contended that the application is misplaced, misconceived, unmerited, and an abuse of court process; thus, the same ought to be dismissed with cost.
10. The application was canvassed by way of written submissions, with the parties buttressing their respective cases. The applicant filed their written submissions dated October 2, 2023, and a supplementary submission dated October 23, 2023 supporting the application; While the respondents filed their written submissions dated October 6, 2023, and a supplementary submission dated October 24, 2023.
11. It is the applicant's submissions that the 1st respondent conducted the recruitment and interview in a manner that affronts the [Constitution](#), and sections 4(1), 5(2)(b) and (c) of the [Fair Administrative Action Act, 2015](#) as they engaged in procedural impropriety and irregularity for favouring a select number of candidates; of which some of the candidates were in possession of questions prior to the interview, which occasioned disadvantage to the rest of the other candidates. Reliance was placed on the cases of [Kenya Human Rights Commission & another v Non-Governmental Organisations Co-ordination Board & another](#) [2018] eKLR in which the court cited with approval the decision of the Court of Appeal in [Judicial Service Commission v Mbiu Mutava & another](#) [2018] eKLR.
12. Further, it was submitted that section 47(1), (2)(3) and (4) of the [Nairobi City County Assembly Standing Orders](#) were violated. In particular, that the 1st respondent preferred a period of one (1) month to release the Report, as opposed to fourteen (14) days after conclusion of the interview. As per the applicant's submissions, the 1st respondent engaged in procedural impropriety and is equally faulted for engaging in a wrong decision making process. Relied on the case of [Municipal Council of Mombasa v Republic & Another](#) [2002] eKLR.
13. The applicant also submits that section 8 and 9 of the [County Assembly Services Act, 2017](#); section 10 of the [Kenya National Examination Council Act](#); and article 10(2) of the [Constitution](#) were violated and disregarded by the respondent.
14. On swearing in, the applicant submitted that the respondents did not swear in the interested parties as the external members of the Nairobi City County Service Board; and averments by the respondents that there was a swearing in ceremony is misleading as on the alleged date September 13, 2023 at 0700hrs there was neither swearing in ceremony, nor voting on the report - noting that the County begins its business at 0800hrs, while the same date the county house sitting was adjourned due to lack of quorum.



15. The applicant maintains that the respondent did not provide any evidence, gazette notice, to prove that the Interested Parties were sworn in. Reference was made to section 31(1) and (2); section 37, and section 74(1) of the *Nairobi City County Standing Orders*.
16. In the end, the applicant contended that the respondent and the interested party disregarded this court's order and directions, which orders are binding. Reliance was placed on the case of *Josephat Alusiola Musambayi v Vibiga County Assembly 7 Another* [2016] eKLR which cited with approval the decision in the case of *Hodkinson v Hodkinson*.
17. Conversely, the respondents submitted that they complied with the procedure for appointment of external members of County Assembly Service Boards, as stipulated in first schedule of the *County Assemblies Services Act 2017*, which position was affirmed by court in ELRC Petition 66 of 2018 *Dr. Tom Shavisa & another v Vibiga County Assembly Service Board & others*, and Constitutional Petition E010 & E011 of 2021(consolidated) -*Owiro & another v Speaker Vibiga County Assembly & others*.
18. To the respondents, the applicant has failed to plead and set out specifically how the recruitment process was unlawful and unprocedural. Also, that the applicant has failed to discharge the burden of proving his allegations against the respondent; and demonstrate how his constitutional rights to fair procedural practices and administrative procedures were infringed upon as a result of the appointment of the interested parties. Relied on the case of *Githunguri Dairy Farmers Cooperative Society Limited v Attorney General & 2 others* (2016) eKLR.
19. It is the respondents' submission that as per section 12(3A) of the *County Governments Act* the members of the Board appointed under section 12(3)(d) shall serve on part time basis, and thus the applicant had no reason to resign from his job. Further, that the applicant was never nominated by any political party as external member of the Nairobi City County Assembly Service Board.
20. It is contended that the interview report of the board was dated August 10, 2023 and tabled on the floor of the house on August 10, 2023; and that the Assembly subsequently adjourned for long recess on the same day. On September 12, 2023 the Assembly resumed its sessions and considered the interview report, culminating in the approval of the names of the 1st and 2nd interested parties.
21. According to the respondents, the 1st and 2nd interested party were lawfully sworn in as members of the board on September 13, 2023; and therefore, notwithstanding that this entire application is unfounded in law, the prayer prohibiting their swearing in has been overtaken by events.
22. That at its sitting held in the afternoon of September 12, 2023 the County Assembly approved the two (2) names and proceeded to publish them in the Kenya Gazette under Notice No 12398 dated September 12, 2023. The Board was subsequently caused to sit on September 13, 2023 at 7:00 AM where the chairperson of the Board administered the oath of office the Board to the 1st and 2nd interested parties; thus, assuming their respective offices upon taking oath.
23. That a temporary order of prohibition, issued by the honourable court on September 12, 2023 at about 10:00 PM prohibiting the swearing in of the 1st and 2nd interested parties, was received at 12:21pm on September 13, 2023 through an email after the swearing in ceremony was conducted.

Issue for Determination

24. In this matter, I find the following issues arising for determination: Whether this application has met the threshold for granting of the judicial review orders of certiorari and prohibition.



Analysis and Determination

25. Before determination of the issues before the court, it is necessary to restate the parameters of judicial review jurisdiction, as stated in the Ugandan case of *Pastoli v Kabale District Local Government Council & others*, (2008) 2 EA 300 thus:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of *Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Babikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

26. Judicial review is now entrenched as a constitutional principle pursuant to the provisions of article 47 of the [Constitution](#), which provides for the right to fair administrative action, and section 7 of the [Fair Administrative Action Act](#) in this regard provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision.
27. In addition, it was emphasized by the Court of Appeal in [Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others](#), (2016) KLR that article 47 of the [Constitution](#) as read with the grounds for review provided by section 7 of the [Fair Administrative Action Act](#) reveals an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator.
28. Further, article 165(6) of the [Constitution](#) also provides that this court has supervisory jurisdiction over any person, body or authority that exercises a quasi-judicial function or a function that is likely to affect a person’s rights. The consideration and determination of the substantive issues raised in the instant application now follows.
29. As to the the relief sought, the applicant has sought orders of certiorari and prohibition. On one hand, an order of prohibition restrains a public body from acting in the manner specified in the order to restrain a threatened or impending unlawful conduct; while on the other hand, an order of *certiorari* nullifies an unlawful decision or enactment. The Court of Appeal held in [Kenya National](#)



Examinations Council v Republic ex parte Geoffrey Gathenji Njoroge Civil Appeal No 266 of 1996 *inter alia* as follows as regards the nature of the said remedies:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice.

However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...

... Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

30. On relief for prohibition restraining the respondents from swearing in the interested parties, the respondents contended that such prayer cannot issue as the swearing in had already been done, thus overtaken by events; While the applicant averred that the swearing in had not been taken place at all - and specifically, before the order was issued. I have taken a keen look at the Hansard annexed and marked DMG-5a in the application and it is confirmed that on September 12, 2023 the names of the two (2) interested parties were discussed and confirmed by the county assembly.
31. However, there is no evidence before this court that the interested parties were sworn in on 12th or September 13, 2023. As such, to my mind and based on the material before court, the issued temporary prohibition order is alive, and an order for prohibition can issue in the circumstances, if deem fit, since the interested parties had not been sworn in by then.
32. The applicant contended that he had legitimate expectation to be nominated and appointed as the 5th Member of the county assembly public service Board. Not all expectations constitute legitimate expectations. The Supreme Court in the Communication Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others, [2014] eKLR laid down the principles that govern a successful invocation of the doctrine of legitimate expectation as follows:

“(269) The emerging principles may be succinctly set out as follows:

- a. there must be an express, clear and unambiguous promise given by a public authority;
- b. the expectation itself must be reasonable;
- c. the representation must be one which it was competent and lawful for the decision-maker to make; and
- d. there cannot be a legitimate expectation against clear provisions of the law or the *Constitution*.”



33. Applying these principles to the present case, it is notable that the ‘legitimate’ expectation claimed by the applicant does not qualify as legitimate expectation.
34. Standing order 47 of the *Nairobi City County Assembly Standing Orders* provides for the appointment of member of the County Assembly Service Board who is not a Member of the County Assembly. It states,

“ 47.

- (1) A vacancy in the position of County Assembly Service Board under section 12(3)(d) of the *County Governments Act, 2012* (Member of the board appointed from amongst members of the public), shall be filled by the Board in the manner prescribed under the *County Assembly Services Act, 2017*, with approval of the County Assembly.
- (2) Upon conclusion of recruitment process, a Member of the Board designated by the Board for that purpose shall, within seven days following the resolution of the Board, table the Interview Report in the Assembly, containing the name of the recommended candidate(s) and relevant supporting information.
- (3) The Assembly shall, within fourteen days following the laying of the Report, by a resolution, either approve or reject the name of a person recommended for appointment as a member of the Board.
- (4) Where the assembly approves a person recommended by the Board, the Secretary shall, within seven days after the approval, publish the name of the person in the Kenya or County Gazette and arrange for the member so appointed to take Oath of Office.”

35. From the annexure marked DMG – 3a b, the calendar of the Nairobi City County Assembly 2023 (Regular Sessions) by the applicant, the long recess for the second part started on Friday August 11, 2023 to Monday, September 11, 2023. The report dated August 10, 2023 was alleged to have been tabled on the floor of the house on August 10, 2023; and that the Assembly subsequently adjourned for long recess on the same day. On September 12, 2023 the Assembly resumed its sessions and considered the interview report, culminating in the approval of the names of the 1st and 2nd interested parties.
36. The applicant maintains that it was done outside the stipulated fourteen (14) days. The question that begs is whether the time the county assembly is on recess is counted, or the factored time is when the house is in session.
37. Standing order 1 of the *Nairobi City County Assembly Standing Orders* stipulates that,

“ In cases not provided for, the speaker to decide

1.

- (1) In all cases where matters are not expressly provided for by these Standing Orders or by other orders of the County Assembly, any procedural question shall be decided by the Speaker.



(2) The decisions made in paragraph (1) shall be based on the Constitution of Kenya, statute law and the usages, forms, precedents, customs, procedures and traditions of Parliament and of County Assemblies of Kenya and other jurisdictions to the extent that these are applicable to Kenya.”

38. For that reason, that issue/question is best decided by the speaker of the Nairobi County Assembly. In any case, I do not think that time ought to run when the county assembly is on recess, since its contemplated and reasonable that the county assembly conducts its business while in session.

39. Resultantly, I find that as the respondents have not been shown to have acted illegally, or in abuse of their powers, no grounds have been established for the orders of *certiorari* and prohibition sought by the applicant. In addition, the respondents cannot be restrained from undertaking their constitutional and statutory duties.

Order:

40. The applicant’s Notice of Motion dated September 19, 2023 is unmerited and the same is dismissed with no orders as to cost.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 28TH DAY OF NOVEMBER, 2023.

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JOHN CHIGITI (SC)

JUDGE

