



**Linturi v Leopard Rock Mico Limited & 5 others; Controller of Budget & 2 others (Interested Parties) (Constitutional Petition E012 of 2022) [2022] KEHC 12791 (KLR) (31 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12791 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CONSTITUTIONAL PETITION E012 OF 2022**

**EM MURIITHI, J**

**AUGUST 31, 2022**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 47, 48, 52, 73, 74, 75, 76, 77, 79, 80, 125, 165, 183, 201, 228, 229, 258, 259 & 260 OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF GROSS VIOLATION OF THE PUBLIC FINANCE MANAGEMENT ACT, 2012 AND IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CHAPTER SIX (LEADERSHIP & INTEGRITY) & MISUSE AND ABUSE OF OFFICE UNDER ARTICLES 35, 73, 74, 75, 76, 183, 201, 225, 227 AND 232 OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF THE COUNTY GOVERNMENT ACT AND IN THE MATTER OF ILLEGAL PAYMENT OF KSHS. 520 MILLION TO LEOPARD ROCK MICO LIMITED BY COUNTY GOVERNMENT OF MERU**

**BETWEEN**

**MITHIKA LINTURI [SUING OF HIS OWN BEHALF AND ON BEHALF OF RESIDENTS OF MERU COUNTY] ..... PETITIONER**

**AND**

**LEOPARD ROCK MICO LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**KIRAITU MURUNGI ..... 2<sup>ND</sup> RESPONDENT**

**TITUS NTUCHIU, DEPUTY GOVERNOR & CECM FINANCE MERU COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**CHIEF OFFICER FINANCE, MERU COUNTY ..... 4<sup>TH</sup> RESPONDENT**

**COUNTY SECRETARY, MERU COUNTY ..... 5<sup>TH</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MERU ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**CONTROLLER OF BUDGET ..... INTERESTED PARTY**

**AUDITOR GENERAL ..... INTERESTED PARTY**



## ETHICS AND ANTI-CORRUPTION COMMISSION ..... INTERESTED PARTY

### RULING

1. This is a ruling on oral application by counsel for the 1<sup>st</sup> respondent that the petition herein be transferred to Hon Lady Justice Cherere for hearing and determination.
2. It is submitted by the 1<sup>st</sup> respondent application that the order for transfer is necessary to avoid the prospect of two conflicting orders by different judges of the same court over the same matter. It is said that there is a “likely contradictory orders of two courts” of equal jurisdiction.
3. Mr Wanyama, counsel for the 1<sup>st</sup> respondent urged that Cherere, J had in a ruling of June 23, 22 allowed an application for *mandamus* in Meru J R no 3 of 2021 seeking to enforce a judgment of the court (Otieno, J) in Misc Application no 1 of 2020 where the latter adopted as a judgment of the court a arbitral award in favour of the 1<sup>st</sup> respondent. The decree in JR no 3 of 2021 is the subject of the petition herein, according to counsel for the 1<sup>st</sup> respondent. Counsel, therefore, concludes that “the court that has jurisdiction is Cherere, J for purposes of consistency and not to expose the court to ridicule by possibility of two decisions by two courts. The matter should be heard by the court that heard the matter sought to be reviewed, he urged.
4. For the 2<sup>nd</sup>-6<sup>th</sup> respondents, Mr Mbaabu submitted that the matters raised in the petition are of constitutional nature revolving around the integrity of the 2<sup>nd</sup>-5<sup>th</sup> respondents who were not parties to the previous judicial proceedings. Mr Maranya, the second counsel for the petitioners urged that the matter before this court is different from what was before the judicial review court (Cherere J) and only the subject matter was the same, but the prayers sought were different. Counsel made a curious submission that:-

“The application has been handled by Cherere, J. It is a reason for not sending it to that court as the bench has had previous interaction [with the matter] and it may have formed its opinion out of the interaction. The other new parties may not get justice for the indirect reason of the bench having interacted with matter. The majority in this petition was not before the court in application no 1 of 2020. The court has power to deal with the petition without necessarily referring it to another bench.

5. Mr K Mugambi, counsel for the petitioner, urged a difference between the two matters that:-

“We are saying that the issues [herein] are of public litigation and what his before the court [Cherere, J] are private interests of an individual.”

### Determination

6. Upon perusing the petition, herein it is clear that it is a challenge on decree of the court in Meru H Misc Application no 1 of 2020 where by order dated June 18, 2021 the court adopted the arbitrator’s award for payment of certain amount of money in aggregate award of kshs 337,070,485 together with interest and costs, by the respondent county government of Meru to the 1<sup>st</sup> respondent herein.
7. Seeking, among others, “an order of permanent injunction barring, restraining, stopping and or prohibiting the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents acting on behalf of the 6<sup>th</sup> respondent from processing payment for the benefit of the 1<sup>st</sup> respondent the sums of money”, the petition asserts that, and seeks a declaration in those terms, “that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents have failed to comply with and/



or breached the provisions of the Constitution, Public Finance Management Act, Integrity Act, Public Procurement and Disposal Act in evicting the 1<sup>st</sup> respondent from Leopard Rock Lodge, and this is gross violation of the law.”

8. There is, in the words of counsel for the 1<sup>st</sup> respondent, clear nexus between the previous proceedings and the present petition in that the petition challenges the decree arising from the arbitral award following the eviction of the 1<sup>st</sup> respondent by the county government, and seeking injunction against his payment of the arbitration award and order of the court in the previous proceeding and decree therefor extracted through judicial review proceedings for payment thereof.
9. The petition is clearly in the nature of a review of the judgment or orders of the court previously made. It is immaterial that officers and members of the county government of Meru which was the defendant in the arbitration and subsequent proceedings are now respondents in the petition. It is the same matter of eviction and compensation by damages paid by the county government.
10. The need to avoid the prospect of contradictory decisions of courts of the same jurisdiction over the same subject matter cannot be over-emphasized. It goes to the root of administration of justice, good order and confidence in the Judiciary.
11. Moreover, by analogy, the rule is for review by the same court (judge or magistrate) where the particular judge or magistrate who made a determination which is sought to be reviewed, if the said judge or magistrate is still available at the court station. See order 45 rule 2 (3) of the Civil Procedure Rules which provides as follows:-

“If the judge who passed the decree or made the order is still attached to the court but is pre-concluded by absence or other cause for a period of three 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.”
12. As Cherere, J is still available at Meru High Court, the petition herein which seeks to challenge and, therefore, review the orders made by the judge as to the payment of the decree following the judgment based on the arbitral award, should be heard by the judge.
13. To state that the judge has interacted with the matter before and, therefore, a fresh hearing before another court is necessary, as urged by Mr Maranya, is to mount an appeal from the decision of the judge before another court of equal status. This is not permissible. A party cannot validly obtain a different determination over a matter by a court of equal jurisdiction with the court that first heard the matter, except by way of review which must be heard by the different court only if the court that made the order is unavailable as provided under order 45 rule 2 of the Civil Procedure Rules.

#### **Orders**

14. Accordingly, for the reasons set out above the court directs that the petition be placed before Cherere, J for directions as to hearing on a date convenient to the judge.

**DATED AND DELIVERED THIS 31ST DAY OF AUGUST, 2022.**

**EDWARD M MURIITHI**

**JUDGE**

#### **APPEARANCES:**

Mr K Mugambi for the petitioner.



Mr Wanyama for 1st respondent.

Mr Mbaabu with Maranya, Ms Kinyanjui and Ms Gitonga the 2nd - 6th respondents.

