



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**JUDICIAL REVIEW CAUSE NO.6 OF 2018**

**IN THE MATTER OF THE LAW REFORM ACT (CAP 26) LAWS OF KENYA**

**AND**

**IN THE MATTER OF: ARTICLE 25 (C), 27(1), 40, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: THE COUNTY ASSEMBLIES SERVICES ACT, LAWS OF KENYA**

**AND**

**IN THE MATTER OF: SECTION 11 OF THE FAIR ADMINISTRATIVE ACTION ACT (NO.4 OF 2015), LAWS OF KENYA**

**AND**

**REPUBLIC.....CLAIMANT**

**VERSUS**

**THE HOMA BAY COUNTY ASSEMBLY SERVICES BOARD .....1<sup>ST</sup> RESPONDENT**

**THE SPEAKER, HOMA BAY COUNTY ASSEMBLY .....2<sup>ND</sup> RESPONDENT**

**BOB KEPHAS OTIENO ..... INTERESTED PARTY**

**EX-PARTE.....EVANS OMONDI OTIENO**

**RULING**

1. Under a certificate of urgency dated 2<sup>nd</sup> October 2018, the applicant, EVANS OMONDI OTIENO, moved this court vide a chamber summons also dated 2<sup>nd</sup> October 2018 for orders that leave be granted for an order of Prohibition to prohibit the first respondent (Homa Bay County Assembly services Board) and the second respondent (Speaker, Homa Bay County Assembly), their servants, agents, employees and/or any other person(s) acting pursuant or purporting to act on their instructions from interdicting, suspending, terminating the employment of the interested party or in any way acting in a manner prejudicial to the right of the interested party (Bob Kephass Otieno) and a further order of Certiorari to call to this court the decision of the first respondent contained in the letter to the interested party dated 4<sup>th</sup> September 2018 purporting to interdict the interested party and quash the said decision forthwith.

The applicant also sought for an order that the grant of leave to institute judicial review proceedings do operate as a stay of the purported interdiction of the interested party contained in the letter dated 4<sup>th</sup> September 2018 and any interference of the employment of the interested party as the clerk of the County Assembly of Homa Bay.

2. The application was made ex-parte and was based on the grounds on the face of the appropriate chamber summons as fortified by the verifying affidavit of the applicant dated 2<sup>nd</sup> October 2018, in which the applicant describes himself as a Homa Bay County Activist interested in good governance, protection of human rights and promotion of public interest and invoked the provisions of the Constitution, the Law Reform Act, the County Governments Act, the County Assemblies Services Act and the Fair Administrative Action Act in bringing this application which was summarily considered by this court and granted to the effect that the necessary leave be issued for institution of judicial review proceedings by the applicant against the respondents i.e prayers (b) and (c) of the chamber summons.

The prayer for the leave to operate as a stay of the impugned decision (i.e. prayer (d)) was held in abeyance to await an inter parties hearing of the same and a ruling of the court in respect thereof. This ruling is therefore in respect of that prayer after hearing all the parties on the basis of their rival submissions both written and oral presented by the learned counsel MR. OWUOR, duly instructed by ODIYA & ASSOCIATES ADVOCATES on behalf of the applicant and the interested party and MR. KOBE, duly instructed by B.A. AKANGO ADVOCATES, who took over from L.A. DHIKUSOKA ADVOCATE, on behalf of the first and second respondents.

3. Generally, the public service regulations provide that a public officer may be interdicted or suspended where disciplinary proceedings leading to his dismissal have been commenced against him by the appropriate public body. Such proceedings are administrative in nature and are never barred by pending criminal proceedings against a public officer. So that, an acquittal or discharge by a court of law on a criminal offence cannot supersede an administrative disciplinary process against a public officer such as the interested party herein.

In the case of JAMES MUGERA IGATI –VS- PUBLIC SERVICE COMMISSION OF KENYA (2014) E KLR, the claim rested on the question whether the respondent was bound by the outcome of the criminal proceedings in a criminal case against the applicant. The High Court observed that a criminal case is a public process where prosecution is carried out by the state for the purposes of securing the safety of the general population and a maintenance of a stable social order.

The court held that an employer (read first respondent) may nonetheless opt to expressly make its disciplinary decision dependent on the outcome of police investigations or on a court decision in a criminal trial. In such a case, such as where the employer advises the employee that he is suspended pending the outcome of the police investigations or decision of the criminal court, then it may be taken that the employer has forfeited the right to steer the disciplinary process and subordinated the managerial pre-rogative in disciplining the employee, to third parties.

4. In this case, the impugned letter of interdiction dated 4<sup>th</sup> September 2018, directed at the interested party clearly suggested that he was interdicted pending the finalization of the criminal case facing him in the Anti-corruption and Economic Crimes Court. The interdiction was as a result of his arraignment in the criminal court for an offence of corruption contrary to Section 47A (3) read with Section 48 of the Anti-Corruption and Economic Crimes Act and not as a result of an administrative disciplinary process initiated against him by his employer (first respondent).

The employer thus surrendered its administrative power to discipline the interested party to third parties i.e. the Directorate of Public Prosecution (DPP), the Anti-Corruption and Economic Crimes Commission and the Courts and could not therefore invoke the provisions of the County Assemblies Service Act to do so. But, if criminal proceedings have no bearing to an administrative disciplinary process which may be undertaken by a public organ, then the employer would have the liberty to commence applicable disciplinary action against an employee after the finalization of a criminal case whether the employee is found guilty or not guilty. In that event, it would be the business of the court, if properly moved, to ensure that administrative actions and decisions by a public body are taken in accordance with the law such that any aggrieved citizen who contests the legality of any administrative decision or indeed, any other decision impacting on his constitutional right must have access to the court to litigate the claim.

Access to justice is a right guaranteed by the Constitution by dint of Article 48.

5. This explains why the applicant felt aggrieved by the interested party's interdiction and hence moved the court for appropriate judicial review remedies against the respondents even though the impugned decision does not directly affect him. One may be tempted to dismiss him as a mere busy-body but cannot do so on the strength of Article 22 (1) (2) (c) of the Constitution which gives him the necessary "locus standi" or standing to institute these proceedings. Such standing would be diminished or doubtful in the absence of the aforementioned provision of the Constitution (see also, Article 258).

Indeed, the applicant is a public spirited individual inasmuch as he describes himself an activist interested in good governance and promotion of public interest. He was thus within his rights to raise an issue pertaining to violation of another person's right to fair administrative action or failure by a public organ to adhere to constitutional principles in the execution of its functions.

6. Basically, judicial review falls within the purview of public law and is more concerned with the process and not the merits of an impugned decision made by a public organ.

In this matter, the impugned decision was not made "per-se" by the respondents but on account of Section 62 (1) of the Anti-Corruption and Economic Crimes Act 2003. Thus, the impugned interdiction of the interested party was not as a result of a strictly administrative disciplinary action taken by the respondents against the interested party. It was as a result of the existence of a criminal case pending against the interested party and arising from his duties as a clerk of the County Assembly of Homa Bay.

Suffice to say that the respondents have not on their own motion made a complaint against the interested party so as to require them to institute a disciplinary process against him as provided by relevant statute i.e. the County Assemblies Services act, 2017.

Whether or not the present action is pre-mature on that account is a matter for consideration at the hearing of the substantive motion filed herein vide a notice of motion dated 12<sup>th</sup> November 2018.

7. The applicant was granted leave by this court to commence these judicial review proceedings against the respondents with the interested party being included as a party. However, given that the impugned decision was essentially a result of criminal proceedings instituted against the interested party by other public organs such as the Director of Public Prosecutions and the Anti-corruption Commission, it was imperative that these bodies be included also as interested parties in these proceedings. In that regard, this court deems it necessary that they be enjoined as interested parties in the main motion as any positive decision coming from the court in respect thereof would invariably affect the pending criminal case against the interested party and those who instituted it. It is therefore hereby ordered that the Ethics and Anti-

Corruption Commission and The Director of Public Prosecutions be included as the second and third interested parties respectively in the notice of motion dated 12<sup>th</sup> November 2018.

8. Be that as it may, what the applicant is seeking in the main motion are judicial review remedies of prohibition and certiorari. These are discretionary remedies and at the hearing of the main motion, the court has to consider whether they are the most efficacious in the circumstances of the case.

It is however, imperative and instructive to note that judicial review is subject to the provisions of Article 47 of the Constitution and those of the Fair Administrative Action Act, 2015.

In the case of Kenya National Examination Council –vs- Republic ex-parte Geoffrey Gathenji Njoroge & others NBI Civil Appeal No.266 of 1999, it was stated that an order of certiorari is meant to question a decision already made and will issue only if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with while an order of prohibition forbids the carrying of a function issued without jurisdiction or in excess of jurisdiction.

Such an order looks to the future and prohibits what is intended to happen before it is done but it cannot be issued to affect what has already been done.

9. At this juncture, the concern is prayer (d) of the applicant’s chamber summons dated 2<sup>nd</sup> October 2018. The basic issue arising therefrom is whether the leave already granted to the applicant ought to operate as stay of the interested party’s interdiction from his position of the clerk of the County Assembly of Homa Bay vide the letter of interdiction dated 4<sup>th</sup> September 2018. Accordingly, the issues for determination as framed by the applicant in his written submissions are firstly, whether this court has jurisdiction to intervene in this matter and secondly, whether interim orders should issue in the circumstances.

The first issue is most pertinent but dealing with it now would pre-empt the arguments which may otherwise be raised in respect thereof at the hearing of the main motion which forms the substratum of the applicant’s claim.

The second issue is most relevant for purposes of prayer (d) of the applicant’s chamber summons.

10. In that regard, the applicant contends that having established a prima facie case against the respondents, he is entitled to stay orders. To buttress this argument, he relied on the decisions in *Mirugi Kariuki –vs- Attorney General (1990-1994) EA 156*, *Pravin Galot –vs- The Chief Magistrate Court at Milimani, Judicial Review No.622 of 2017*, *Mrao Limited –vs- First American Bank of Kenya Limited (2003) e KLR* and *Suleman –vs- Amboseli Resort Limited (2004) e KLR*.

Apart from the cited judicial review case, the other cases mostly deal with the equitable remedy of injunction and circumstances under which temporary injunctive orders of stay may issue. These, do not apply in the present circumstances.

The recent High Court decision in the *Mohamed Swazori* case was also cited and relied upon by the applicant, but it cannot apply in this matter which is concerned with a public officer rather than a state officer i.e. a person holding a state office such as a commissioner of an independent commission.

Any person other than a state officer who holds a public office is a public officer (see Article 260 of the Constitution and Section 2 of the Public Officer Ethics Act).

Thus, all state officers are public officers but not all public officers are state officers.

11. The respondents’ contention was that the interested party was suspended in accordance with Section 62 (1) of the Anti- Corruption and Economic Crimes Act and as such, they did not infringe his rights. His suspension was thus a matter of law. In that regard, the respondents cited decisions of the High Court in *Moses Mutathia & Five others –vs- Jacob Muthoni Kireri & 4 others [1017] e KLR* and *Thuita Mwangi & 2 others –vs- Ethics & Anti-Corruption Commission & 3 others (2013) e KLR*.

In the opinion of this court, based on what has been stated hereinabove, the prayer for leave to operate as stay and indeed the entire judicial review proceedings may be pre-mature as no disciplinary process under the County Assemblies Act 2017, has been instituted against the interested party and if such is contemplated or even instituted at a later stage it would be independent of the criminal proceedings instituted by the Anti-Corruption Commission and the Directorate of Public Prosecution against the interested party.

In the circumstances, it would be inappropriate for the grant of leave to operate as stay of the interested party’s interdiction.

12. In any event, the decision whether or not to grant a stay pursuant to leave is an exercise of judicial discretion and that discretion ought to be exercised judiciously.

Order 53 Rule (1) (4) of the Civil Procedures Rules provides that:-

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”

The circumstances under which a court may order that leave do operate a stay of proceedings or of a decision and the factors to be taken into

account were laid down in the English decision in *REPUBLIC –VS- ASHWORTH SPECIAL HOSPITAL AUTHORITY* (2003) 1 WLR 127, where it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review and the purpose of a stay is to preserve the “status quo” pending the final determination of the claim for judicial review.

13. In this case, the action sought to be reviewed is essentially the interdiction of the interested party by dint of Section 62 (1) of the Anti-Corruption & Economic Crimes Act which provides that:-

“A Public Officer or State Officer who is charged with corruption or economic crime shall be suspended at half pay with effect from the date of the charge until the conclusion of the case.”

As clearly implied in the letter of interdiction dated 4<sup>th</sup> September 2018, the action was purely based on the pending criminal proceedings against the interested party and has since been implemented in keeping with the Anti-Corruption & Economic Crimes Act 2003.

Where an interdiction is on account of the operation of the law or is a matter of law, it would be inappropriate for a stay order to issue (see, *MOSES MUTEITHA & OTHERS –VS- JACOB MUTHON KIREIA & OTHERS* (supra).

It would also be inappropriate to grant a stay order where an impugned decision has already been implemented as there would be nothing remaining to be stayed (see, *GEORGE PHILIP WEKULO –VS- LAW SOCIETY OF KENYA* (2005) e KLR and *R. –VS- CAPITAL MARKETS AUTHORITY EX-PARTE JOSEPH MUMO KIVAI & ANOTHER* (2012) e KLR).

14. In the latter case (i.e. Joseph Mumo’s case), the element of public interest came into focus and it was held that judicial review proceedings are public law proceedings for vindication of private rights and for this reason public interest is a relevant consideration in the granting of stay orders.

In the Ashworth case (supra), it was held that where there is a public interest element involved, the court strikes a balance between the rights of an individual and the public interest, and in striking that balance, the court should usually refuse to grant a stay unless satisfied that there is a strong and not merely an arguable case that a tribunal’s decision was unlawful.

It cannot be gainsaid that the circumstances leading to the arraignment of the interested party for an offence under the Anti-Corruption and Economic Crimes Act have evoked great public interest which would militate against grant of stay orders with the effect of reversing the interdiction of the interested party and compromising or putting in an awkward position the criminal proceedings pending against him.

Such stay would be a mockery of the criminal justice process and an elevation of private interest above public interest.

15. For all the foregoing reasons and factors, prayer (d) of the chamber summons is hereby declined.

After all, interdiction in public service is merely a temporary removal of an officer from performing his normal duties while disciplinary proceedings for his dismissal or criminal charges are pending against him.

The impugned action against the interested party is an interdiction or suspension and not a dismissal from his employment.

**J.R. KARANJAH**

**JUDGE**

**[Dated and delivered this 23<sup>rd</sup> day of January, 2019]**