



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW APPLICATION NO. 19 OF 2016

IN THE MATTER OF THE COUNTY GOVERNMENT ACT LAWS OF KENYA

AND

IN THE MATTER OF THE COUNTY ASSEMBLY OF NAKURU

AND

IN THE MATTER OF SECTORIAL COMMITTEE OF THE COUNTY ASSEMBLY OF NAKURU

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE COUNTY ASSEMBLY OF NAKURU RESPONDENT

AND

SAMUEL WAITHUKU NJANE & 21 OTHERS EX PARTE APPLICANTS

AND

SPEAKER FOR THE NAKURU COUNTY ASSEMBLY 1ST INTERESTED PARTY

GEORGE MWAURA (MAJORITY LEADER) 2ND INTERESTED PARTY

RULING

By way of a Notice of Motion Application dated 15th July, 2016, the 22 Exparte Applicants sought inter alia the following orders

“(c) That this honourable court be pleased to grant the Ex parrte applicants leave to institute judicial review proceedings against the respondent for grant of orders of certiorari to bring to this court and quash the decision of the interested parties to change the composition of the Assembly without following due process and that such leave do operate as stay of reconstitution

of the committee.

(d) That the costs of this application be provided for”

A brief background of the matter is that the Ex parte applicants are all members of the Nakuru County Assembly where they also serve in various committees within the Assembly. The applicants allege that on 5th April, 2016 the Speaker of the Assembly established an ad hoc committee to investigate the recruitment processes by the County Government. The Ex parte applicants voted against the report prepared by this committee. Due to their failure to vote in favour of the report, the speaker subsequently threatened to remove the Ex parte applicants from the various committees in which they were serving and to take away the privileges that they enjoyed by virtue of being members of those committees. The Ex parte applicants then moved to the High Court seeking to challenge the decision of the Interested Party to reconstitute the committees in the Assembly.

However, before the Notice of Motion could be heard the Interested Parties filed the Amended Notice of Preliminary Objection dated 9th August, 2016 seeking to have the application of 15th July, 2016 struck out on the grounds (and here I quote directly)

“1. THAT the matter herein is fatally defective and in breach of the clearly laid down procedure because the prayers in the Notice of Motion should be in the statement of facts in terms of Order 53 Rule 1. That Rule requires the statement to contain the names of the Applicant, the relief sought and the grounds to be relied upon.

2. THAT Judicial Review application being ‘sui generis’ its procedures must be strictly followed and no other procedures can be imported thereto. As such only the statutory statement, verifying affidavit and the annextures lodged in the leave application was to be lodged together with the substantive motion.

3. THAT the applicant has to lodge with the court the decision which is sought to be quashed. After all there may be no decision as the contents may be different from what is alleged.

4. THAT the Application herein offends the provisions of Order 53 of the Civil Procedure Rules, 2010 as the application for leave should be via chamber summons as opposed to Notice of Motion as presented by the Applicant.

5. THAT the Republic should not have been named as an Applicant in this initial stage of the proceedings. At the stage of seeking leave, only the aggrieved party or parties should appear as Applicants. It is only after leave is granted that the actual judicial review proceedings should be instituted in the name of the Republic as the Applicant while the aggrieved party becomes the Ex Parte applicant.

6. THAT the matter herein seeks to interfere with mandate vested on the County Assembly whereas the doctrine of separation of powers enables the three traditional arms of government as well as independent commissions to function freely without any direction or control by any other person.

7. THAT the doctrine of separation of powers in relation to the legislative and the judiciary provides that the legislative and the judiciary should respect each other’s sphere of competence with the court respecting the legislative mandate of Parliament and Parliament the adjudication role of the courts. In the circumstances, the court may only interfere with legislative matters including the selection of members of committees through which the legislative agenda is carried out, where it is shown that the Assembly has acted, is acting or has threatened to act in contravention of the constitution which the Judiciary must defend in accordance with its delegated sovereign judicial mandate of the people of Kenya.

8. ***THAT certiorari is a discretionary remedy which a court may refuse to grant even when the requisite grounds for it exist.***

The court has to weight one thing against another to see whether or not the remedy is most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles”

This Preliminary Objection was argued orally before me in open court. The following were the main grounds for the objection

1. That the Notice of Motion application dated 15th July, 2016 is fatally defective
2. That the Application is fatally defective for want of proper authority to plead.
3. That the application is defective for failure to attach the decision sought to be quashed.

I will now proceed to consider and determine each ground individually

(a) IS THE APPLICATION DATED 15TH JULY 2016 FATALLY DEFECTIVE

MR. KARANJA Counsel for the Respondent and Interested Parties submitted that the application was fatally defective because it was brought by way of a Notice of Motion and not by way of a Chamber Summons in contravention of order 53 Rule (2) (1) of the Civil Procedure Rules. Order 53 Rules (1) (2) provides that

“An application for such leave as aforesaid shall be made Ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on”

Order 53 Rule (1) (2) further provides that the grounds upon which Judicial Review is to be founded must be included in the statutory statement.

It is clear therefore that an application for leave to commence judicial review proceedings should be made by way of a Chamber Summons and not through a Notice of Motion.

Similarly the inclusion of the ‘**Republic**’ as an applicant is also incorrect. The initial application seeking leave is made by the actual applicant and it is only once leave has been granted that the ‘**Republic**’ is enjoined at time of filing the substantive motion. Thus the objections raised by the respondent in this regard do have merit.

The question then is whether the above lapses in procedure serve to render the entire application fatally defective. Article 159(d) of the Constitution of Kenya provides

“(d) Justice shall be administered without undue regard to procedural technicalities”.

Courts have a duty to determine the underlying issues between the parties and ought not give undue regard to infractions of procedure. Rules of procedure are to be regarded as the hand maidens rather than the mistresses of justice.

In any event the interested parties will not suffer any prejudice as a result of these irregularities in the pleadings. The import of the application as well as the prayers being sought by the exparte applicant are clear. The same have been responded to by the interested parties. The irregularities noted are curable and therefore this limb of the objection is dismissed.

(b) AUTHORITY TO PLEAD

Counsel for the interested parties has argued that the proceedings make reference to 22 ex-parte applicants. The 1st ex parte applicant alleges that he has been granted authority to swear affidavits and file other documents on behalf of the other 21 ex parte applicants. However no written authority has been annexed by the 1st ex parte applicant, duly signed by the other 21 ex parte applicants as proof of their authority in this regard.

It was argued for the interested parties that judicial review matters are not representative suits and accordingly any party purporting to act on behalf of another must annex specific written and signed authority giving him that authority to act. Order 1 rule 13 of the civil Procedure Rules provides

“(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceedings

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case”
(own emphasis)

Although the 1st ex parte applicant claims to have authority to act for the others, he has not annexed an authority to act duly signed by the other 21 ex parte applicants. What has been annexed to the 1st ex parte applicants supporting affidavit is actually a complaint by the other 21 ex parte applicants who are members of the County Assembly to their parties being The National Alliance (TNA) Party

Munyao Sila J in **REPUBLIC Vs MUSANKA OLE RUNKES TARAKWA & 5 OTHERS EX-PARTE JOSEPH LESALOL LEKITION & OTHERS [2015]**

eKLR held that although the rule pertained to cases commenced by way of complaints hence the use of the terminologies plaintiff and defendant, the principle was applicable to other processes including matters of judicial review. The court held-

“Where there are more litigants than one, one of them may be authorized by others to appear, plead or act on their behalf. Such authority must be in writing and must be signed by the parties giving it and must be filed. That is the only way the court will know that the parties have given the one before court, the authority to act for them..... Authority in a case where there are several litigants is critical, for it is the only way that others can be bound by what one person files. It is not a matter to be taken casually. One cannot purport to bind others unless with their authority”.

The importance of exhibiting an authority to plead, where a party acts for other parties was stated in **JOHN KARIUKI & 347 OTHERS Vs JOHN MUNGAI NJOROGE & 8 OTHERS NAKURU HCCC No. 152 OF 2003 (unreported)** at page 9 as follows:

“The mischief that the said rule was meant to address, in my humble view, is to prevent a situation where a party may become bound by a court decision without his having any knowledge of the suit that led to the said decision. The court can envisage a scenario, where let’s say, after the dismissal of a suit, such a plaintiff whose name has been included declines to settle the costs on the pretext that he did not authorize the suit to be filed in his name. In my considered view, this requirement is mandatory. A party cannot be condemned or enjoy a benefit from a court process without his say so”.

The documents which the 1st ex parte applicant has annexed is actually a copy of a list of all the 22 aggrieved members bearing the heading **“members complaint to the part T.N.A”**. It merely refers to a complaint made to the T.N.A party and makes no reference at all to any court proceedings. More importantly the annexed document does not contain **express** authority granted by the 21 ex parte applicants to the 1st ex parte applicant to institute proceedings or to act for them in those proceedings. It is

certainly **not** an authority to appear, plead or act on behalf of the other 21 ex parte applicant.

Without such express authority to act there exists no concrete proof that the 21 intended to be enjoined in this present suit. The 1st ex parte applicant cannot purport to make any allegations on behalf of the other ex parte applicants and the other 21 ex parte applicants cannot therefore be bound by or benefit from any orders the court may make in these proceedings. In the circumstances any claim the 21 ex parte applicants may have had will not be considered by this court. The application can only proceed in respect of the 1st ex parte applicant.

(c) FAILURE TO ATTACH THE DECISION TO BE QUASHED

It was argued that the failure by the ex parte applicant to annex the decision being challenged was fatal as without it there was no evidence that such a decision actually existed. In order to grant leave a court must be satisfied that a prima facie case exists to do so. Without a copy of the impugned decision annexed to the application it would be impossible for this court to make such a determination. Counsel for the Interested Parties further submitted that if this court were in the circumstances to proceed to grant the leave sought it would be acting in vain as the ex parte applicant has sought leave to institute judicial review proceedings as against the respondents yet the decision they are challenging was actually made by the Interested Parties.

Order 53 Rule 7(1) of the Civil Procedure Rules provides

“In the case of an Application for an order of certiorari, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition, or record unless before the hearing of the motion he has lodged a copy thereof verified by affidavit or accounts for the satisfaction of the High Court”.

This provision of the Civil Procedure Rules requires that any party seeking an order of certiorari must annex to his application a copy of the order he seeks to challenge or if he does not must give the court a satisfactory reason for that failure. It has been severally held that this provision is mandatory and failure to comply with Order 53 Rule 7(1) renders the proceedings incompetent.

In the case of **SAMSON KIREREA M'RUCHU Vs MINISTER FOR LANDS & SETTLEMENT CA 21 OF 1999**, cited with approval in **MUSA KINGORI GAITA Vs KENYA WILDLIFE SERVICE [2006] eKLR** the Court of Appeal held-

“Compliance with the above provision is a precondition to seeking an order or certiorari. An applicant who fails to comply with the requirements of that provision disentitles himself to a hearing of his Motion under Order Rule 3 of the Civil Procedure Rules. It would appear to us that the failure to comply with Rule 7 (1) above, does not render the application incompetent ab initio but renders proceedings continued in violation thereof a nullity. We say so advisedly as a copy of the decision sought to be quashed may be lodged before the hearing of the Motion for an order of certiorari”.

In **REPUBLIC Vs RUIRU DISTRICT LAND DISPUTES TRIBUNAL & ANOTHER EX PARTE LUCIA WAITHIRA MUIRURI & ANOTHER [2014] eKLR** the court also held that failure to comply rendered the entire application incompetent since the court was not in a position to determine whether there in fact existed an order capable of being quashed.

However, the court in **ASHRAF SAVANI & ANOTHER Vs CHIEF MAGISTRATE'S COURT KIBERA & 4 OTHERS [2012] eKLR** interpreted the above rule to mean that failure to annex the decision being challenged together with the application for leave was not fatal as the same could be produced at a later stage before the hearing of the main motion or if the applicant gives the court a satisfactory reason for his failure. Githua, J states-

“In my understanding Order 53 Rule 7 of the Civil Procedure Rules does not provide that the

order sought to be quashed by Orders of Certiorari must be attached to the application seeking leave. It only provides that a copy of such an order must be lodged with the courts registrar verified by an affidavit before hearing of the motion in which validity of the order is being challenged.

From a reading of Order 53 Rule 7(1) of the Civil Procedure Rules, I find that though a party challenging validity of an order or decision seeking to have the same quashed by orders of certiorari may attach the impugned decision or order to the verifying affidavit sworn to verify facts in the statutory statement in the application for leave, a party who fails to do so at the leave stage may still do so at a later stage provided copy of the said order or decision verified by affidavit is lodged with the courts registrar before hearing of the Notice of Motion for Judicial Review or a satisfactory reason is given to the court regarding why this has not been done”.

The same reasoning was adopted by the court in **REPUBLIC Vs CHAIRMAN DISTRICT ALCOHOLIC DRINKS REGULATION COMMITTEE & 4 OTHERS EX-PARTE DETLEF HEIER & ANOTHER [2013]** where the court granted the applicants leave to file the judicial review proceedings even though the decision sought to be quashed had not been annexed. The court was of the view that the issue could not be properly determined then because the parties still had lee way to file the decision before the hearing of the main motion-

“However, that is an issue which can only be determined after the substantive motion has been heard. The issue cannot be raised as a preliminary point of law considering that under Order 53 Rule 4 (2) of the Civil Procedure Rules, the court may allow the Ex-parte Applicants to file further affidavits to deal with new matters arising out of the affidavits of any other party to the Application”.

Although failure to annex the decision of the interested party which is being challenged does not at this stage render the proceedings incurably defective as the default can be cured at a later stage, it must be remembered that a party seeking leave to file judicial review proceedings must show that there he has a prima facie case. Leave in judicial review, is not granted automatically as a matter of course. The court must satisfy itself on the material before it without going into depth, that there is an arguable case. It is intended to weed out early cases that are frivolous and vexatious.

In **REPUBLIC Vs LAND DISPUTE TRIBUNAL COURT CENTRAL DIVISION AND ANOTHER EX PARTE NZIOKA [2006] 1 EA 321, Nyamu J** (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralyzed for months because of pending court action which might turn out to be unmeritorious.

In **AGUTU WYCLIFFE NELLY Vs OFFICE OF THE REGISTRAR ACADEMIC AFFAIRS DEDAN KIMATHI UNIVERSITY OF TECHNOLOGY DeKUT [2016] eKLR** it was also held-

“The leave stage is used to identify and filter out at an early stage, claims which may be trivial or without merit. At the leave stage an applicant must show that he/she has ‘sufficient interest’ in the matter otherwise known as locus standi. In other words, the applicant must demonstrate that he/she is affected in some way by the decision being challenged. An applicant must also show that he/she has an arguable case and that the case has a reasonable chance of success. The application must be concerned with a public law matter, ie. The action must be based on some rule of public law. The decision complained of must have been taken by a public body that is a body established by statute or otherwise exercising a public function.

....Thus at the leave stage, the applicant has the burden of demonstration that the decision is illegal, unfair and irrational as discussed above. The applicant must persuade the court that the

application raises a serious issue. This is a low threshold. A serious issue is demonstrated if the judge believes that the applicant has raised an arguable issue that can only be resolved by a full hearing of the judicial review application. If the court is not persuaded as aforesaid, leave will be denied and the matter proceeds no further”.

The ex-parte applicant sought to challenge the decision of the interested party on the ground that the same was made without following due process. He has however not annexed a copy of this decision. The rationale behind Order 53 Rule 7 is to enable the court satisfy itself of the existence of the orders, their contents and whether the application was filed in time. This was ably captured by Wendoh, J in **WAWERU Vs DISTRICT VETERINARY OFFICE, MARAGUA & ANOTHER [2006] 1 KLR (E & L)** as follows

“A reading of the above provision indicates that it is mandatory to lodge the decision sought to be quashed. I believe the reason behind it is that the court should know whether the order does exist, its nature and contents and avoid acting in vain or giving an order that may end up being contradictory and an embarrassment to the court”.

The Court of Appeal **REPUBLIC Vs MWANGI S. KIMENYI EX-PARTE KENYA INSTITUTE FOR PUBLIC POLICY AND RESEARCH ANALYSIS (KIPPRA) [2013]** held as follows on the need for a court to ascertain itself of the existence of orders before granting an order of certiorari-

“The learned judge in his judgment was correct in stating that the court cannot act in vain against a non-existent decision. There was no decision or letter dated 24th August, 2005 that could be called and removed into the High Court to be quashed. This being so, the learned judge erred in quashing the alleged decision of 24th August, 2004 when the said decision is non-existent. Further, the learned judge erred in issuing orders to quash the letter of 16th December, 2004 when the court had not determined that the decision made on 3rd December, 2004 was in existence. A court of law should not descend into the realm of speculation. The decision to be quashed must first be ascertained and determined to be in existence. This is the rationale for calling and removing into court a decision to be quashed. We hold that the learned Judge erred and it was not appropriate to issue the judicial review orders in this matter”.

In order to establish a prima facie case the Ex parte applicant must show that the decision he is challenging was made in contravention of one of the grounds upon which judicial review orders of certiorari may issue, and must also show that the application has been made within six months from the date when the challenged decision was made.

The failure to annex the decision to be challenged in this case is fatal as it remains uncertain whether there actually exists a decision which can be called into court for purposes of quashing. The Ex parte applicant here is acting on the apprehension that the speaker of the Assembly will carry out her threat to remove the committee members for failing to vote in accordance with her wishes. It was alleged that the clerk of the Assembly was in the process of preparing minutes of the meeting when the decision to change membership of the committees was made. The decision to reconstitute the committees which forms the subject of these proceedings has not yet been made.

Additionally the author (or maker) of the decision being challenged remains unclear. The Exparte applicant has sought leave to institute judicial review proceedings as against the respondent being The County Assembly of Nakuru, yet he alleged that the decision against which the order of certiorari is being sought was actually made by the 1st and 2nd Interested Parties herein being the speaker and the majority leader. Further in the body of his application the Ex parte applicant argues that it was the 1st Interested Party who actually made the impugned decision and the role of the 2nd Interested Party was limited only to implementing that decision. What is clear is that this impugned decision was **not** made by the respondent.

Therefore if this court were to proceed to grant the orders of leave, it would be acting on the basis of

speculation and would be acting on facts which have not yet materialized. The courts orders would be in vain since the person against whom the leave is directed (the respondent herein) is **not** the actual decision maker.

I therefore find that the ex parte applicant has failed to show an arguable case to warrant leave to file the substantive motion seeking orders of certiorari to remove into this court for purposes of being quashed the decision of the Interested Parties to reconstitute committees of the County Assembly.

Based on the foregoing I am satisfied that the Interested Parties. Preliminary Objection has merit. The application dated 15th July, 2016 is hereby dismissed. Costs to be borne by the 1st Ex parte applicant.

Dated and Delivered in Nakuru this 28th day of March, 2017.

Maureen A. Odero

Judge