



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT SIAYA

ELC JUDICIAL REVIEW CASE NO. E004 OF 2021

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

AND

REPUBLIC.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF SIAYA.....1ST RESPONDENT

THE COUNTY SECRETARY, SIAYA COUNTY.....2ND RESPONDENT

THE CHIEF FINANCE OFFICER, SIAYA COUNTY.....3RD RESPONDENT

PETER HESBON ODHIAMBO OTIENO.....1ST EX PARTE APPLICANT

WILLIS OCHIENG ONYANGO.....2ND EX PARTE APPLICANT

PAUL ABUNDA OBONYO.....3RD EX PARTE APPLICANT

JOHN OWINO NDEGE.....4TH EX PARTE APPLICANT

JOHN WILSON MARAMBA.....5TH EX PARTE APPLICANT

RULING

Ex parte applicant’s case

1. Pursuant to the provisions of **Section 3** of the **Civil Procedure Act** and **Order 53 Rule 1 (1)(2) and (4)** of the **Civil Procedure Rules** the *ex parte* applicants have filed a chamber summons dated 5/11/2021 against the respondents seeking the following main verbatim relief:

a) Spent

b) This honourable court be pleased to grant leave to the applicants to apply for an order of mandamus directed at the 1st, 2nd and 3rd respondents compelling them to pay Kshs.2, 580,725/= being the decretal sum arising from Siaya Principal Magistrates ELC 148 of 2018.

2. The summons is supported by a statement of facts and a supporting affidavit both dated 5/11/2021 and annexures thereto. The summons is grounded on the main ground; the respondents have failed to settle the certificate of costs of Kshs. 2,580,000/= which was issued in favour of the *ex parte* applicants in **Siaya PM- ELC 148 of 2018**.

The applicant and respondent’s case

3. Despite service, the applicant and respondents have neither filed a response to the summons nor filed written submissions and in essence the summons is unopposed. However, this court is called upon to determine the motion on its own merits.

The ex parte applicant’s submissions

4. The *ex parte* applicants filed written submissions dated 10/11/2021. They reiterated the averments in their statement of facts and supporting affidavit and contended that efforts to secure the settlement of Kshs. 2,580,000/= have failed. They argued that their claim for mandamus is attainable against the 2nd and 3rd respondents on the grounds that they were respectively the head of public service and chief accounting officers of the 1st respondent. They placed reliance on the authority of **Kenya National Examinations Council vs Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No.266 of 1996 (CAK) 1997 eKLR** which described the essence of mandamus orders.

Analysis and determination

5. Having considered the application, statement of facts, supporting affidavit and annexures thereto, the only issue falling for determination is whether the *ex parte* applicants have established grounds for the court to grant the leave sought.

I will proceed to analyze the legal and jurisprudential framework on the issue.

6. **Article 47 of the Constitution and Section 13 (7) of the Environment and Land Court Act** clothes this court with jurisdiction to preside over judicial review cases. The procedure for moving the court in an application for judicial review is governed by **Order 53 of the Civil Procedure Rules**.

7. The intent of leave before filing a substantive notice of motion is to ensure frivolous and vexatious applications that are an abuse of the court are weeded out by the courts. This was the position held in the case of **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** as follows;

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly 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... It is an exercise of the court’s discretion but as always it has to be exercised judicially.”

8. Have the *ex parte* applicants established grounds for the court to grant the leave sought? The answer lies in establishing whether an *ex parte* applicant has established a prima facie case. This was settled by the Court of Appeal in the case of **Mirugi Kariuki Vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** where the court held:

“If he fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave”

9. Contrary to the provisions of **Order 53 (2) (b)**, the *ex-parte* applicant’s summons is supported by a supporting affidavit as opposed to a verifying affidavit. The court of appeal in the case of **Kisumu Civil Appeal No. 45 of 2000 Between Commissioner General, Kenya Revenue Authority through Republic & Silvano Onema Owaki T/A Marenga Filling Station** held thus on the purpose of a verifying affidavit in judicial review.

“We would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1 (2) of Order LIII”

10. This court has had a chance to look at the supporting affidavit and it contains evidence in support of the *ex parte* applicants’ case. Being guided by the provision of **Article 159(2)(d) of the Constitution**, it is the considered view of this court that the oversight is curable because the role of this court is to administer justice without undue regard to procedural technicalities.

11. This court has analyzed the pleadings filed by the *ex parte* applicants and it is the considered opinion of this court that they have an arguable case.

12. Ultimately, I make the following disposal orders;

- a) **The *ex parte* applicants’ summons is granted in terms of prayers (2).**
- b) **Costs of the summons shall be in the cause.**
- c) **The *ex parte* applicants shall file and serve the respondents with the substantive Notice of Motion and submissions thereon and shall also serve the respondents with a copy of this ruling and a mention notice within 21 days from today’s date.**
- d) **Upon being served with the said pleadings and documents, the respondents shall be at liberty to file their responses to the substantive Notice of Motion and submissions thereon within 21 days from the date of service by the *ex parte* applicants.**
- e) **This matter shall be mentioned for directions on 14/3/2022.**
- f) **An affidavit of service shall be filed 3 days prior to the mention date.**
- g) **Parties shall be at liberty to apply.**

13. It is so ordered.

Ruling delivered virtually

DATED, SIGNED AND DELIVERED THIS 27TH DAY OF JANUARY 2022

In the Presence of:

Mr. Onyango for the ex parte applicant

N/A for the respondent

Court assistant: Olivia Nyumba

HON. A.Y. KOROSS

JUDGE

27/1/2022