Kimaita v County Government of Meru & 2 others; Mitu & 5 others (Interested Parties) (Constitutional Petition E006 of 2023) [2025] KEHC 2016 (KLR) (13 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2016 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CONSTITUTIONAL PETITION E006 OF 2023

HM NYAGA, J

FEBRUARY 13, 2025

BETWEEN

EARNEST KIMAITA ..... PETITIONER

AND

COUNTY GOVERNMENT OF MERU ..... 1ST RESPONDENT

COUNTY SECRETARY, MERU COUNTY ..... 2ND RESPONDENT

MERU COUNTY PUBLIC SERVICE BOARD ..... 3RD RESPONDENT

AND

JULIUS KAINGA MITU ..... INTERESTED PARTY

JUSTUS KIAMBI ARITHI ..... INTERESTED PARTY

HELLEN NKIROTE MUGAMBI ..... INTERESTED PARTY

MARTIN MUTUMA KUBAI ..... INTERESTED PARTY

JULIUS GITONGA KABUI ..... INTERESTED PARTY

MBAABU M'INOTI ..... INTERESTED PARTY

RULING

1. In its judgment delivered on 16th May 2024, this court found that-

    i. The court finds no evidence to support the claim that nomination, appointment and approval of the 1st to 6th Interested parties as Chairperson and members of the 3rd Respondent was flawed and unprocedural

    ii. The court however finds that the composition of the 3rd Respondent violates the provisions of Article 27(8) and 175 (c)of *the constitution*.

iii. On the strength of orders issued by this court in *Kioga v Meru county Assembly Service Board and Another (Constitutional Petition E029 of 2022)* [2024] KEHC 3576 (KLR) (21 MARCH 2024) (Ruling) the 3rd Respondent has six(6) months from 1st March 2024 within which to ensure compliance with the two thirds gender rule enunciated under the provisions of Article 27(8) and 175(c)of *the Constitution*.

2. After the delivery of the Judgement, the court gave a mention date of 19th September 2024 for compliance. The court referred to its earlier decision in petition No. E029 of 2023 Kioga vs Meru County Assembly 2024 KEHC 2074 on the said date. The matter was mentioned before my brother Justice L. Kassan. The court made the following orders:-

> " To ensure the compliance of 2/3 gender rule and in accordance to the judgement of this court, the board is hereby dissolved and the governor is supposed to appoint selection committee which will appoint another board that will comply with *the constitution*."

3. Following the said Ruling, the 1st to 5th Interested parties moved the court vide an application dated 30th September 2024, which sought the following orders.

   a. Spent.

   b. That there be a stay of execution of the ruling of this Honourable Court delivered on 19th September 2024, pending the hearing and determination of this application.

   c. That the Ruling of this Honourable court delivered 19th September 2024 be vacated and set aside and the question of compliance with the courts Judgement delivered on 16th May 2024 do proceed for hearing and determination de novo in the presence of all the parties in the matter.

   d. That the costs of this application be provided for.

4. The application is propped by the grounds set out in its face and is supported by the affidavit of Jacob Ngwele Muvengei sworn on 30th September 2020.

5. In a nutshell, the applicant states that after judgement was delivered, the court set a date for compliance. That in the absence of advocates for the 3rd Respondent and the 1st to 5th Interested parties, the court delivered a ruling and determined that the 3rd Respondent had not complied with the Judgement and ordered it dissolved. It is further averred that the ruling was made pursuant to submissions by the Petitioner and the 1st and 2nd Respondents who misled the court that the 3rd Respondent had not complied when they had been served with an affidavit of compliance by the Advocate for the 1st and 5th Interested parties.

6. It is further averred that on the stated date, counsel for the 1st to 5th Interested parties was in court, but he experienced technical challenges causing him to log off and by the time he was readmitted, the matter had been called. That the court stayed the ruling in order to enable counsel for the 1st and 5th Respondent file a formal application.

7. The Applicants aver that the 3rd Respondent is properly constituted as it contains six members of which 4 are male and 2 are female and are as follows:-

   a. Julius Kainga Mitu – chairperson – male

   b. Justus Kiambi Arithi – Member – Male

   c. Hellen Nkirote Mugambi – Member – female

d. Martin Mutuma Kubai – Member – Male

e. Julius Gitonga Kabui – Member – Male

f. Virginia Kawira Miriti – Secretary – CEO- Female

8. It is further averred that on 28th December 2023, the 6 year term of Mr. Mbaabu M'intoi as a member of the Board came to an end and subsequently, the secretary to the Board requested the office of the Governor to make replacement in accordance with section 584 of the Act. That on 30th May 2024, the 3rd Respondent through the Chairman issued an advisory to the Governor on replacement of a member of the county public service Board and urged to expeditiously initiate the process filing the position and constitute a selection panel.

9. That having notified the Governor to fill up the vacancy with a woman, if filled the total number of women will rise from 2 to 3.

10. It is further averred that the 3rd Respondent and 1st to 5th Interested parties have discharged their duty and it is only the Governor as the pointing authority who can confirm compliance. It is further averred that the 1st to 5th Interested parties have a fixed contract and will be greatly prejudiced if denied the opportunity to be heard, since there is no provision in law for dissolution if a statutory body which have perpetual succession.

11. The petitioner filed a replying affidavit in response to the application.

12. In a nutshell, the Petitioner avers that this matter has been determined and it is erroneous for the applicant to seek dismissal of a spent petition.

13. It is averred that the alleged further affidavit by the Interested parties dated 16th September 2024 was served on advocates who were no longer representing him and was filed without leave of the court.

14. It is further averred that the application is an afterthought and is meant to derail the implementation of the Judgment delivered herein.

15. That the Application seeks to canvass issues that had been raised before, and therefore the issues are res judicata. That to date, the Interested parties and 3rd Respondent have not sought a review or appealed against the Judgement in question. That the Applicants have not shown any intent of complying with the Judgement.

16. It is further averred that when the court delivered its Judgement, it was well aware that the term of Mr Mbaabu M'inoti had lapsed and that Virginia Kawira Miriti was the Secretary to the Board and still found that the composition of the 3rd Respondent did not meet the gender rule as set out under Article 27 (8) and 175 (c) of *the Constitution*. That the Secretary CEO of the Board does not take a vote in the deliberation of the Board.

17. It is further argued that the appointment of a 5th member is not the only way to meet the constitutional threshold, since such threshold could still be achieved with a minimum of 3 board members and a chair person. That the passage of time is not a cure to an irregularity or illegality as alleged by the Applicants.

Applicants submissions.

18. It is submitted that the issues for determination are as follows-

a. What are the nature and Principles guiding courts on the grant of orders for setting aside ex parte orders and/or varying ex parte rulings /orders.

b. Whether the present application have satisfied the applicable principles for grant of orders for setting aside ex parte orders and/or varying ex parte rulings/orders.

19. Advocate cited the provisions of Article 159 of *the Constitution* and order 10 Rule 11 order 51 rule 15 and order 12 rule 7 of the civil Procedure Rule.

20. It is argued that the law provides for instances when the court can go back and set aside the Judgement, order, decree and/or ruling made in the absence of parties. That Article 50 (1) of *the Constitution* given every person has a right to a fair trial.

21. Counsel cited the decision in David Kiptanus Yego and 134 others vs Benjamin Reno and 3 others where the court held that:-

> Courts have the discretionary power to set aside ex parte judgment with the main aim being that justice should prevail. The Courts are not required to consider the merits of a defence in an application of this nature, although the applicant has a defence to the counter-claim which it should be allowed to be heard on merit.

22. Therefore, courts ought to look at the draft defence to the plaint and accompanying witness statements before proceeding to give its ruling as to whether the applicant's defence raises triable issues. In Patel -v- E.A. Handling Services Ltd (1974) EZ 75 and Tree Shade Motor Ltd -v- D.T. Dobie Co. Ltd *CA 38 of 1998* and Mania -v-Muriuki (1984) KLR 407 the courts held that the discretion of the court should be exercised to avoid injustice or hardship resulting from accident, inadvertence and excusable mistake or error. The general principle is that an applicant should not suffer due to a mistake of its Counsel. This was the position in Lee G. Muthoga -v- Habib Zurich Finance (K) Ltd & Another, Civil Application No. Nair 236 of 2009 where it was held that:

> "it is widely accepted principle of law that a litigant should not suffer because of his Advocate's oversight."

23. Also cited was Phillip Kiptoo Chemwala and Mumias Sugar Company Ltd vs Augstine Kubede (1982-1988) KAR 1055 where the court of Appeal held that;

> "The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties. Kimani -v- MC Conmell (1966) EA 545 where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied that there is a triable issue."

24. On the principles to be applied in determining whether a ruling sought to set aside on regular or irregular, the advocate for the applicants relied on the case of Yooshin Engineering Corporation vs Aia Architects Ltd 2023 KECA 872 KLR where it was held that-

> What comes out clearly is that where the judgement is irregular in the sense that service was not effected, or that the judgement was improperly or prematurely entered, then such a judgement is irregular and must be set aside as a matter of right. It does not matter whether the defendant has a defence or not. The defendant only needs to satisfy the court that the judgement was irregular and that is the end of the matter. The issue of imposing conditions does not arise. 27.However, even where the judgement is regular, the court still retains the wide discretion to set the same aside though if the Court decides to set aside the judgement, depending on the circumstances, it may do so on 9 Earnest Kimaita -vs- County

> Government of Meru & Others conditions that are just. That discretion, being wide, the main concern is for the court to do justice to the parties, and in so doing the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. It has however to ask itself under what conditions, if any, it ought to set aside the judgement and such conditions, if appropriate, must be just to both the Plaintiff and the Defendant.

25. It is submitted that the impugned ruling was irregular in that the matter was coming for confirming compliance with the Judgment and the court was not being called upon to make a finding and disband the 3rd Respondent and in any case the applicants having participated in the proceedings, there was no need for the petitioner, the 1st and 2nd Respondents to proceed with the matter in their absence.

26. The Applicants further submit that the issues raised are a question of facts which are not controverted. That the applicant has explained the technical challenges experienced by their advocate and the same was not deliberate but due to inadvertence and honest mistake.

27. It is further argued that the application was filed without undue delay.

28. In addition to the authorities cited above, counsel also cited the following cases.

    a. Caroline Mwirigi vs African Wildlife Foundation [2021]Eklr

    b. Wachira Karani vs Bildad Wachira [2016] Eklr.

29. The applicant avers that it is only fair and just that the Application be allowed. The impugned ruling be set aside and that they be given a chance to be heard.

The Petitioner's Submissions

30. The Petitioner submitted that the application does not meet the threshold for granting the orders sought for granting the orders sought for the following reasons:-

    a. The grounds advanced by the Applicants in arguing that the Board was gender compliant were advanced prior to the delivery of the Judgement herein.

    b. Arguments against the entire petition are moot in view of the Judgement herein.

    c. No fault can be imputed on the Governor in regard to the composition of the Board as the Board may be constituted by a minimum of 3 members and a chair person.

    d. That the Board and constituted is unconstitutional as determined by the court.

31. It is further deponed that the Affidavit in support of the application is defective as it runs afoul of Rule 8 of the Advocates (Practice) Rules. Cited to support this position was Barrack Afule Otieno vs Instrarect Limited[2015] eKLR. Also cited were the decisions in-

    a. Regina Waithera Mwangi Gitau vs Bonface Nthenge [2015] eKLR.

    b. Magnolia Put Ltd vs Synamed Phamaceutical st, Ltd [2018] eKLR.

32. In regard to the application itself, the petitioner submits that it is in essence an application for review and as such it does not meet the threshold for such an application. That the same grounds adduced now are the same ones adduced during the hearing of the petition itself. As such, there is no apparent

error or mistake. Counsel cited the case of Grace Akinyi vs Gladys Obiri and Another [2018) eKLR where it was held as follows-

> " A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evidence and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceeds on an incorrect expansion of the law."

33. On the absence of the Advocate in court and the date in question it is submitted that this is neither here nor there as no evidence was adduced to show there was compliance with the Judgement herein.

Analysis and determination

34. After considering the application, the supporting affidavits, the replying affidavit and the submissions by the parties, I am of the view that the sole issue for determination whether there is sufficient ground presented to warrant the setting aside of the orders of the court issued on 19th September 2024 before Justice L. Kassan.

35. Once that question is answered the court will then give other directions.

36. As to the competence of the affidavit n support of the applicants, I am of the view that the explanation on the absence of the advocate can only be done by the advocate himself. Thus the affidavit, in so far as the explanation is concerned is competent.

37. The powers of the court to set aside an order made "ex-parte" are well known.

38. A distinction is drawn between a regular and irregularly obtained order. If on one hand an order obtained irregularly it is to be set aside ex debito justicae.

39. If on the other hand, the order was regular, then the court has the discretion to set it aside. It is well settled that such discretion is to be exercised judiciously to avoid hardship prejudice where there is honest mistake or inadvertence, and not to aid a party who had deliberately set out to subvert the course of justice. This was affirmed in the celebrated case of Shah vs Mbogo (1967) EA 116 where it was held that;

> " This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

40. From the court record, the date of 19th September 2024 was given immediately after the Judgement was delivered in the presence of all the parties. As such all the parties were aware of the same. Therefore, it cannot said be that the proceedings of 19th September 2024 were irregular. The absence of the party who had notice of the date does not make such proceedings irregular.

41. Having found that the proceedings were not irregular then the court has to examine the matter and determine whether to exercise its discretion in favour of the applicants or not.

42. The question would be to establish if sufficient cause has been shown to warrant the orders sought. As to what amounts to sufficient cause, the court has to look at every case on its own merits. In Wachira vs Karani vs Bildad Wachira (supra), the court described sufficient cause as follows;

> "Sufficient cause" is an expression which has been used in large number of statures. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously."

43. The terms of the judgment are not in dispute. The court found that the Board as constituted, failed to meet the constitutional threshold on gender representation. The 3rd Respondent was given 6 months to comply with the law with effect from 1st March 2024.

44. When the matter came up for directions, the court was informed that there has been no compliance with the Judgment. The court then ordered that the 3rd Respondent be dissolved and ordered the Governor to appoint a selection committee which would appoint another board that was compliant with the constitutional demands.

45. There is really no dispute that the Judgement of the court delivered on 16th May 2024 was to the effect that the 3rd Respondents had 6 months, from 1st March 2024 to ensure compliance within the provisions of articles 27(8) and 175(c) of *the constitution*. The court then gave a date for directions.

46. Thus, the 3rd respondent had until the end of August 2024 to comply with *the Constitution*.

47. On 19/9/2024, when the matter came up for mention before Justice Kassan, Mr. Kaumbi is on record to have appeared for the 1st, 2nd and 3rd respondent. Mr. Wambua appeared for the Petitioner. After hearing the Parties, the court made the orders that are the subject of the present application.

48. Advocate for the Applicant has sought reliance on his absence from the proceedings for that day, counsel has explained that his call dropped and once he was back on the virtual platform he promptly addressed the court. He explained that he was struggling to upload an affidavit of compliance but he had a hard copy of the same.

49. If I get the applicant correctly, they state that the orders in question were issued without them being given a chance to be heard.

50. I have carefully looked at the terms of the Judgement of the court. The orders that were issued were directed at the 3rd Respondent. What it was required to show was that it had complied with the judgement and the Constitutional provisions.

51. Counsel for the Applicant has fronted an affidavit of compliance which in his argument, shows that the Board was duly constituted. The Applicants have also referred to the exit of one member of the Board a Mr. Mbaabu M'Inoti.

52. In my view, the material presented to the court now was the same as that presented before the court when it rendered its judgment.

53. Whereas there is the actual position that counsel for the Applicants was not present, I do not think that the physical presence of the advocate would have altered the terms of Judgement. The fact was and is apparent that to date, the Judgement has not been complied with. The situation that existed at the time of the judgement is the same one as at present.

54. In my view, the applicant's application is largely an attempt to regurgitate issues that were argued and a judgement delivered. This court cannot be called upon to revisit the same issues again. I am barred from doing so by this doctrine of res-judicata.

55. Looking at the application one gets the feeling that the Applicants are actually dissatisfied with the Judgment and the subsequent ruling of the court ordering the dissolution of the Board. They argue that the court was not called upon to give such a determination. This to me, is a ground for Appeal. I cannot sit to examine the propriety of a Judgement or Ruling of a court presided over by a judge of concurrent jurisdiction.

56. There is a danger of trying to revisit issues that were deliberated upon in the petition itself, as the Applicants want the court to do. This court will be deemed as if it interrogating the propriety of the judgment and the subsequent orders, for which it has no jurisdiction.

57. The question is, can this court be asked to look at the same documents and come up with a different direction? The simple answer is no.

58. Whereas this court has discretion to set aside an order made ex-parte, the order herein was based on a decision made in the presence of all the parties. There has been no appeal against that Judgment. If there was no compliance with the Judgment then the Board was and is still non-compliant with *the constitution*. Even if the orders of 19th September 2024 are to be set aside, the fact remains that there is a finding that the Board as constituted is non-compliant. That finding of fact has not changed. Reference to the CEO/Secretary to the Board are a member thereof was a matter considered by the court and it cannot be a point to be revisited by the court.

59. The tone of the application in my view is seeking a review of the orders of the court issued on 16th may 2024. The parameters for review are well known. They are based on an error apparent on the face of the record, discovery of a new and important matter not within the knowledge of the applicant, or for any other good reason. However, there is no such application before this court.

60. With all the due respect if the Applicants felt that the court erred in placing the burden on compliance on the 3rd Respondent and who is said to have no power to make appointments, that is a ground for appeal and not for argument in this application. The same argument can be made in respect of the place of Virginia Kawira Miriti, whose issues was also considered by the court in its judgment.

61. It is also noted that the Judgment herein also referred to another case, Kioga vs Meru county Assembly service Board 2024 KEHC 3576 [KLR] which had found the board not to have met the constitutional threshold. It hinged the period for compliance on that case.

62. In my opinion allowing the applicants to argue the issues raised now will be tantamount to sitting on appeal over my fellow Judge. The issues are res-judicata. What the 3rd Respondent ought to have done if it felt that the court had erred was to appeal. Raising that issue now will not assist its cause.

63. As I stated the 3rd Respondent was supposed to have complied with the gender representation in 6 months effective from 1st march 2024. At present, there is no change in the composition of the board as of the time of the Judgement. That was the same position as at 19th September 2024.

64. That being the case, I find that allowing the 3rd Respondents and Interested parties to make the representation set out in their affidavit is to re-open the argument herein and not to show compliance.

65. That said, I am of the view that even if the ruling is set aside, the facts remain the same. It would thus be an exercise in futility to merely hear the advocate when the reality is that there has been no compliance and no appeal against the Judgement.

66. As matters stand the Ruling of 19th September 2024 by Justice L. Kassan was made with full knowledge of the facts and the judgment herein and I cannot now attempt to set the orders aside.

67. In conclusion, if I find that the application lacks merit and it is hereby dismissed with costs to the petitioner.

68. There being no evidence of compliance, the orders of the court issued on 16th May 2024 , have the effect that the composition of the 3rd Respondent violates the provisions of Articles 27(8) and 175(c) of *the Constitution*, have taken effect. The said orders are to be read along those referred to by the court in Kionga vs Meru County Assembly Service Board and Another (2024) KEHC 3576 (KLR).

H. M. NYAGA

JUDGE

SIGNED, DATED AND DELIVERED AT MERU THIS 13TH DAY OF FEBRUARY, 2025.

H. M. NYAGA

JUDGE