



**Republic v Director of Pensions, the Pensions Department, the National Treasury  
of the Republic of Kenya; Gewa & another (Exparte); Ouma (Interested Party)  
(Judicial Review E040 of 2023) [2024] KEHC 7652 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7652 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
JUDICIAL REVIEW E040 OF 2023  
RE ABURILI, J  
JUNE 20, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE DIRECTOR OF PENSIONS, THE PENSIONS DEPARTMENT, THE  
NATIONAL TREASURY OF THE REPUBLIC OF KENYA ..... RESPONDENT**

**AND**

**CAROLINE AKINYI GEWA ..... EXPARTE**

**CHRISTINE NANCY AKOTH GEWA ..... EXPARTE**

**AND**

**MERCY ATIENO OUMA ..... INTERESTED PARTY**

**JUDGMENT**

1. The ex parte applicants herein are Christine Nancy Akoth Gewa and Carolyne Akinyi Gewa. They filed the notice of motion application dated 17<sup>th</sup> October 2023 with leave of this court. The application is brought pursuant to Articles 23 (3) (f) and 47 (1), (2) & (3) of *the Constitution*, Sections 8 & 9 of the *Law Reform Act*, Section 3A of the *Civil Procedure Act* and Order 53 Rule 1 & 2 of the Civil Procedure Rules seeking orders that:
  - i. Prohibition restraining the respondent whether by himself, his agents or persons acting on his behalf and/or by his instruction or acquiescence from remitting, disbursing and/or releasing to Mercy Atieno Ouma or to any other person claiming to be the wife or child of the late Kevin Omondi Gewa a dependants pension and/or any other benefits due to a wife/widow or child



pursuant to the Pensions Act Cap 189, the Widows and Children's Pensions Act cap 195 and any other statute, law or policy relevant to the respondent's mandate.

- ii. Spent
  - iii. That this Honourable Court be pleased to grant such other or further reliefs as it may deem fit in the circumstance.
  - iv. That the costs of and incidental this application be provided for.
2. The Notice of Motion is supported by the grounds therein as well as the facts and grounds contained in the verifying affidavit of Christine Nancy Akoth Gewa sworn on the 29<sup>th</sup> September 2023.
  3. It was the *ex parte* applicants' case that they obtained grant of letters of administration over the estate of their deceased brother, Kevin Omondi Gewa, who passed away on the 18<sup>th</sup> April 2020 and which grant was confirmed on the 7<sup>th</sup> February 2021 as the deceased, their brother, who hailed from West Kadinga sub-location, South West Seme Location, Kombewa Division, Seme sub-county within Kisumu County died single having never been married formally or by cohabitation nor did he have any children.
  4. It was the applicants' case that the interested party purported to be the deceased's wife on the basis that her name was marked in a Teacher's Service Commission form as next of kin and further that the interested party had not furnished any relevant proof of her marriage to the deceased.
  5. The applicants further averred that the interested party did not attend the deceased's funeral nor has she ever intimated to any family member or the deceased's friends her purported relationship with the deceased. They further averred that during the entire process of succession, the interested party did not raise any objections to the proceedings.
  6. It was their assertion that on the 3rd September 2021, the Chief of South West Seme Location, Kombewa Division, Seme sub-county wrote to the Secretary of the Teachers Service Commission (TSC) stating that the deceased was a resident of his jurisdiction prior to his death and that he was at all times single and without a child. The applicants averred that the chief filled form GP215 of the Widow's and Children's Pension Scheme addressed to the Pensions Department of the Treasury.
  7. The applicants averred that they had received correspondence from the respondent in which they have remitted Kshs. 2,439,328.50 to the Public Trustee as death gratuity due to the deceased's estate and had included the interested party as a beneficiary of the deceased's estate and as such, the respondent could soon unlawfully and forcefully disburse the dependant's/widow benefits under the Pensions Act and Widows and Children's Pensions Act to the interested party, a stranger to the estate.
  8. The applicants averred that they were aware that the interested party had not furnished the respondent with a marriage certificate, affidavit or any other evidence verifying her marriage with the deceased yet the respondent was proceeding with processing and disbursement of the pension as the respondent had already "made a decision."
  9. It was the applicants' case that if the respondent proceeded with the disbursement of the pension to the interested party, it would be acting *ultra vires* and would compromise a manifest unreasonableness.
  10. The Respondent filed grounds of opposition dated 18<sup>th</sup> December, 2023 contending that the respondent's mandate, duties and powers are anchored under Cap 186, the Pensions Act and that it carries out its mandate upon verification of information by relevant entity or authority as is in this case; that the orders sought touch on marital status of parties cannot issue under judicial review proceedings; that the Notice of motion touches on a party who is not made a party hence the application is bad in



law for non-joinder and misjoinder of parties; that determination of issues of who is a widow or wife is a matter falling within family law and not Judicial review purview nor a mandate of the respondent; that there is no actual demonstration of any ultra vires actions, abuse of or unreasonableness cause. The respondent urged this court to dismiss the application.

11. The Interested party filed a replying affidavit sworn on 19<sup>th</sup> December, 2023 and supplementary affidavit sworn on 22<sup>nd</sup> February, 2024 in which she deposed that she is the widow of the deceased who worked with the Teachers Service Commission rising from a secondary school teacher to Deputy principal and that the deceased named her in his next of kin details with the employer as his next of kin and dependant. That the exparte applicants herein knowing very well that the deceased was married to her, upon his demise, they secretly petitioned for grant which they obtained by concealment of material facts vide Kisumu CM Succession Cause No. 217 of 2020 and that she had since challenged the said grant and stayed its confirmation on 3/10/2023. Further, that the deceased's pension is not subject to distribution as the deceased had nominated her as the beneficiary of the said pension hence the money was payable to her directly and that therefore prayer No. 2 of the Notice of motion cannot be granted as this court has no jurisdiction to grant the same.
12. The parties canvassed the application by way of written submissions.

### **Applicants' Submissions**

13. The applicants submitted that should the respondent purport to remit pension and/or benefits pursuant to the provisions of Sections 17 and 19 of the *Pensions Act* and Section 5 of the Widows and Children's *Pensions Act*, the respondent would be acting ultra vires and in abuse of his powers especially considering that the interested party has failed to establish that she is a widow of the deceased. Reliance was placed on the case of *Okiya Omtatah & 3 Others v Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 6 Others* [2021] eKLR where the court addressed itself to what amounts to acting ultra vires.
14. It was submitted further that the respondent's actions in processing the interested party's application for pension amount to administrative action which trigger this court's judicial review mandate.
15. The applicants further submitted that the actions of the respondent in ignoring the facts and explanations brought forth against the interested party amounted to manifest unreasonableness. Reliance was placed in the case of *Republic v Public Procurement Administrative Review Board & 2 Others Ex-Parte Pelt Security Services Limited* [2018] eKLR where Mativo J noted inter alia that many errors of law and fact involve ignoring relevant matters or taking in to account or irrelevant ones, ignoring relevant considerations or taking account of irrelevant ones may make a decision or rule unreasonable.

### **The Interested Party's Submissions**

16. It was submitted that the respondent had not made any decision as to who should be the rightful beneficiaries of the pension and the respondent had also not paid out any pension to the interested party and as such, the instant application was pre-empting the respondent's decision with regard to the subject pension.
17. Reliance was placed on the case of *Zachariah Wagunza & Another v Office of the Registrar Academic, Kenyatta University & 2 Other* [2013] eKLR where the court held inter alia that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made.



18. The interested party further relied on the case of *SDV Transami Kenya Limited & 19 Others v Attorney General & 2 Others* [2016] eKLR where the court held inter alia that there is a public law duty of court not to interfere with the constitutional functioning of public bodies. It was thus submitted that the applicants have not demonstrated that the respondent has breached any law or that any decision making process has been violated by the respondent or that the respondent has acted outside his powers or that the respondent has reached any decision that is unlawful or un-procedurally reached.
19. The interested party submitted that it was immaterial that the applicants have obtained grant of letters of administration in respect of the deceased's estate as was held in the case of *in Re-Estate of Faith Muita [deceased]* [2016] eKLR where the court held that funds the subject of a nomination do not form part of the nominator's estate and thus the funds cannot pass under the will of the deceased or vest in his personal representative.

### **Analysis & Determination**

20. I have carefully read and considered the pleadings filed by the parties herein as well as the affidavits and the submissions and the statutory as well as the judicial pronouncements relied on by the parties' counsel and find that the issue for determination is whether the Ex Parte Applicant is entitled to the Judicial Review Orders of prohibition sought.
21. The Applicant has sought for orders of prohibition to stop the respondent from including the interested party as a beneficiary to the deceased's pension. The interested party has filed a response asserting on oath that she is the deceased's widow and nominee as next of kin and defendant at the employer, Teachers Service Commission, that the applicant unlawfully obtained a grant from the lower court to administer his estate without involving her as the widow and that the pension is not subject of distribution. Further, that this court has no jurisdiction to deal with matters pension which is not subject of succession proceedings. The respondent had contended that matters of who is a widow and wives are not the type to be determined by way of judicial review but in the family court.
22. When the challenge is over an infringement arising from an administrative action, such a claim falls under the purview of judicial review as a right recognized under Article 47(1) of *the Constitution* and given effect by the *Fair Administrative Action Act*. This jurisdiction is also to be invoked under the Supervisory powers of this court under Article 165(6) and (7) of *the Constitution*.
23. It is important to restate the scope of judicial review and this can be found in the words of the Judges of the Court of appeal in *Kapa Oil Refineries v Kenya Revenue Authority* [2019] eKLR where the court stated that:

“Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the *Commissioner of Lands –versus Hotel Kunste* [1997] eKLR. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See *David Mugo t/a Manyatta Auctioneers –versus Republic – Civil Appeal No. 265 of 1997 (UR)*. JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. See *Zakayo Michubu Kibwange –versus Lydia Kagina Japheth and 2 others* [2014] eKLR. JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See *Zakayo Michubu Kibwange case (Supra)*. The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom



the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature. See Prabhulal Gulabuland Shah –versus Attorney General & Erastus Gathoni Mlano, Civil Appeal No. 24 of (1985) (UR). Following the promulgation of the Kenya Constitution, 2010, judicial review is available as a relief to a claim of violation of the rights and fundamental freedoms guaranteed in *the Constitution* of Kenya 2010. See Child Welfare Society of Kenya –versus- Republic and 2 others, *Exparte Child in Family Forces Kenya* [2017] eKLR.”

24. What Judicial Review Orders entail was elaborated in the case of *Kenya National Examination Council v Republic Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No.266 of 1996*, where the Court held that: -

“That now bring us to the question we started with, namely the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the council in this case. What does an Order of Prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules or natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury’s Law of England, 4<sup>th</sup> Edition vol.1 at Pg.37 paragraph 128.”

25. From the foregoing cases, the applicable law in cases of Judicial review have already been established and this Court will now consider the above applicable law and further consider the available facts to determine whether the Exparte Applicant is deserving of the orders sought.
26. Further to the above, Section 7 of the *Fair Administrative Action Act* provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with section 8; or a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Section 7 (2) of the act provides for grounds for applying for Judicial Review.
27. The applicants herein are seeking a prohibition against the respondent to bar them from including the interested party as a beneficiary of the deceased’s pension. It is clear that the alleged decision complained about has not been taken.
28. The applicants allege that they were informed by an official at the respondent’s office that they would proceed to include the interested party as a beneficiary to the deceased’s pension which whole process reeked of manifest unreasonableness.
29. There is disclosure that the exparte applicants and the interested party are litigating over the same matter before the succession Court where the applicants are administrators of the estate of their late brother while the interested party is the objector, claiming to be a widow of the deceased intestate and who laments that she was excluded from the succession proceedings.
30. In my humble view, the exparte applicants cannot leave the succession court and rush to this court to seek for judicial review orders of prohibition. There are avenues for ventilating disputes where a party is aggrieved by the decision of the lower court in succession proceedings.



31. An appeal would do and through an appeal, this court will be exercising appellate jurisdiction over decisions of the lower court. This court cannot simultaneously exercise both appellate and judicial review jurisdiction in the same matter. That would amount to abuse of court process.
32. Furthermore, the letter submitting the cheques to the Public Trustee has listed all the three parties hereto as next of kin and it is upon them to demonstrate before the succession court or on appeal that they are entitled to the said benefits of the deceased. Since the respondents are not holding the funds which the applicants herein are fighting over, it would be a waste of judicial time to prohibit the respondent from releasing the said funds.
33. Taking into account the material on record, it is my finding that this court cannot exercise its discretion to grant judicial review order of prohibition as sought as the administrative action complained of by the applicants has not been exercised and more so, the parties hereto, mainly, the exparte applicants and the interested party are still litigating over the same subject matter before the succession court.
34. In the circumstances, I find that the instant application lacks merit and I proceed to dismiss it.
35. I order that each party shall bear their own costs of this application and the application for leave.
36. This file is closed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 20<sup>TH</sup> DAY OF JUNE, 2024**

**R.E. ABURILI**

**JUDGE**

