



**Republic v County Secretary, Turkana County Government & 2 others; Ekai (Exparte Applicant)
(Judicial Review E003 of 2022) [2024] KEHC 10023 (KLR) (8 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10023 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
JUDICIAL REVIEW E003 OF 2022
RN NYAKUNDI, J
AUGUST 8, 2024**

**IN THE MATTER OF: EXECUTION OF A DECREE OF KES 422,616.04 ARISING FROM
THE JUDGEMENT AND DECREE ISSUED BY SENIOR PRINCIPAL MAGISTRATE’S
COURT AT LODWAR IN CASE IN LODWAR MCELRC NO. 1 OF 2021: STEPHEN LOKOLI
EKAI VERSUS THE DIRECTOR/CEO LODWAR COUNTY REFERRAL HOSPITAL**

BETWEEN

REPUBLIC APPLICANT

AND

**THE COUNTY SECRETARY, TURKANA COUNTY GOVERNMENT 1ST
RESPONDENT**

THE CHIEF OFFICER, FINANCE, TURKANA COUNTY 2ND RESPONDENT

TURKANA COUNTY GOVERNMENT 3RD RESPONDENT

AND

STEPHEN LOKOLI EKAI EXPARTE APPLICANT

***(IN THE MATTER OF: EXECUTION OF A DECREE OF KES 422,616.04 ARISING FROM
THE JUDGEMENT AND DECREE ISSUED BY SENIOR PRINCIPAL MAGISTRATE’S
COURT AT LODWAR IN CASE IN LODWAR MCELRC NO. 1 OF 2021: STEPHEN LOKOLI
EKAI VERSUS THE DIRECTOR/CEO LODWAR COUNTY REFERRAL HOSPITAL)***

RULING

1. This ruling determines the *ex parte* Applicants’ substantive notice of motion application dated 3rd November 2022, expressed to be brought under the provisions of Article 23, 47(1) & (2) and 48 of the Constitution of Kenya 2010, Section 2(4) of the Government Proceedings Act, Sections 22 and 29 of



the [Civil Procedure Act](#) and Order 53(1) and (3) of the [Civil Procedure Rules](#). The *ex parte* Applicant seeks for orders as follows:

- a. An order of Judicial Review in the nature of *Mandamus* to compel the Respondent to pay the *ex parte* Applicant the sum of Kshs 422,616.04 being the decretal amount together with the interest at the court rate of 14% per annum from the date of award until payment in full.
 - b. In default, notice to show cause do issue against the Respondents and its Principal officers particularly the 1st and 2nd Respondents to show cause why they should not be cited for contempt of Court and jailed until the Decretal sum is paid.
 - c. Costs of and incidental to this Application be borne by the Respondents.
2. The application is supported by the verifying Affidavit sworn by Stephen Lokoli Ekai and anchored on 6 substantive grounds enumerated as follows:
- a. By a decision dated and delivered on 5th July 2021, this Honourable Court entered Judgement against the Director/CEO Lodwar County Referral Hospital, an entity fully owned and managed by the 3rd Respondent for the sum of Kshs 422,616.04 inclusive of costs.
 - b. The Decree of the Court, a Certificate of Order against the Government was dully extracted and served upon the 3rd Respondent through the Respondents, and its County Attorney, Mr Erastus EtheKon. The Respondents are therefore aware of their contents. The Decree has not been vacated or set aside to date.
 - c. In blatant contempt, and direct defiance of the Decree and the Certificate of Order against the Government, the Respondents have refused to pay the *ex parte* Applicant the said decretal sum of Kshs 422,626.04
 - d. The *ex parte* Applicant has no execution remedy available to it and for this reason, the Respondents continue disobeying the Court Orders and Decree unless compelled to do so by this Honourable Court.
 - e. The *ex parte* Applicant has no execution remedy against the Respondents in respect of the decretal sum.
 - f. The Respondents' deliberate non-payment of the Decretal sum is a mockery of this Honourable Court's orders and an illegal and unjustifiable affront to the Applicant's constitutional right of access to justice, thus continues to cause the *ex parte* Applicant economic torture and prejudice.
3. This Application is unopposed.

Analysis and determination

4. I have read through the application, the affidavit in support, the parties' submissions and the response thereto. The only issue I find for determination is whether the substantive Notice of motion dated 3rd November has merit.
5. The law as spelt out under Order 53 of the [Civil Procedure Rules](#) provides for the procedure that parties must adhere to while seeking for judicial review orders of *Mandamus*, prohibition or certiorari. Order 53 Rule 1 specifically provides for parties to first seek leave of the court before filing applications for the said orders as follows:



- (1) No application for an order of *Mandamus*, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
 - (2) 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.
6. The applicable law on leave to commence judicial review proceedings is Order 53 Rule 1 of the [Civil Procedure Rules](#), which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The reason for the leave was explained by Waki J. (as he then was), in [Republic v 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. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court’s discretion but as always it has to be exercised judicially”.

7. It is also trite that in an application for leave, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant’s case is sufficiently meritorious to justify leave. In the present application, the Applicant has filed a chamber summons application seeking judicial review orders.
8. In [Uwe Meixner & another v Attorney General](#) [2005] eKLR, it was held that:

“The leave of court is a prerequisite to making a substantive application for Judicial Review with a view to filtering out frivolous applications and the grant or refusal involves an exercise of judicial discretion and the test to be applied is whether the applicant has an arguable case. Thus, the first step in the Judicial Review procedure involves the mandatory “leave stage.” At this stage an application for leave to bring Judicial Review proceedings must first be made. The leave stage as held by Waki J. (as he then was) is used to identify and filter out, at an early stage, claims which may be trivial or without merit.

9. The *ex parte* Applicant herein filed an Ex-parte chamber summons application dated 24th October, 2022 seeking leave to apply for the following orders;
- a. Spent
 - b. Leave be granted to the Applicant to apply for an order of *Mandamus* to compel the Respondents to pay the *ex parte* Applicant the sum of Kshs 422,616.04 being the decretal



amount together with interest at Court rate of 12% per annum for the date of award until payment in full

- c. Costs of and incidental to this Application be borne by the Respondents.
10. The court on 27th October 2022 granted leave to the *ex parte* Applicant as sought in his chamber summons application and ordered as follows:
- a. That the Application dated 24th October 2022 is certified urgent.
 - b. That leave is granted to the applicant to apply for an order of *Mandamus* to compel the Respondents to pay the *ex parte* Applicant the sum of Kshs 422,616.04 being the decretal amount together with interest at Court rate of 12% per annum for the date of award until payment in full
 - c. That costs to abide the outcome of the substantive Application for *Mandamus*.
11. It is a requirement under Order 53 of the [Civil Procedure Rules](#) that reliefs intended to be sought when seeking leave are the same ones to form the basis of the main reliefs in the substantive application. The *ex parte* Applicant herein was granted leave apply for an order of *Mandamus* to compel the Respondents to pay the *ex parte* Applicant the sum of Kshs 422,616.04 being the decretal amount together with interest at Court rate of 12% per annum for the date of award until payment in full. It is clear also that the *ex parte* applicant was asking for an order of *Mandamus* at the leave stage.
12. I am persuaded by the court in the case of [Republic v Secretary, BOM, Kakamega High School & another ex parte Boaz Vida](#) [2021] eKLR where the court stated as follows:
- “Is the court dwelling on a technicality of procedure? I do not think so. Where a party comes to court and seeks an order, and that order is granted to it on certain terms, that party ought to comply with the terms of the order. Leave was given under certain terms, and the substantive application ought to have been brought in those terms. Failure to adhere to those terms has meant that the order sought is substantially different from that which leave was grant for.”
13. Further, in [Kenya African National Union v Kibaki and 6 others](#); (2005) 2 KLR 435, the court held, interlia,
- that by virtue of section 9 of the [Law Reform act](#) (cap 26) a party will only rely upon and seek relief for that which the court has granted leave and will only rely on the grounds specified in the application for leave. A party will only rely on other grounds and / or seek other relief only with leave of court.
14. The advent of the [Fair Administrative Actions Act](#) (The FAAA) expanded the scope of reliefs under judicial review. There was no departure, however, from the salient feature of judicial review, which is that, it relates to the court’s power to supervise the exercise of administrative actions by those in authority or in quasi-judicial bodies. It is a special jurisdiction that must be distinguished from petitions to remedy breaches of fundamental rights and freedoms under the [Constitution](#) or ordinary causes of action under the civil jurisdiction of the court. The [FAAA](#) did not provide an alternative procedure of moving the court under judicial review and order 53 of the [Civil Procedure Rules](#) was not repealed. Neither did the [FAAA](#) remove the need to sift applications that met the threshold for grant of leave to apply for judicial review orders. Order 53 thus remains the provision governing invocation of judicial review jurisdiction.



15. I am in agreement with the holding of Korir, J in *Felix Kiprono Matagei v Attorney General; Law Society of Kenya (Amicus Curiae)* [2021] eKLR where he was of the view that:

“the procedural rules in Order 53 of the CPR governed judicial review prior the promulgation of the Constitution and are still in force as they have not been repealed.”

16. In HCJR Case No E087 of 2021, *AAR Insurance v Public Procurement Administrative Review Board, Secretary IEBC anad Zamara Risk and Insurance brokers Limited Interested Parties* (unreported), Ngaah J aptly summed up the rationale for the requirement for leave where he stated;

“I must reiterate that that judicial review remedies are discretionary and it is partly for this reason that a judicial review court has been clothed with the discretion to interrogate, at a preliminary level, the intended application for prerogative orders. It is at that stage that, in exercise of its discretion, the review court will weigh between ‘the legitimate requirement of public authorities that they should be free to perform their proper functions on behalf of the public and the corresponding requirement that they should have due regard for the legitimate rights and interests of the individual and groups of individuals.’ If upon examination of the material before it, the court is persuaded that a case has been made out that on further interrogation the legitimate rights and interests of the individual or group of individuals may have been abrogated, it will intervene and exercise its discretion in favour of grant of leave to institute a substantive motion for judicial review reliefs. It follows that the application for leave is not a mere procedural technicality that can be dispensed with at the whims of either the court or an applicant. It is a material stage in the application of judicial review orders at which the discretion of this Honourable court is called into question and which, for this very reason, cannot be taken away without an express provision of the law in that regard.”

17. I have given due consideration to the issues raised in the application herein. I form the considered view that the matters raised are issues that into the purview of judicial review.

The upshot of the foregoing is that the substantive Notice of Motion dated November 3, 2022, is hereby allowed and the same is merited for failing to comply with the law. Costs to the *ex parte* Applicant.

DATED AND SIGNED AT ELDORET THIS 8TH DAY OF AUGUST, 2024

R. NYAKUNDI

JUDGE

