



Republic v Principal Secretary, Ministry of Interior & Co-ordination of National Government & 6 others; Sheikh & another (Interested Parties); Matan (Exparte Applicant) (Judicial Review E006 of 2022) [2023] KEHC 2265 (KLR) (23 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2265 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
JUDICIAL REVIEW E006 OF 2022
EM MURIITHI, J
MARCH 23, 2023**

**IN THE MATTER OF AN APPLICATION BY MR. ABDI GEDI MATAN TO
APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, ROHIBITION**

AND

**MANDAMUS AGAINST THE DECISION MADE VIDE THE LETTER
DATED 22ND APRIL 2022 AND VIDE LETTER DATED 10TH MARCH 2022**

AND

IN THE MATTER OF ARTICLES 47, 50 & 73(2) OF THE CONSTITUTION

AND

IN THE MATTER OF FAIR ADMINSTRATIVE ACTIONS ACT

AND

IN THE MATTER OF LAW REFORMS ACT

AND

**IN THE MATTER OF APPOINTMENT OF CHIEF,
SHIDLEY LOCATION HABSWEIN SUB-COUNTY, WAJIR**

BETWEEN

REPUBLIC APPLICANT

AND

**PRINCIPAL SECRETARY, MINISTRY OF INTERIOR & CO-ORDINATION OF
NATIONAL GOVERNMENT 1ST RESPONDENT**

**REGIONAL COMMISSIONER, NORTH EASTERN REGION 2ND
RESPONDENT**



COUNTY COMMISSIONER, WAJIR COUNTY 3RD RESPONDENT
THE DEPUTY COUNTY COMMISSIONER, HABSWEIN SUB-
COUNTY 4TH RESPONDENT
MR. KASSIM KHALIF ADEN 5TH RESPONDENT
THE ATTORNEY GENERAL 6TH RESPONDENT
OMAR ABDI ISMAIL 7TH RESPONDENT

AND

SAID ABDULLAHI SHEIKH INTERESTED PARTY
ALI DAHIR ISMAIL & 50 OTHERS INTERESTED PARTY

AND

ABDI GEDI MATAN EXPARTE APPLICANT

JUDGMENT

Notice of Motion Dated 5/7/2022

1. Pursuant to leave granted by the Court, the Applicant filed the substantive Notice of Motion dated 5/7/2022 pursuant to order 53 rule 1 (2), (3) and (4) of the *Civil Procedure Rules*, sections 8 and 9 of the *Law Reform Act*, section 7, 8 and 9 of the *Fair Administrative Actions Act* and other enabling provisions of the law, seeking judicial review orders as follows:
 - A. Mandamus to compel the 1st - 4th Respondents to honour the results as per the letter dated 24th February 2022 from the 1st interview held on the 14th January 2022 and appoint the Ex parte Applicant as Chief – Shidley Location.
 - B. Certiorari to quash the decision of the 1st - 4th Respondents vide letter dated 10th March 2022 rendering and declaring the Ex parte Applicant unsuitable for position of Chief - Shidley Location.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Abdi Gedi Matan, the ex parte Applicant sworn on even date. He avers that he imminently risks being elbowed out of his fairly earned and awaiting appointment as the Chief-shidley Location. After he interviewed for the said position on 14/1/2022 and attained the first position, the panelists recommended that due to his service delivery, discipline and fair performance, he be promoted to be Chief as it would serve as a motivating factor to Assistant Chiefs in the Sub County. The 4th Respondent was in agreement with those recommendations and voiced the same to the 3rd, 2nd and 1st Respondents through correspondences. He is the current assistant chief of Shidley Location, which position he had held for a cumulative period of 10 years. His reputation speaks for itself and goes without question that his firm stands on how the location operates or the decisions and choices made for the betterment of the society does not conform with some of the elderly members of the society views. The allegations raised by residents have not been owned by anyone or even the elderly as there is no formal complaint launched. The 1st-4th Respondents agreed to appoint the 7th Respondent, who is 46 years old, not because of his qualifications but because the elders supported him. When re-advertisement was done, the citizens of Shidley protested and signed a petition against the appointment



of the 7th Respondent and demanded that due procedure be followed. The 1st-4th Respondents acted ultra vires by attempting to go to the ground to conduct investigations. The 1st-4th Respondents' decision in declaring him an unsuitable appointee based on baseless allegations goes against the rule of fair hearing, the Constitution, was in bad faith, and violated his legitimate expectation to be appointed as the chief. The 1st-4th Respondents' decision is unfair, arbitrary, inconsistent, capricious, irrational, unjustifiable, oppressive, punitive, an abuse of power because it was actuated by malice and extraneous consideration other than the administration of justice.

The 4th Respondent's Affidavit

3. The 4th Respondent swore a replying affidavit on 14/11/2022 in opposition to the application. He avers that the interviews for the position of Chief Shidley location were conducted on 12/1/2022, but before the process was concluded, serious allegations on the character and conduct of the Applicant were raised to the 1st Respondent by the residents. On the basis of the said allegations, he was advised to re-advertise for the post, which was done on 22/4/2022 and interviews conducted on 28/6/2022. The recruitment of the chief was undertaken over a long period of time but also with the Applicant's full knowledge and zealous participation. He accuses the Applicant of coming to court with the malicious and ill-informed intention to scuttle the government process of filling a vacant position which had been created 10 months earlier on and without notifying the Respondents of his intentions to file the suit. The recruitment process followed the laid down public service recruitment procedures and therefore the process should not be subjected to judicial review, as the same was open, transparent, fair and without any abuse of power. The decision to re-advertise afresh for the post of chief was informed by the petition by the residents of Shidley, and due to the nature of the chief's duties, it is customary for the appointing authority to advise for investigations or re-advertisement or fresh interviews whenever such issues of integrity are raised. In the second interview, 3 candidates namely Omar Abdi Ismail, Abdi Gedi Matan and Kassim Khalif Aden were shortlisted, all of whom did not meet the Revised Scheme of Service for National Government Administrative Officers approved by the Public Service Commission. But after the Public Service Commission had renewed academic waiver on the requirements of the Scheme of Service for Chiefs and Assistant Chiefs and granted minimum of KCPE for all applicants from North Eastern Region, it is Omar Abdi Ismail who was appointed as the Chief for Shidley Location. His appointment was guided by the fact that Mr. Omar Abdi Ismail emerged the best in the interview since he holds KCSE and was for that reason qualified to be appointed. Additionally, the 1st Respondent has discretionary powers to appoint any of the 3 shortlisted candidates in the recruitment and selection of Chiefs and Assistant Chiefs, and he exercised that discretion appropriately by appointing the top candidate. The application has been brought in bad faith with malice, as the Applicant has failed to disclose how the Respondents contravened the principles of legality, reasonableness, fairness and accountability. He urges the court to dismiss the application as it not only fails to disclose any cause of action, but it ought to have been filed at Garissa High Court. He has further been advised that the substantive issues herein revolve around an employee and an employer and therefore it is an Employment and Labour Dispute matter over which the Court with jurisdiction is the Employment and Labour Relations Court. He accuses the Applicant of obtaining some pleadings/annextures improperly using unprocedural means and outside his course of employment, and urges the court not to allow him benefit from illegally acquired evidence to the detriment of the Respondents.

The 5th Respondent's Affidavit

4. The 5th Respondent swore an affidavit on 24/10/2022 in opposition to the application. He avers that although he was among the candidates interviewed for the post of chief on 12/1/2022, he has since



lost interest in the said job and moved on with his life. He prays for dismissal of the application with costs as he has lost interest in this suit.

The 7th Respondent's Affidavit

5. The 7th Respondent swore a replying affidavit on 11/11/2022 where he avers that he and the Applicant attended the interview of 28/6/2022 and he emerged as the best candidate and was accordingly informed of his appointment. His said appointment was lawful and procedural, as the prerogative of employment, promotion and dismissal of employees is that of the employer. He accuses the Applicant of participating in the interviews of 28/6/2022 while at the same time having applied for leave to file judicial review, which amounts to seeking simultaneous redresses. He urges the court to dismiss the application as it is incurably defective, brought in bad faith and it is an Employment and Labour Relations Court matter.

The Interested Parties' Affidavit

6. The Interested Parties swore 2 affidavits on 21/10/2022 and 16/12/2022, on behalf of the other representatives of communities from Shidley location, vehemently opposing the application. They aver that they were opposed to the consideration of the Applicant for the position of Chief due to his poor character and lack of good conduct in public/community service. They made numerous reports to the Sub-County Commissioner Habasweine Sub-County about the Applicant's conduct and implored the 1st Respondent to not only fail to consider him for promotion but to also take disciplinary action against him. Further, given that the Applicant hails from Rer Yusufwise, they suggested a candidate from the more marginalized Rer Waise Abdiwaise sub-clan, which recommendation was informed by an aspiration to achieve clan balance with respect to positions of influence. As residents of Shidley Location, they need a leader committed to serving and uniting them, ready to combat insecurity threats and fight drug and substance abuse, which attributes the Applicant lacks.

Preliminary Objections dated 4/11/2022 and 8/12/2022

7. The 1st, 2nd, 3rd, 4th and 6th Respondents raised a preliminary objection on the grounds that; the Honorable Court lacks jurisdiction to hear and determine the application as the dispute falls within the provisions of section 12 of the Employment and Labour Relations Court Act, as it emanates from employee-employer relationship among the Applicant and the Respondents; and the Honorable Court lacks territorial jurisdiction to hear and determine the application and it offends the provisions of section 15 of the Civil Procedure Act, as the cause arose within Habswein Wajir whose nearest High Court is Garissa. At the hearing Counsel for the Attorney General for the said respondents, however, abandoned the Preliminary objection and submissions made thereon citing the authority of the Court of Appeal in *Attorney General & 2 Ors. v Okiya Omtatah & 14 Ors.* [2020] eKLR.
8. The 7th Respondent and the Interested Parties averred that the court lacks jurisdiction to hear and determine this matter, and that entire suit is sub judice, an abuse of judicial process as the Applicant filed this suit on 24/6/2022 but simultaneously attended the interviews held by the 1st-4th Respondents on 28/6/2022. At the hearing, the Counsel for the 7th respondent and the Interested Parties did not pursue the objection on sub judice.

Notice of Motion dated 2/12/2022

9. The Applicant filed a Notice of Motion under certificate of urgency dated 2/12/2022 pursuant to sections 1A, 1B and 3A of the *Civil Procedure Act*, order 45 of the *Civil Procedure Rules*, and article 50



of the Constitution seeking review of the court's ruling and orders of 1/12/2022 and admission of the Applicant's Replying affidavit dated 21/11/2022 as properly filed and on record.

10. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Plister Omondi, the Applicant's Counsel, sworn on even date. She avers that the ruling of 1/12/2022 was delivered without consideration of their replying affidavit dated 21/11/2022. Although the court had granted them 7 days to file their response to the application dated 11/11/2022, the same was only filed on 1/12/2022 due to an oversight by their office assistant. She avers that the mistake in not filing the replying affidavit on time was not deliberate and the Applicant stands to suffer a greater prejudice if the same is not considered, as it contains crucial and exhaustive information. She urges the court not to visit the mistake of an advocate on the client and that the application has been brought within reasonable time as required by order 45 rule 1 of the Civil Procedure Rules.

The 4th Respondent's Replying Affidavit

11. The 4th Respondent opposed the application dated 2/12/2022 vide his replying affidavit sworn on 12/1/2023. He avers that the application has been overtaken by events as the court is accused of not considering a replying affidavit that was not on record. He avers that the principle in law that the mistakes of an advocate should not be visited on a client does not qualify as sufficient reason as contemplated under order 45 rule 1(b) of the Civil Procedure Rules, thus the Applicant's failure to file his response within the stipulated time frame does not amount to a ground for review, and cites Grace Akinyi v Gladys Kemunto Obiri & another (2016) eKLR. He avers that the provisions of order 45 rule 1 of the Civil Procedure Rules are meant to assist genuine litigants and not parties who are guilty of laches and urges the court to dismiss the application with costs.
12. Counsel for the Parties filed written submissions on their respective cases and highlighted the same at the hearing and ruling was reserved.

Analysis and Determination

13. Having considered the substantive motion, the motion of 2/12/2022, the responses thereto, the preliminary objections and the written submissions together with the authorities cited therein and orally at highlighting, the two issues that emerge for determination are
 - (a) whether the Court has jurisdiction to entertain the substantive motion; and
 - (b) whether the reliefs sought may be granted in the circumstances of this case.

Jurisdiction of the Court

14. The Applicant urges that there did not exist an employer-employee relationship between him and the Respondents, to warrant this matter being an Employment and Labour Relations Court matter, and cites Clive Nyaaga Ogwora v the Governor Nyamira County & 2 others (2021)eKLR, National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties) (2020)eKLR. He urges that attending the interview is not in any way commensurate to filing another suit before another court of competent jurisdiction, and thus the issue of sub-judice does not arise. He submits that the court is fully clothed with the jurisdiction to hear and determine this matter with finality, and urges the court to dismiss the preliminary objection.



15. The 1st, 2nd, 3rd, 4th and 6th Respondents withdrew their submissions on want of jurisdiction of the Court relying on the Court of Appeal decision in *Attorney General & 2 others v Okiya Omtata Okiiti & 14 others* [2020] eKLR Civil Appeal No. 621 of 2019 which considered the question

“whether the Employment and Labour Relations Court (ELRC) has jurisdiction to determine the constitutionality of the appointment of the chairperson and members of the National Land Commission (the Commission)” and held as follows:

“[T]he appointment and removal from office of the commissioners of these independent commissions is not a labour and employment issue as the ELRC erroneously held, but a special constitutional innovation, a sui generis devise to address challenging governance needs and gaps. The appointment of the chairperson and members of the Commission did not involve any of the parties or raise any of the employment and labour relations issues contemplated by section 12 of the Act. With due respect, it was completely off the mark for the learned judge to hold that the recruitment of the chairperson and members of the commission raised employment and labour relations issues merely because they were to be remunerated from the Consolidated Fund. On the parity of that reasoning, the election or removal from office of the President of the Republic or appointment and removal of Judges of the Superior Courts would amount to employment and labour relations issues, merely because they are remunerated from the consolidated fund.

We have no doubt in our minds that the ELRC did not have any jurisdiction to entertain the three petitions that led to this appeal. A burning and well founded desire to remedy what are perceived to be violations of the Constitution does not justify seeking redress from a forum in which the Constitution has not vested the power to issue a remedy. It is a sad case of assuming that a wrong can be made right by another wrong. There is no fidelity to the Constitution in seeking to enforce the constitution through unconstitutional means. The issues raised in the petitions were weighty but were misdirected to the wrong forum. The Constitution has granted the High Court the requisite jurisdiction to hear and determine those issues and that is where they ought to have been raised. Having come to that conclusion, we have no basis for venturing into the merits of the appeal.

We have no doubt that the ELRC and the ELC have jurisdiction to interpret and apply the Constitution as held by the High Court in *United States International University (USIU) v The Attorney General & Others* [2012] eKLR and this Court in *Daniel N. Mugendi v Kenyatta University & 3 Others* [2013] eKLR. However, the jurisdiction of those specialized courts to interpret and apply the Constitution is not original or unlimited like that of the High Court. It is limited to constitutional issues that arise in the context of disputes on employment and labour relations or environment and land matters. In *Daniel Maingi Muchiri Jubilee Insurance Co Ltd*, CA No 138 of 2016, this Court expressed the position as follows:

“The Environment and Land Court and the Employment and Labour Relations Court too have jurisdiction to redress



violations of constitutional rights in matters falling under their jurisdiction.” (Emphasis added).”.

16. The 7th Respondent and the Interested Parties contend that this court lacks jurisdiction by dint of article 162 (2)(a) of the *Constitution* and section 12 of the *Employment & Labour Relations Court Act*, and cite *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & others* (supra). It was urged that the decision in *Okiya Omtatah case, supra*, related to appointment to constitutional commissions and not to regular employment disputes.
17. It is trite law that the High Court draws its jurisdiction from article 165 (3) of the *Constitution*, which provides that:-
- “(3) Subject to clause (5), the High Court shall have —
- (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of —
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under article 191; and
 - (v) any other jurisdiction, original or appellate, conferred on it by legislation.”
18. The Applicant herein is challenging the process of how interviews for the position of chief of Shidley Location were conducted which culminated in the eventual appointment of the 7th Respondent, yet he had initially been recommended by the panelists after the 1st interview to be the best suited for such appointment.



19. Section 12 of the *Employment and Labour Relations Act* on the jurisdiction of the Employment and Labour Relations Court (ELRC) provides as follows:

“ 12. Jurisdiction of the Court

- (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with article 162(2) of the Constitution and the provisions of this *Act* or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —
- (a) disputes relating to or arising out of employment between an employer and an employee;
 - (b) disputes between an employer and a trade union;
 - (c) disputes between an employers' organisation and a trade unions organisation;
 - (d) disputes between trade unions;
 - (e) disputes between employer organizations;
 - (f) disputes between an employers' organisation and a trade union;
 - (g) disputes between a trade union and a member thereof;
 - (h) disputes between an employer's organisation or a federation and a member thereof;
 - (i) disputes concerning the registration and election of trade union officials; and
 - (j) disputes relating to the registration and enforcement of collective agreements.”

20. Under category (a) of the types of disputes falling under the jurisdiction of the court, that is disputes relating to or arising out of employment between an employer and an employee, there is specifically required a basis of employment relationship between the parties to the suit. In this regard, and with respect to the office of the chief which is the subject of the litigation herein, there does not exist such a relationship. Indeed, the primary dispute or the predominant issue as urged by Counsel for the Petitioner citing the Court of Appeal decision in *National Bank of Kenya v Leonard Githui Kamwii* [2019] eKLR, the impugned process of recruitment to the office of chief, a judicial review and possibly a constitutional matter over which the High Court has unlimited jurisdiction. The court finds that there does not exist an employer-employee relationship between the Applicant and the 1st Respondent, and thus this matter does not fall within the purview of the Employment and Labour Relations Court.

21. This Court is certainly vested with the requisite jurisdiction to determine whether the 1st-4th Respondents acted illegally in declaring the Applicant an unsuitable candidate and calling for a second interview for the position of Chief based on some reservations by the elders of Shidley location. The court has jurisdiction to deal with the dispute before it not least because there is no employer – employee relationship between the ex parte applicant and the respondents with regard to the office of the Chief subject of this litigation and because the core pre-dominant complaint in this case is alleged breach of the right to fair administration action in the process of recruitment to the office of Chief.



22. The fact that the Applicant contemporaneously attended the 2nd interview and applied for leave to commence judicial review proceedings, does not make this matter sub-judice. Nor does the administrative appeal to the Respondents. Indeed, the demand letter before action in this judicial review proceedings, which was not responded to by the Respondents constitutes an act of exhaustion of internal remedy, and these proceedings are not barred by the principle in Section 9 of the Fair Administrative Action Act as urged by the Counsel for the 7th respondent and the Interested Parties.
23. Consequently, the Preliminary Objection dated 8/12/2022 is rejected.

Grant of the orders sought

24. The Applicant urges that he has satisfied all conditions precedent for the grant of the orders sought, and cites Republic v Principal Secretary, Ministry of Interior security & Another Ex-parte Schon Noorani & Another (2018) eKLR, Esther Victoria Wanjiku Mahoro v Mary Wambui Githinji & 3 Others (2021) eKLR, Pastoli v Kabale District Local Government Canal & Others (2008) eKLR and Republic v Cabinet Secretary, Ministry of Lands & Physical Planning & 2 Others; Gerevasio Mugao Nyaga (Interested Party) Exparte; Joseph Mutemi Nkuno & Another (2021) eKLR. He urges that the decision to declare a candidate unsuitable for the position of chief should be based on their qualifications and not some reservations by the elders. He urges that the actions of the 1st-4th Respondents are illegal and with the intention to treat him with malice and unfairness. He urges that the Interested Parties' pleadings should be treated with the contempt they deserve as it has been satisfactorily demonstrated that their interest in this suit is not for the residents of Shidley location but self-serving interest.
25. The Applicant submits that his counsel's mistake should not be visited upon him, and urges the court to allow his application dated 2/12/2022.
26. The 1st – 4th Respondents submit that the Applicant has not satisfied the test for grant of the reliefs sought, and cite Republic v Jomo Kenyatta University of Agriculture and Technology Ex parte Elijah Kamau Mwangi (2021) eKLR, Republic v The Commissioner of Lands & Another Ex-Parte Kithinji Murugu M'agere, Nairobi High Court Misc. Application No. 395 of 2012, Republic v Principal Secretary, Ministry of Internal Security & Another Ex-Parte Schon Noorani & Another (2008) eKLR, Republic v Chairperson Business Premises Rent Tribunal & Another Ex-parte Keiyo Housing Cooperative Society Ltd & Another (2014) eKLR, Peris Wambogo Nyaga v Kenyatta University (2014) eKLR, Republic v Cabinet Secretary, Ministry of Lands & Physical Planning & 2 Others; Gerevasio Mugao Nyaga (Interested Party) Ex-parte, Joseph Mutemi Nkuno & Another (2021) eKLR and Republic v Director of Immigration Services & 2 others Ex parte Olamilekan Gbenga Fasuyi & 2 others (2018) eKLR. They urge that the order of mandamus is used to compel action when refused in matters involving judgment and discretion but not to direct the exercise of judgment and discretion in a particular way nor direct the retraction or reversal of action already taken in the exercise of either. They urge that their decision to re-advertise the position of Chief for Shidley location and hold fresh interviews was within their discretion and in fulfillment of their mandate. They urge that the prohibition, initially sought but not urged in oral argument, cannot be issued as they have already conducted the interviews and declared the 7th Respondent as the suitable candidate for appointment as Chief, and cite Kenya National Examinations Council v Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996. They urge that they are obligated to consider every piece of information available when determining whether or not to appoint an individual as chief. They submit that given the role of the petition by the residents, it cannot be said that the decision to abandon the initial interview was irrational, illegal or procedurally improper, and entreat the court to find that the Applicant is undeserving of the reliefs sought.



27. The 7th Respondent and the Interested Parties urge that the Applicant did not exhaust all available dispute resolution avenues before filing this suit, and cite [*Geoffrey Muthiga Kabiru & 2 Others v Samuel Munga Henry & 1756 others*](#) (2015) eKLR. They urge that the motion is ripe for dismissal for non-exhaustion of statutory remedies and abuse of the court process. They urged that the Applicant has not demonstrated any illegality, irrationality or procedural unfairness on the part of the appointing authorities to warrant issuance of the orders sought.

Application for review dated 2/12/2022

28. The Application for review of the ruling of 2/12/2022 is overtaken by the event of the hearing of the main petition and it must be declined. By the said ruling, the court ordered joinder and participation of the Interested Parties constituents of the Shidley Location as persons interested in the appointment of the person to govern over them in the office of Chief.
29. A successful review order would only mean that the joinder of the interested parties is set aside and their participation in the proceedings consequently set aside. There has not been demonstrated any sufficient ground in terms of section 80 of the [*Civil Procedure Act*](#) and order 45 of the [*Civil Procedure Rules*](#) to review and set aside the order for the joinder of the Interested Parties. The explanation as to the failure of the Counsel for the ex parte applicant to respond to and attend court for the hearing of the application for joinder may only impact on an order for costs but there is no merit proposition as to why the application for joinder may be reviewed for any error of law.
30. The Interested Parties already filed a Replying Affidavit of 16/12/2022, and the petition has been heard by way of affidavit and submissions written and oral thereon leading to this judgment and nothing remains to be done upon which an order for review of the ruling allowing the joinder of Interested Parties may impact. The greatest objection to the participation of the Interested Parties was that they would use the opportunity to settle old scores against the ex parte applicant. The court has deliberated on the dispute before it scrupulously on the basis of law and facts surrounding the appointment, interviews of April and June 2022 and no scope or forum for dealing with any old scores between any parties before it.
31. Accordingly, on the Applicant's application dated 2/12/2022, this court finds that the Applicant is the author of his misfortunes as he was granted 7 days leave to file his response to the application dated 11/11/2022 but that response was belatedly and without any justifiable cause filed on 1/12/2022. The application is therefore without merit and it is dismissed.

Application for judicial review dated 5/7/2022

32. On the whole, it is trite law that Judicial Review deals with the procedure and process of decision-making and not with the merits and/or substance of the case, as restated in [*Commissioner of Lands v Kunste Hotel Limited*](#) [1997] eKLR where the Court of Appeal held that:

“But it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected”



33. The respective scopes of the judicial review orders of mandamus, prohibition and certiorari was settled by the Court of Appeal in *Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR. As regards mandamus and certiorari sought herein, the court said:

“[A]n order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. If the complaint is that the duty has been wrongly performed, i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done. Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

An ex parte applicant must demonstrate the presence of the above requirements for the grant of the respective judicial review order.

Order of mandamus

34. The court has considered the dispute the court, and with respect does not find a public duty owed to the applicant, capable of enforcement by an order of mandamus, to be appointed or promoted to the position of Chief on the ground that he answered to an invitation for employment to the position of chief, was shortlisted, interviewed and allegedly graded as number one among the participants.
35. The true complaint in the application is not that the respondents failed to perform a public duty as directed by statute as there is no duty to hire a particular candidate even the winning candidate. The complaint is that the duty was wrongly performed by inviting second interview upon allegations made by the elders.
36. The question becomes only whether the 1st Respondent was entitled to consider the views of the people on the participation of the ex parte applicant and therefore to call for readvertisement and fresh interviews for applicants to the office of chief.

Public participation in public recruitment

37. Article 10 (2) on the values and principles of governance require people participation. Article 232 specifically on public service high levels of performance, integrity and accountability as follows:

- “ 10 (2) The national values and principles of governance include—
- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
 - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
 - (c) good governance, integrity, transparency and accountability; and
 - (d) sustainable development.

232. Values and principles of public service

- (1) The values and principles of public service include—
- (a) high standards of professional ethics;



- (b) efficient, effective and economic use of resources;
- (c) responsive, prompt, effective, impartial and equitable provision of services;
- (d) involvement of the people in the process of policy making;
- (e) accountability for administrative acts;
- (f) transparency and provision to the public of timely, accurate information;
- (g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;
- (h) representation of Kenya's diverse communities; and
- (i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—
 - (i) men and women;
 - (ii) the members of all ethnic groups; and
 - (iii) persons with disabilities."

38. In these circumstances, the respondents could not close their eyes as submitted by Counsel for the 1st Respondent to the adverse reports of non-performance of the ex parte applicant.
39. The Court must counsel all who seek public office at all levels to expect public participation in the matter of their suitability to be appointed to the particular office, and to take the consequences of any inquiries that may be occasioned by public complaints, views and that follow invitation for comments as to their suitability. A public employment authority or agency such as the 1st Respondent in this case is expected to invite and act upon such comments on suitability, of course giving the affected candidate an opportunity to respond to such charges at the interview or other suitable stage of the recruitment process. The public interest in securing competent and qualified officers able professionally to deliver public service with diligence and integrity, and keeping out of such appointments and promotions persons of questionable conduct and ability, is a constitutional and lawful objective of any public recruitment exercise, as demonstrated by Article 232 on values and principles of public service.
40. Following the interviews for the position of chief held on 12/1/2022, the Applicant, who emerged the best, was recommended by the 4th Respondent for promotion to the said post. However, the Interested Parties filed a petition dated 10/2/2022 protesting against the intended promotion of the Applicant as Chief, which precipitated a re-advertisement of the said post, and although the Applicant still applied and participated in the 2nd interview, it was the 7th Respondent who was appointed as chief. It was alleged that the Applicant, who had served as the assistant chief for 9 years, a position he still holds to date, was of despicable character and members of the society were opposed to his promotion. No investigations were shown to have been carried out by the 1st-4th Respondents to establish the factual basis of the weighty allegations leveled against the Applicant's otherwise outstanding reputation. No



formal complaint was launched into the said allegations, and the applicant was not given a chance before the 2nd interview or at all to respond to the allegations.

41. The 4th Respondent admits at paragraphs 19 – 23 of his replying affidavit sworn on 14/11/2022 that:

“In the second interview, three candidates namely; Omar Abdi Ismail, Abdi Gedi Matan and Kassim Khalif Aden were shortlisted for appointment and these were ranked in the above order as outlined in the minutes dated 28th June 2022. However, the above named three (3) candidates still had not met the laid down requirements of the Revised Scheme of Service for National Government Administrative Officers (October, 2015) approved by the Public Service Commission as per the following requirements for appointment to the position of Chief II Job Group “H” and in accordance with the Scheme of Service:-

Have Kenya Certificate of Secondary Education (KCSE) mean grade C (Plain) or its equivalent from a recognized examining body; Diploma in any of the following disciplines: Public Administration, Management, Social Work, Community Development, Education, Governance, Conflict Management or its equivalent qualification from recognized institution; Be not less than thirty five (35) years of age; Be a resident of the particular location; Certificate of good conduct; Have good communication skills; and Have Certificate in Computer Application skills from a recognized institution.

However, the Public Service Commission vide letter referenced as PSC/1/67 dated 12th June, 2014 renewed academic waiver on the requirements of the Scheme of Service for Chiefs and Assistant Chiefs and granted minimum of Kenya Certificate of Primary Education (KCPE) for all applicants from North Eastern Region. As a result of the foregoing therefore the Principal Secretary vide letter Ref. No. MICNG/SEC.5/16 dated 15th July, 2022 granted authority for the appointment of Omar Abdi Ismail as the Chief for Shidley Location. The appointment decision was guided by the fact Mr. Omar Abdi Ismail emerged the best in the interview since Mr. Omar Abdi Ismail holds Kenya Certificate of Secondary Education (KCSE) and was for that reason qualified to be appointed.”

42. The 4th Respondent’s reasoning for appointment as chief of the 7th Respondent who held a Certificate of Secondary Education was faulty in view of the waiver that reduced the minimum qualifications for the North Eastern Region to Certificate of Primary Education. However, Questions of academic qualifications of the successful candidate, and the ex parte applicant as countered by the 7th Respondent’s counsel, are matters of merit that the court does not delve into.

Order of Certiorari

43. The letter of 10/3/2022 the subject of the certiorari application is not a decision capable of being quashed. It was a mere report on issues surrounding the recruitment of the Chief and recommendation of the Deputy District Commissioner on the matter. The Letter did not direct rejection of the ex applicant’s candidature or sanction the appointment of the 7th Respondent to the position.

44. The Court is satisfied quashing the letter of 10/3/2022 would still leave the decision to call for fresh interviews and subsequent appointment of the 7th respondent. An effective quashing order should have been directed at the decision to call for a second interview and the subsequent appointment thereof of the 7th Respondent.

45. But the order to quash was not sought against the decision to call for a second interview or appoint the 7th Respondent; it was sought against a letter of 10/3/2022 communicating the outcome of the first



interview and the fact of allegations made against the ex parte applicant, upon which a decision was subsequently made to call for the second interviews.

Discretion of the Court

46. Even if the ex parte applicant had established a case for the grant of judicial review orders the court may still refuse the orders having regard to the nature of dispute and the surrounding circumstances. The court in the instant case must take into account three important factors peculiar to this dispute, namely, the nature of the employment relation of a chief of an administrative location which must command the respect of both the local and national government and the governed constituents; the requirement of integrity in the particular security area of the border region of Wajir with risks of terrorist infiltration; and the need for uninterrupted provision of services for the inhabitants of the administration location, such as would be occasioned by protracted recruitment process in the event of an order for a re-advertisement and recruitment for the office of Chief, apart from upholding the right of the Cabinet Secretary in accordance with the law to hire public officers in his ministry, with necessary public participation.

Grant of reliefs

47. The Applicant approached this court seeking specific judicial review remedies. He sought mandamus to compel the 1st - 4th Respondents to honour the results as per the letter dated 24th February 2022 from the 1st interview held on the 14th January 2022 and appoint him as Chief – Shidley Location. This court unfortunately cannot issue such an order because doing so would be usurping the mandate of the appointing authority, and there is public duty demonstrated as discussed above.
48. The court cannot further issue Certiorari to quash the decision of the 1st - 4th Respondents vide letter dated 10th March 2022 rendering and declaring the Ex parte Applicant unsuitable for position of Chief - Shidley Location, because that would be tantamount to arrogating itself the powers to investigate and determine that the allegations made therein are baseless, and in any event it is not directed at the substantive decision subject of judicial review dispute.
49. The Court must find that the orders sought in the substantive motion of 5/7/2022 cannot issue.

Obiter

50. The Court, however, accepts that in failing to give the ex parte applicant an opportunity to respond to the allegations made against him by the elders, the Respondents were in breach in relation to him of his rights under the *Fair Administrative Action Act*, 2015 which restates the right to fair administrative act under article 47 of the *Constitution*.
51. It may appear that the applicant could in a constitutional petition make a case for damages as appropriate relief under article 23 for breach of right to fair administrative action. However, this court, exercising its judicial review jurisdiction can grant only the orders sought by the Applicant. It cannot by any judicial craft grant orders that were not sought.

Unlike in the UK, there is in Kenya no provision under the Judicial Review procedure to make an order for compensation by an award of damages. Such an order for damages may, however, be made under article 23 of the *Constitution* in constitutional litigation by way of petitions for protection and enforcement of rights and freedoms under article 22.

52. The court's power to make law is limited as observed by Judge Benjamin N. Cardozo of the Supreme Court of the United States in *The Nature of the Judicial Process* (1921) (Dover edition 2005 p.137)



where he famously discussed the extent of a judge as a legislator, on the principle of justice according to law, as follows:

“The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to “the primordial necessity of order in social life.” Wide enough in all conscience is the field of discretion that remains.”

53. The court is respectfully bound by decision of the Court of Appeal in *Makupa Transit Shade Limited & another v Kenya Ports Authority & another* [2015] eKLR which held:

“Finally, we would observe that Judicial Review Jurisdiction is a special Jurisdiction that it is neither criminal nor civil. It operates within narrow confines of the *Law Reform Act* and order 53 of the *Civil Procedure Rules*. As it is narrow, it should never be mixed or combined with other Jurisdictions. In this appeal we note that though the appellants came to Court specifically seeking Judicial Review orders, they also wittingly or unwittingly roped in Constitutional Jurisdiction. We do not think that this was proper or appropriate. The two are different jurisdictions that should not be mixed. We appreciate that under article 23 of the *Constitution* that deals with authority of courts to uphold and enforce the bill of rights, the Court may grant many reliefs including an order of Judicial Review. However, this can only happen where a party has properly invoked the Constitutional Jurisdiction of the Court. One cannot come to Court vide Judicial review proceedings and expect to be granted Judicial Review orders on the basis of an infringement of a constitutional right. A party should make an election.”

54. Here, the applicant elected to commence judicial review proceedings and this Court must refrain from invoking its Constitutional Jurisdiction by granting orders which were not specifically sought. As held in *Makupa Shade Ltd. v Kenya Ports Authority* it is not permissible to convert an application for Judicial Review into one of constitutional application. Had the ex parte applicant filed a constitutional petition, there might have been scope to order compensation in damages for any breach of his rights under the fair administration action procedure.
55. There is, of course, no prejudice to any cause of action that the ex parte applicant may have in defamation arising from reports made by the interested parties and or deponents of affidavits in the matter.
56. Although the court found the respondents in contempt of court in proceeding to install the 7th Respondent as chief in disobedience of a court order holding the status quo, the Court has on the hearing of the full merits of the main motion for judicial review determined that the respondents were entitled to call for the second interview in the circumstances of this case, and the remedies sought are not available. While that does not excuse the contempt of court, nothing turns on it now in view of this final judgment in the matter.

Costs

57. Costs should not be such as to discourage or hamper the access to justice by aggrieved parties especially in public litigation for enforcement of rights and fundamental freedoms. Although there is an aspect of private interest in the claim for direction to the respondent to appoint the ex parte applicant, the



issues of breach of right to fair administrative action raised by the applicant are of public nature and the court shall not make any order as to costs.

Orders

58. Accordingly, for the reasons set out above, the Court makes the following orders:

1. Application for review dated 2/12/2022 is declined.
2. The Preliminary Objection dated 8/12/2022 challenging the jurisdiction of the Court is rejected.
3. Judicial Review application by Notice of Motion dated 5/7/2022 is declined.

59. There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED ON THIS 23RD DAY OF MARCH, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mrs. Omondi with Mr. Mungála Advocates for the Ex Parte Applicant.

Ms. Njoroge, State Counsel for the Permanent Secretary Ministry of Interior the 1st Respondent.

Mr. Wachira Nguyo State Counsel for the Attorney General for the 2nd - 6th Respondents

Mr. Madowo Advocate for the 7th Respondent and Interested Parties.

