



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**MISCELLANEOUS NO. 1 OF 2018 (JR)**

**IN THE MATTER OF AN APPLICATION FOR AN ORDER OF MANDAMUS AND PROHIBITION**

**AND**

**IN THE MATTER OF ARTICLE 2(1)(2), 10(1), 20(1), 22,23,27, 47(1), 73,75,159(1)(2), 165(3), 179(2)(7), 182, 232(1), 259 & 260 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENT ACT (NO.7 OF 2012)**

**SHEILA WARUGURU GITHAIGA.....APPLICANT**

**VERSUS**

**THE GOVERNOR, NYERI COUNTY .....1<sup>ST</sup> RESPONDENT**

**THE COUNTY SECRETARY, NYERI COUNTY.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Pursuant to leave granted by this court on the 4<sup>th</sup> April, 2018 the Applicant filed the substantive Notice of Motion dated the 13<sup>th</sup> April, 2018 seeking for the following orders:

(i) An Order for Mandamus directed at the respondents compelling them to immediately and unconditionally facilitate the swearing in of the applicant as the duly legally appointed County Executive Committee Member in charge of Gender, Sports and Social Services for Nyeri County.

(ii) An Order of Prohibition directed at the respondents to stop and/or restrain them from selecting, nominating, recruiting and/or appointing or allowing any other person other than the applicant to assume office and discharge the duties of County Executive Committee Member in charge of Gender Sports and Social Services Nyeri County or any other office which affects the applicant

2. The application was premised on the grounds on the face of the application and the applicant's Statement of Facts and her Verifying Affidavit.

3. The respondents upon being served with the Notice of Motion filed an application under the provisions of Section 3A of the Civil Procedure Act, Article 22, 23, 90, 165 and 179 of the Constitution and Sections 30 and 35 of the County Government Act seeking for the following orders;

(i) The orders issued on the 4<sup>th</sup> April, 2018 be set aside, varied or discharged;

(ii) The entire judicial review proceedings be struck out;

(iii) Costs

4. The respondent's application was premised on the grounds on the face of the application in which the contention was that this court had no power under the law to entertain the proceedings by virtue of the provisions of Article 165 of the Constitution and Section 12 of the Employment Act; the respondents also contend that the substantive motion was filed and served in violation of Order 53 Rule 3 of the Civil

Procedure Rules and the directions given on the 4<sup>th</sup> April, 2018.

5. The parties opted to deal with the issue of jurisdiction set out in the respondents' Notice of Motion dated the 2/05/2018 before addressing the issues relating to the substantive application seeking for the prerogative orders; directions were taken that the parties file and exchange written submissions and thereafter highlight the same; hereunder is a summary of the applicant/respondent's case and the respondent/applicant's response;

#### **APPLICANTS CASE**

6. The ex-parte applicant was granted leave to apply for prerogative orders; the orders sought to compel the respondent to employ her as a county Executive Member of Nyeri County Government; that the matter touches on employment and therefore should be before Employment and Labour Relations Court established under Article 162 of the Constitution of Kenya; this specialized court has exclusive jurisdiction to hear and determine this dispute that relates to employment;

7. The High Court does not have jurisdiction to hear this instant judicial review application; the authorities relied on are **Republic vs National Land Commission** in which the Hon.Odunga J declined to hear an application related to land matters; the Court of Appeal in **County Government of Nyeri vs Cecilia Wangechi Ndungu** held that the Employment and Labour Relations Court could issue orders for Judicial Review;

8. In view of the above the applicant prayed that the judicial review proceedings be struck out with costs to the applicant/respondent.

#### **RESPONDANT/APPLICANT'S RESPONSE**

9. The respondent relied on her Grounds of opposition; that the judicial review application was commenced on the 28/03/2018 and leave was granted and directions were given by the court on the 4/04/2018;

10. The respondent sought the dismissal of the application on the court lacking jurisdiction and that the court proceed to hear the substantive application; the ex-parte applicants submission was that the court is seized of jurisdiction and that the application was properly before the court and that the applicant had locus to be before this court;

11. That the applicant could seek for judicial review orders as contemplated by Article 23(f) of the Constitution; the applicant was seeking to enforce her economic right to employment and sought to compel the respondent and to prohibit certain acts of persons holding public office; Article 165(3)(d)(2) vests jurisdiction on this court in matters related to state organs like the Nyeri County; the applicant needed to compel or prohibit the breach of her rights;

12. The Employment Act has a definition of contract of service and an employee is also defined therein as a person employed for wages /salary; that the applicant was not yet an employee there was no contract of service in existence; that the court was being requested to facilitate the contract with the County Government so that it employs the applicant; until then there exists no employer/employee relationship; the applicant relied upon **Republic v National Land Commission & Another Exparte Cecilia Chepkoech Letting & 2 Others (2018)eKLR** where the court cited **Samuel Kamau Macharia & Another v Kenya Commercial Bank (2012)eKLR** on the proposition that a court's jurisdiction flows from either the Constitution or legislation or both and as such it can only exercise jurisdiction conferred by the Constitution or other written law.

13. Counsel submitted that the court had jurisdiction and the Employment Act cannot be used to oust this court's jurisdiction; that the application dated 2/05/2018 had no basis and ought to be dismissed; alternatively instead of this court taking the drastic action of dismissing the substantive motion the court can order for the transfer to the Employment and Labour Relations Court;

#### **REJOINER**

14. Counsel conceded that the applicant was before the court seeking protection of her fundamental right to employment; that Article 41 of the Constitution deals with fair labour practices; this dispute can only be dealt with at the Employment and Labour Relations Court; that Section 12 of the Employment Act was categorical that any dispute involving labour/employment issues must be dealt with by the Labour Court; whether such orders sought were within the ambit of the Labour Court was an issue; and whether the orders prohibiting the respondent from filling the position were viable as the position had since been filled; that there was a substantive office holder and any order would affect the incumbent;

15. Counsel urged the court to refuse the invitation to refer the matter to the Employment and Labour Relations Court as there was no such application; such an application ought to be brought before the court in the right procedure so as to enable the applicant to respond in the right manner;

#### **ISSUES FOR DETERMINATION**

16. After hearing the presentations by both counsel for the respective litigants and reading the parties' pleadings and written submissions the parties court has framed one issue for determination; which is;

- (i) Whether this court has jurisdiction to hear and determine this matter;

#### **ANALYSIS**

**Whether this court has jurisdiction to hear and determine this matter**

17. This is an application brought by way of Notice of Motion in which the applicant seeks prerogative orders of Mandamus and Prohibition; the respondents responded to the application by filing this instant application dated the 2/05/2018 in which they contend that the application was filed out of time and further raised the question whether this court has jurisdiction to entertain a matter that ought to be heard by a specialized court; in this instance the specialized court would be the Employment and Labour Relations Court;

18. On the first point of limitation it is noted that although the applicants raised it in their application they did not present any arguments or submissions and it can safely be assumed that the line of argument was abandoned;

19. On the issue of jurisdiction Counsel for the applicants submitted that this matter has all the elements of an employment dispute; in that the respondent/ex-parte applicant seeks to compel the county to facilitate her swearing in and the signing of a contract of service; therefore the matter should be before the Employment and Labour Relations Court established under Article 162 of the Constitution of Kenya as read with Section 4 and Section 12 of the Employment and Labour Relations Act; that this specialized court is vested with exclusive jurisdiction to hear and determine such disputes that relate to employment;

20. Counsel for the ex-parte applicant contends that this court has jurisdiction to determine the application in which she seeks to enforce and protect her fundamental rights as guaranteed by the Constitution;

21. Going by the provisions of Article 23, 41 and 165 of the Constitution these Articles have bestowed this court with the jurisdiction to entertain an application of this nature as the position relates to that of state officer; the provisions of Article 260 of the Constitution defines a State Officer as a person holding a State Office and the position of member of the Executive Committee of a County Government is included therein; as pointed out in the Court of Appeal decision of **County Government of Nyeri and Another vs Cecilia Wangechi Ndungu (2015) eKLR** where it was held:-

***‘We are of the considered view that the Employment Act does not apply to State Officers. A State Officer’s terms and conditions of service are regulated by the Constitution or the relevant statute, principles of fair administrative action and rules of natural justice. It therefore follows that a member of the County Executive Committee being a State Officer is not subject to the provisions of the Employment Act.’***

22. It is also noted that the *ex-parte* applicant did not even have any contract of service with the applicants; the applicants eventually conceded that the matter was not confined to the context of labour relations and that ex-parte applicant was actually seeking protection of her fundamental right to employment;

23. The upshot is that the application that this court lacks jurisdiction fails as it is found lacking in merit; but this notwithstanding this court has judicial notice that the applicants had filled the position and that there is a substantive office holder and that any orders that may be made would affect the incumbent; the issues that this court would also have to consider are the viability of such orders as the position has since been filled and that the orders have the likelihood of touching on the incumbent’s contract of service;

24. For those reasons this court will therefore not proceed any further in considering the merits of the application for prerogative orders and will instead remit the matter to the specialized court as it is also seized with jurisdiction encompassing all the issues that will arise from the judicial review application; refer to the case of **Okiya Omutatah Okoiti vs Cabinet Secretary for Water and Irrigation & 6 others [2016] eKLR** where it was held;

***“I find the nature of the Petition herein relate to appointments and recruitment of the Interested Parties into positions that relate to employment and labour relations in the context where this Court is clothed with the requisite jurisdiction to hear and determine. This Court has the requisite jurisdiction to hear matters of constitutional interpretation, rights violations, judicial review and rights due within employment and labour relations.”***

25. The applicants had urged this court to refuse such invitation to refer the matter to the Employment and Labour Relations Court as there was no such application before it; and that such an application ought to have been brought before the court using the right procedure so as to enable the applicants to respond in the right manner; and urged this court to strike out the substantive application; but it is this court’s view that the act of striking out the substantive application would be draconian in view of the time limitations; this court is guided by the case **Kenya Kazi Services Limited vs Lucas Ndolo [2018] eKLR** where it was held;

***“The second question is the easier one to deal with. Ideally, a Court ought to strike off a matter in which it is bereft of jurisdiction. But in the matter before me the jurisdiction is not with this Court but with a Court of Equal status. Save for the different mandates given to us by the Constitution, this and the ELRC are one and the same Court. If this Court finds that a matter should be before that Court and not here, then a sensible thing would be for the Court to simply have it transferred to where it ought to have been filed in the first place. It would be too drastic a step to take if I were to strike out the Suit.***

***In the end I transfer this Suit to The Employment and Labour Relations Court of Kenya at Nairobi for hearing and determination. Costs up to now shall be in the cause.”***

26. Instead of striking out the application this court will instead invoke its inherent powers as set out in Section 3A of the Civil Procedure Act to make orders as may be necessary to meet the ends of justice; from the material on record this court is satisfied that this is a suitable case for transfer and instead of striking out the main application will instead exercise its inherent powers and remit this matter to the Employment and Labour Relations Court, Nyeri for hearing and determination.

**FINDINGS AND DETERMINATION**

27. For the reasons stated above this court makes the following findings;

(i) This court finds that the Constitution 2010 bestows this court with jurisdiction to hear and determine the matter; but finds that it is in the best interest of justice that this matter be transferred to the Employment and Labour Relations Court;

(ii) The matter is hereby transferred '*suo moto*' to the Employment and Labour Relations Court in Nyeri for hearing and determination.

28. The costs shall be in the cause.

Orders accordingly.

**Dated, Signed and Delivered at Nyeri this 16<sup>th</sup> day May, 2019.**

**HON.A.MSHILA**

**JUDGE**