



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

MISCELLANEOUS CIVIL APPLICATION NO.3 OF 2018

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE COUNTY GOVERNMENT ACT

AND

**IN THE MATTER OF THE REPORT OF KERICHO COUNTY ASSEMBLY HEALTH SERVICES COMMITTEE ON THE
KERICHO COUNTY REFERRAL HOSPITAL**

AND

IN THE MATTER OF COUNTY ASSEMBLY OF KERICHO STANDING ORDERS

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY ASSEMBLY OF KERICHO COUNTY.....RESPONDENT

MICHAEL KIPTOO RONO.....EX-PARTE

RULING

1. Before me is a Notice of Motion dated 19th June 2018 filed by the ex-parte applicant Michael Kiptoo Rono pursuant to **leave** granted by this courts. The substantive Notice of Motion appears to have been filed on the same date as the Chamber Summons for leave.

2. The application was brought under Order 53 Rule (3) (1) of the Civil Procedure Rules, and section 8 and 9 of the Law Reform Act (cap.26) and seeks the following orders:-

i. An order of certiorari to remove into the High Court for the purpose of quashing the report of Kericho County Assembly Health Services Committee on the Kericho County Referral Hospital of the 6th day of June 2018 that recommended the disbandment of the County Health Management Team (CHMT) and recommended that members of the committee be deployed to serve in other health facilities.

ii. An order of mandamus directed to compel the said Kericho County Assembly Health Services Committee to hear and determine according to law any interrogations or any deliberations relating to matters touching of the Kericho County Referral Hospital.

iii. An order of prohibition, prohibiting the Kericho County Assembly from proceeding with the hearing and determination of any matter relating to the Kericho County Assembly Health Services Committee on the Kericho County Referral Hospital.

iv. An injunction restraining the Kericho County Assembly whether by itself, servants or agents or whosoever otherwise from compelling the County Executive Committee member in-charge of Health from complying with the recommendations of the Report as adopted by the Kericho County Assembly.

v. A declaration that the judgment, the findings and recommendations of the report of Kericho County Assembly Health Services Committee on the Kericho County Referral Hospital were and are invalid (*ultra vires*) and void and of no effect.

vi. A declaration that the Kericho County Assembly is in breach of its duty under Article 47 of the Constitution as well as section 4 of the Fair Administrative Action Act in that it failed:-

a. to grant the officers affected the right to be given written reasons for any administrative action that is taken against them;

b. to give the affected officers prior and adequate notice of the nature and reasons for the proposed administrative action;

c. to give the affected officers an opportunity to be heard and to make representations in that regard;

d. to give the affected officers the notice of a right to a review or internal appeal against an administrative decision, where applicable;

e. to give the affected officers the notice of the right to legal representation;

f. to give the affected officers notice of the right to cross-examine;

g. to give the affected officers information, materials and evidence that were relied upon in making the findings and recommendations;

vii. If leave to apply or move is granted, an ex-parte injunction to restrain the Kericho Referral Health Services Committee on the Kericho County Assembly whether by itself, its servants or agents or howsoever otherwise from further acts of harassment of County staff requiring or otherwise of the recommendation of the Report of Kericho County Referral Health Services Committee on the Kericho County Referral Hospital until the determination of the application for judicial review or further order.

viii. If leave to apply is granted, a direction that the hearing of the application for judicial review be expedited.

ix. An order for costs.

x. Such further and other relief be granted to the applicant as this court deems fit.

3. I can say straight away that prayers (vii) and (viii) have been spent and are not for my decision.

4. The application is grounded on the verifying affidavit filed with the Chamber summons application for leave, and a statutory statement all dated 19th June 2018 in which the reasons for the application are given.

5. The application is opposed through a replying affidavit sworn by Martin Episs the Clerk of the County Assembly in which it is admitted that the County Assembly Committee Health Committee made the report, but states that the County Standing Orders and Article 43 of the Constitution confers on the County Assembly Health Committee the powers exercised herein, and that the report had already been adopted by the County Assembly under Standing Order 194, and also already forwarded to the County Executive as a recommendation.

6. Parties' counsel filed written submissions and highlighted the same in court on the hearing date.

7. Mr. Kembero for the applicant specially emphasized that the respondent violated the applicant's fair administrative actions rights by being denied the right to be heard before a decision was made. Counsel also contended that the action of the County Assembly Committee was *ultra vires*, as they exercised an executive function which was not in their province - by ambushing members of the County Health Management Team and levelling adverse allegations against them, which should have been done by the County Executive. Counsel relied on the Case of **Republic -vs- Attorney General & 2 Others -Exparte Tom Odoyo Oloo [2015] eKLR** in which the court issued an order of certiorari quashing the gazettement of the interested party Polycap Igate as Chairman of the Anti-counterfeit Agency. Counsel also relied Article 185 of the Constitution and section 8 and 9 of the County Government Act, and emphasized that under Article 229 of the Constitution, only the Auditor General was mandated to conduct and present appropriate reports, on operations of public operations or bodies.

8. Ms Ng'eno for the respondents relied on the replying affidavit and Standing Order 145 under which the County Health Committee was created, with one of its functions being to investigate matters to do with health in the County, and stated also that the Committee's report herein was validly tabled before the County Assembly and adopted under Standing Order 134 (2) (6), and that the second step was to submit the same to the County Executive Committee Member for health for implementation. According to counsel, this second step had already been done to improve health services in Kericho County. Counsel concluded by stating that as what had been done was only to make recommendations to the County Executive, this application was premature. Counsel relied on a number of case authorities including the

Case of **Republic -vs- Kenya Revenue Authority & Another -vs-Parte Parte Bear Africa (K) Ltd – Nairobi J/R No.285 of 2013** where the court applied the principle that Judicial Review was concerned with the process not the merits of a matter. Counsel maintained that due process was followed.

9. Having considered the application, documents filed and the submissions on both sides both written and oral, I am of the view that it cannot be faulted that the Kericho County Assembly Health Committee can visit and inspect all health institutions in Kericho County and make recommendations. In my view, their functions as a Health Committee would be rendered impotent if they were prevented from doing so. They cannot thus be faulted for carrying out the inspection herein. In my view, the Auditor-General's functions are that of an external auditor and cannot prevent the County Health Committee from performing its oversight functions on behalf of the County Assembly and the County Government of Kericho.

10. It cannot be said also that the County Assembly Health Committee usurped the powers of the County Government Executive in doing what they did. They could conduct such inspection and make this report and recommendations to the County Assembly for adoption and further action, such as submitting the same to the County Executive, which they did.

11. From the facts disclosed to this court, which are not disputed, the County Health Committee went ahead to prepare and table a report with recommendations to the County Assembly without giving those adversely affected, including the applicants a chance to be heard.

12. Having said so, Article 50 of the Constitution of Kenya 2010, contains very elaborate provisions on the right of every person to fair hearing. These provisions relate to hearings before the courts and other independent and impartial tribunals. Therefore, everyone has a right to fair hearing.

13. Article 47 of the Constitution has elaborate provisions on the right to fair administrative action. It states as follows-

“47 (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by an administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights under clause (1) and the legislation shall-

(a) provide for review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.”

14. Pursuant to the provisions of Article 47 of the Constitution, Parliament enacted the Fair Administrative Actions Act.

15. It is clear to me from the Constitutional and the statutory provisions above that, it is not constitutional or lawful for any institution, or individual to make adverse recommendations on another, without giving that person an opportunity to be heard.

16. The actions by the Kericho County Health Committee had to be constitutional and legal for them to be sustained. The Standing Orders do not overturn the requirement of fair hearing and fair administrative action. The County Government Act likewise does not override the Constitution provisions. It is the applicant's contention that he and others were not given a hearing before adverse reports were made against them herein.

17. Since the respondent does not say that the applicant was given a chance to be heard before adverse recommendations were made against him, the application herein has to succeed in this Judicial Review matter as due process was not followed. The Judicial Review Court, being a court that looks at the process rather than the merits of the matter has no option but to allow such an application.

18. What orders should this court issue in favour of the ex-parte applicant? The applicant has listed prayers (i) to (vii), then costs under prayer (ix). As stated earlier, prayer (vii) and (viii) have been spent. I thus grant prayers (i), (ii), (iii), (iv), (v) and (vi) of the application which I have already reproduced above. Let me repeat that the Kericho County Assembly Health Committee has powers to intervene and make reports, provided that they comply with the constitutional and legal requirements of due process and fairness.

19. I award the costs of the proceedings to the ex-parte applicant against the respondent.

Dated and delivered at Kericho this 16th day of July 2019.

George Dulu

JUDGE