



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA KIAMBU

JUDICIAL REVIEW NO. 17 OF 2018

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI,
PROHIBITION AND MANDAMUS**

AND

IN THE MATTER OF THE LAW REFORM ACT, CHAPTER 26 LAWS OF KENYA

AND

IN THE MATTER OF THE COUNTRY GOVERNMENT OF KIAMBU

AND

IN THE MATTER OF URBAN AREAS AND CITIES ACT, 2011

AND

IN THE MATTER OF PUBLIC APPOINTMENTS (COUNTY ASSEMBLIES APPROVAL ACT, 2011

BETWEEN

SAMUEL THINGURI WARWATHE.....APPLICANT

AND

- 1. GOVERNOR KIAMBU COUNTRY**
- 2. COUNTY GOVERNMENT OF KIAMBU**
- 3. COUNTY ASSEMBLY OF KIAMBU**
- 4. THE CLERK COUNTY ASSEMBLY OF KIAMBU**
- 5. KIAMBU COUNTY PUBLIC SERVICE BOARD.....RESPONDENTS**

RULING

1. On 4th July, 2018 **Dr. Samuel Thinguri Warwathe** (the Applicant) approached this court under certificate of urgency. Seeking, leave to apply for an order of certiorari “**to remove into this honourable court and quash the decision of the Respondents to nominate and appoint Municipal Board members for each of the municipalities of Kiambu, Karuri, Thika, Limuru and Ruiru**” (sic).

2. The Respondents are the **Governor, Kiambu County, the County Government of Kiambu, the County Assembly of Kiambu, the Kiambu County Public Service Board** hereinafter the 1st to 5th Respondents, respectively.

3. At the preliminary stage, the Court directed that certain formal matters relating to the jurat in the supporting affidavit and endorsement on the annexures thereto be rectified before the application could be dealt with. The file was next placed before the Judge on 6.7.18, whereupon the Court made the following observation and direction:

“The subject matter herein appears to be the same as in Judicial Review 15/18. Equally, the present Applicant is allegedly the chairman of the Kiambu chapter of the Kenya National chamber of Commerce and Industry, which is the Applicant in Judicial Review 15/18. I direct that the application filed on 4/7/18 be served on the Respondents for directions on 9/7/18, when Judicial Review 15/18 is scheduled for hearing.”

4. On that date, the 2nd and 3rd Respondents through Mr. Waithaka filed a preliminary objection to the application herein , to the effect that:
 - a. the question of the constitution of the municipality boards in Kiambu County was *sub judice* and pending before this Court in Judicial Review No. 15 of 2018 (erroneously referred to as 2017) **Kenya National Chambers of Commerce and Industry v County Government of Kiambu and 3 others.**
 - b. the application before the Court was a carbon copy of the chamber summons pending before the court in Judicial Review No. 15 of 2018 above.
 - c. the present application is incompetent, misconceived and an abuse of the court process.
5. For the 1st, 4th and 5th Respondents, Mr. Mwangi also raised a preliminary objection. Based on statements by the Applicant that he was aggrieved that he was not appointed to the relevant Municipality Board, and was moving the court in his individual capacity , the said Respondents raised the following objections:
 - a. the Applicant has no crystalized right that is enforceable.
 - b. the Applicant’s nomination by the Kenya National Chamber of Commerce and Industry (**KNCCI**) did not give rise to a legitimate expectation that the Applicant would be appointed to any municipality board.
 - c. the application is obtuse as it did not specify the municipality targeted in the application.
 - d. the Applicant ought to agitate his cause in Judicial Review 15/18, and the orders of certiorari alone, as sought, will not aid the Applicant.
 - e. the 5th Respondent has no role in the impugned process and is wrongly enjoined.
6. During oral arguments in respect of the two preliminary objections, Mr. Waithaka emphasized the similarities between the instant cause and Judicial Review 15 of 2018 , and asserted, that the present Applicant being a member of the Kenya National Chambers of Commerce and Industry which is the Applicant in the latter cause is inseparable from the said professional body. In his view, Judicial Review 15 of 2018 involved the same parties, substance and is before the same court and that the present cause adds no new issues. Such multiplication of suits, he argued, is inimical to the efficient and proper use of the court’s time. He urged the court to strike out the chamber summons. He relied on the decision of **Odunga J in Republic v Registrar of Societies of Kenya and 2 others Ex parte Moses Kirima and 20 others (2017) eKLR.**
7. For his part, Mr. Mwangi for the 1st, 4th and 5th Respondents urged his five-pronged objection as filed. In his response, the Applicant sought to distinguish this cause from Judicial Review No. 15 of 2018 referring to the orders sought and the fact that his suit relates to events subsequent to the filing of the former cause, namely, the appointments made on or after 19th June 2018 by the 1st Respondent.
8. Referring to his nomination by the **Kenya National Chamber of Commerce and Industry**, he asserted that he has a proper interest in his private capacity in the cause. He urged the court to either stay his cause pending the determination of Judicial Review No.15 of 2018, or to grant him leave to apply so that his substantive motion can be consolidated with Judicial Review No. 15 of 2018.
9. In light of the impending court recess, the Court delivered its decision on 1st August, 2018, upholding the preliminary objection raised by the 2nd and 3rd Respondents and reserving reasons thereof to 18th September 2018.
10. The court has considered the representations made by the parties herein. Whereas it may be doubted whether the provisions of section 6 of the Civil Procedure Act apply to judicial review proceedings as to civil cases, there can be no doubt that the principle therein is universally applicable to prevent the abuse of the court process by parties, and that the court seized of a matter is also impliedly clothed with an inherent jurisdiction, not only to further the ends of justice but to prevent the abuse of the court process.
11. **Section 6** of the Civil Procedure Act provides that:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”
12. It is a matter of common sense that the process of administration of justice will be hampered if the court were to allow the same parties to bring a multiplicity of suits over the same dispute. As the Court of Appeal observed in **Barclays Bank of Kenya Limited v Elizabeth Agidza and 2 others [2012] eKLR** cited by **Odunga J** in the *ex parte Moses Kirima* case:

“The circumstances obtaining at the time of the enactment of Sections 1A and 1B of the Civil Procedure Act were that there is constraint on judicial time and therefore a lot of pressure on the courts to expedite resolution of Civil disputes, if a substantial part of the matters in issue or controversy in the subsequent suit is covered by the previous suit, Section 6 should be invoked to save the precious judicial resources”.

13. I have looked at the pleadings in Judicial Review No. 15/18 and more particularly the prayers sought, and also compared them with the pleadings herein. In my view, Mr. Waithaka’s assertion that the latter may well be a carbon copy of the former is not an exaggeration. Not only are the respondents similar, but also the Applicant herein is a member of the professional body known as the **Kenya National Chamber of Commerce and Industry**, the Applicant in Judicial Review No. 15 of 2018. The fact that the present Applicant purports to be acting in his personal capacity does not make a difference; his nomination for consideration to be appointed in the relevant municipality board emanated from the Kenya National Chamber of Commerce and Industry. The Applicant herein did not apply directly as an individual for the positions advertised by the Respondents.

14. At the heart of the dispute in the two suits is the proper process of appointment of members of boards to the six municipalities in Kiambu County, and, the application of sections 13 and 14 of the Urban Areas and Cities Act to that process. Thus, whether the present Applicant came to court after certain events in the process, namely appointments, had occurred and therefore seeks one order in respect of the process – *certiorari* – makes no difference.

15. A similar order is indeed among prayers sought in Judicial Review No. 15 of 18. If granted, the orders sought in Judicial Review 15/18 would have the same net effect as the instant Applicant’s single prayer for *certiorari*. As was observed by the Court of Appeal in the **Barclays Bank case** cited by **Odunga J**, courts currently operate under great pressure and with limited resources, including time. It would be inefficient, if not downright wasteful for the courts to allow the same parties the liberty and luxury to file multiple suits over the same matter with the obvious result that the entire system is clogged.

16. Indeed, as pointed out in this case, **Section 13** of the **Urban Areas and Cities Act** envisages the nomination of board members to the municipal boards by three different categories of associations: professional, private sector, informal sector and neighborhood associations of urban areas and cities. It is not difficult to predict the volume of duplicated litigation that would arise in the event that each member of the said associations together with their respective associations were to be allowed to separately bring litigation with regard to the impugned appointment process. The ensuing litigation would effectively clog the wheels of justice.

17. These then were the reasons why this Court upheld the preliminary objection raised by the 2nd and 3rd Respondents. So far as the preliminary objection raised by the rest of the Respondents is concerned, the Court took the view that on the whole, the grounds raised therein properly belonged to the substantive hearing of the application for leave, rather than the preliminary stage. Because, in determining whether there was merit in the objections, it was necessary to first make findings of fact – see definition of a preliminary objection in **Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited [1969] EA 696** and **Quick Enterprises Limited v Kenya Railways Corporation Kisumu HCCC No. 22/1999**. For instance, on the role played by the 5th Respondent in the appointment of Board members, and whether or not the Applicant had a crystallized right that was capable of enforcement. The court therefore disallowed the preliminary objection by the 1st, 4th and 5th Respondents. There will be no orders as to costs in respect of either objection.

DELIVERED AND SIGNED AT KIAMBU THIS 17TH DAY OF SEPTEMBER, 2018.

In the Presence of:

Mr. Mwangi for 1st, 2nd and 5th Respondents

Mr. Waithaka for the 3rd and 4th Respondents

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C. MEOLI

JUDGE