



**Ngei v County Chief Officer Public Service Management and Devolution;
Migori County Public Service Board (Interested Party) (Judicial Review
E024 of 2023) [2024] KEELRC 1129 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1129 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW E024 OF 2023**

CN BAARI, J

MAY 2, 2024

BETWEEN

CPA, MARVIN OMONDI NGEI APPLICANT

AND

**THE COUNTY CHIEF OFFICER PUBLIC SERVICE MANAGEMENT AND
DEVOLUTION RESPONDENT**

AND

MIGORI COUNTY PUBLIC SERVICE BOARD INTERESTED PARTY

JUDGMENT

1. The Ex Parte Applicant lodged this proceeding vide a Notice of Motion dated 27th June, 2023, seeking the following reliefs: -
 - i. Spent.
 - ii. The Court be pleased to grant an ORDER OF CERTIORARI to remove to this court for purposes of quashing the impugned decisions of the Respondent herein, reposed in public advertisements both dated 5th May 2023 as referenced: CGM/PSMD/001/2023 and CGM/PSMD/002/2023 and all consequential actions, decisions and proceedings thereon.
 - iii. The court be pleased to grant an ORDER OF PROHIBITION to prohibit the Respondent either by himself, agents or employees from implementing, operationalizing, validating and/ or giving effect to the impugned decision reposed in the public advertisements both dated 5th May, 2023 as referenced CGM/PSMD/001/2023 and CGM/PSMD/002/2023 and all consequential actions, decisions and proceedings thereon; or in any way howsoever manner or



form interfering with the management and operations at the Migori County Public Service Board, in violation of the law.

- iv. The court be pleased to grant an order of mandamus to require the immediate publishing of a public notice, of equal prominence by the Respondent from his personal resources, recalling the impugned decision reposed in the public advertisements both dated 5th May, 2023 as referenced CGM/PSMD/001/2023 and CGM/PSMD/002/2023 and all consequential actions, decisions and proceedings thereon.
 - v. The court be pleased to grant an order of mandamus, to require the Respondent to implement the recommendations of the Migori County Assembly in respect of the absorption of casual and temporary employees, within the agreed framework including, vacating any suppose dismissal or terminations and that they be accorded all necessary facilities to resume their positions and perform their roles as was the case immediately before the impugned administrative action.
 - vi. That the court be pleased to grant an order declaring that the impugned decision reposed in the public advertisements both dated 5th May, 2023 as referenced CGM/PSMD/001/2023 and CGM/PSMD/002/2023 and all consequential actions, decisions and proceedings thereon, is an unlawful usurpation of authority reserved for the Migori County Public Service Board and the National Government in contravention of *the Constitution* and the law.
 - vii. Spent.
 - viii. That the court be pleased to grant any further and/or consequential orders necessary to give effect to the justice of the matters herein.
 - ix. That costs of the application be borne by the Respondent on a full indemnity basis.
2. The Motion is premised on the grounds that:
- i. The public advertisements dated 5th May, 2023 and referenced CGM/PSMD/001/2023 and CGM/PSMD/002/2023, were manifestly unlawful and unreasonable for failing to meet the threshold in the Fair Administrative Actions Act and *the Constitution*.
 - ii. Through the advertisements the Respondent has in one fell swoop supposedly terminated the employment of casual workers thereby grossly violating the Applicant's and other residents' rights.
 - iii. The Respondent has no authority in law to establish any office, which is the preserve of the board.
 - iv. This court has the onus of protecting public interest and observance of the rule of law by ensuring that no public entity acts in a manner that deprives the public of their lawful rights.
 - v. No prejudice will be suffered by the Respondent if the orders sought are granted.
3. The Respondent opposed the application vide a replying affidavit dated 30th October, 2023 sworn by George Odhiambo Olieng, the Chief Officer at the County Public Service. He depones that:
- i. Issues of policy formulation is the function of County Executive Committee established by Article 176 of *the Constitution*.
 - ii. The County Public Service Board established by Section 57 of the County Government Act is an entity of the County Executive.



- iii. The decision to place the advert was made by the Migori County Executive Committee and was communicated to him by the County Secretary who is also the head of County Executive Committee.
- iv. The contracted security guards had already been engaged on 5th, July 2023 hence the proceedings herein are overtaken by events.
- v. The orders herein if granted would infringe on the rights of those who had already been engaged in service.
- vi. The need to recruit the temporary staff was necessitated by lapse of fixed term contracts of other employees and the need to ensure smoother service delivery.
- vii. The proceedings herein are politically motivated and are instituted to settle political scores.
- viii. The Notice of Motion offends the provisions of Order 53 Rule 4 of the Civil Procedure as the reliefs sought in the motion are different from the reliefs set out in the statement.
- ix. The proceedings offend the doctrine of exhaustion and the express provisions of Section 9(4) of the Fair Administrative Actions Act, as any irregularity can be remedied under Section 75 of the *County Governments Act*.
- x. There is no employer-employee relationship or any labour relationship between the Ex-parte applicant and the Respondent, hence this court has no jurisdiction to determine the dispute.
- xi. Orders of prohibition in their very nature do not apply to events that have already taken place.
- xii. The applicant has not demonstrated the manner in which the advertisement usurps the functions of the National Police Service.
- xiii. The advertisement does not in any way violate the rights of anyone let alone the Ex-parte Applicant.

The Applicant's Submissions

4. In support of his case, the Ex-parte Applicant filed skeletal submissions and supplemental submissions. In the skeletal submissions, the thrust of his submissions were that the application was unopposed, given that by then the Respondent had not filed written submissions.
5. After the Respondent filed its submissions the Applicant supplemental submissions were filed, wherein, the Applicant states that the issue of jurisdiction was res judicata having been the subject of this court's ruling delivered on 12th October, 2023. The Applicant relies on the Court of Appeal cases of *Arnold and Others v National Westminster Bank PLC* [1991] and *AC and Pop-in-Kenya and 3 others v Habib Bank AG Zurich* [2015] eKLR, where the courts barred re-litigation of matters already determined and extended res judicata to matters that could have been urged but were not urged.
6. He urges the court to be guided by the definition of a cause of action as delineated in the Court of Appeal case of *Diana Katumbi Kiio v Reuben Musyoki Muli* [2018] eKLR where the court citing Lord Diplock in *Letang v Coper* (1964) 2 ALL ER 929 at pg 934 stated:

“a cause of action is simply a factual situation that existence of which entitles one person to obtain from the court a remedy against another person”



7. With regard to jurisdiction, the Applicant submits that's the issue herein is a labour relations dispute in the form of a public advertisement and all consequential actions, decisions and proceedings thereon. He affirms that the dispute revolves around a decision to declare vacancies and to make recruitments to fill the subject vacancies within the county public service of Migori. He sought to rely in the Supreme Court case of *Kenya Tea Growers Association and 2 others v Nssf & 13 Others Petition No. E004 of 2023* as Consolidated with Petition No. E002 OF 2023, to buttress this position.
8. It is the Applicant's submission that the court considers the Supreme Court Case of Edwin H.D. Dande v Inspector General of Police & Others SC. Pet No. 6 (E007) OF 2022 Consolidated with Pet No. 4 (E005) & 8 (E010) of 2022 where the court held that entrenchment of judicial review under *the Constitution* elevated it to a Constitutional fundamental right. Further reliance was placed in Republic v firearms licensing Board & another Ex-parte Afrison Export Import Limited & Another (2018) eKLR.
9. On whether conservatory orders should issue in a Judicial Review court, the Ex-parte Applicant cited Section 11(1)(b) & (i) of the Fair Administration Act, which he avers allows for interlocutory conservatory orders.
10. With regard to the illegal action having already taken place, the Ex-parte Applicant cites the ratio in R(H) v Ashworth Special Hospitality Authority [2003]1 WLR 127 by Dyson L.J restated in Taib A Taib v Minister for Local Government and Others Mombasa HC MISCA No. 158 of 2006 and equally in R v The *Cabinet Secretary, Ministry of interior and Co-ordination of National Government, HCMISA No 1 of 2021*, Kiliavo Fresh LTD *v National Environmental Tribunal and others ELC JR 4 of 2021* for the holding that:

“I now turn to the third situation which occurs where the decision has not only been made, but it has been carried out in full. At first sight it seems nonsensical to speak of making an order that such a decision should be suspended. How can one say of a decision that has been fully implemented that it should cease to have effect. Once the decision has been implemented it is a past event and it is impossible to suspend a piece of history. It overlooks the fact that what a successful judicial review challenge does in a very real sense rewrite history.”
11. The Applicant submits that a party who flouts the law cannot expect that the court will aid him in sustaining the position acquired through violation of the law. On this he cites the case of Cortec Mining Kenya v Cabinet Secretary Ministry of Mining & 9 others [2015] eKLR to support this position.

The Respondent's and the Interested Party's Submissions

12. It is the Respondent's submission that this court lacks jurisdiction to entertain this suit. He avows that under Article 162(2) of *the Constitution* as read with Section 12(1) of the *Employment and Labour Relations Court Act*, this court's jurisdiction is only limited to matters of employee-employer and employment and labour relations.
13. It is their submission that notwithstanding the wide latitude afforded to anyone seeking to institute proceedings claiming infringement of rights, the Employment and Labour Relations Court as a specialized court is only limited to employment relations. He relies on the case of Nick Githinji Ndichu v Clerk Kiambu County Assembly & Another (2014) where the court held that: -

“Though advertisement, short listing, interviewing are all steps towards recruitment and steps towards creating an employer-employee relationship, they are not in my view envisaged



in Section 12 and which will place this petition under the jurisdiction of the Employment and Labour Relations Court.”

14. Furthermore, the Respondent submits that there is no employer- employee relationship between the Ex-Parte Applicant and the Respondent, as contemplated under Sections 12(1) (a-j) of the ELRC Act. In view of this, the Respondent submits that the Applicant does not have the requisite locus standi to institute this suit. He relies on the Court of Appeal case of *Clerk Nakuru County Assembly, Speaker Nakuru County Assembly, the County Assembly of Nakuru v Kenethe Odongo and Others (Nakuru Civil Appeal No. E136 & 137 of 2022)* where it was held:

“In the instant case, having found that the issue at hand was not an employer- employee dispute as contemplated by the provisions of Article 162(2) of *the Constitution* and Section 12(1) of the ELRC Act, it goes without saying that the 1st Respondent did not have the requisite locus standi to file the petition.”
15. The Respondent also submits that the Applicant failed to exhaust out of court settlement processes prescribed by law before approaching court. He asserts that the application goes against the provisions of Section 77 of the County Government Act and Section 87(2) of the *Public Service Commission Act*.
16. On whether the judicial review orders sought should lie, the Respondent submits that the Notice of Motion offends Order 53 Rule 4 of the Civil Procedure Rules. He avers that the reliefs sought in the motion are different from the reliefs set out in the statement. He relies on the Court of Appeal case of Republic v Commission on Administrative Justice & Yusuf Mohamed Fazul (Civil Appeal no. 309 of 2017) to buttress this position.
17. The Respondent urges this court to disregard the 2nd prayer in the Notice of Motion for the reason that it was not in the application for leave.
18. The Respondent further stresses that the Orders of Certiorari and Prohibition as sought do not lie as they have been overtaken by events as the actions sought to be quashed have already occurred. For this reason, the Respondent asserts that those who had already been hired and are not party to this suit, and have already acquired rights that could not be taken away.
19. With Regard to whether the Ex-parte Applicant had proven his case on a balance of probabilities, the Respondent submits in the negative, and further states that there is no way he could unilaterally have made the decision to send out the advertisements of 5th May, 2023, or that he usurped the role of the Migori County Public Service Board. He further urges this court to be guided by Section 107 of the *Evidence Act*.

Analysis and Determination

20. Having considered the motion, reply and the rival submissions, the issues that arise for determination are whether: -
 - a. Whether the Court has jurisdiction to entertain this matter
 - b. Whether the Ex-parte Applicant has the requisite locus to institute these proceedings
 - c. Whether the advertisements of 5th May, 2023, and the consequent recruitments were in violation of the law.
 - d. Whether the Ex-parte Applicant is entitled to the reliefs sought.



Whether the Court has jurisdiction to entertain this matter

21. Despite this Court having dealt with the issue of jurisdiction in its ruling of 12th October, 2023, the Respondent still brought it up in his replying affidavit and in the submissions. It is trite law that once a court has rendered itself on an issue, it becomes functus officio.
22. From the record it is decipherable that the Respondent filed a Preliminary Objection challenging the court's jurisdiction citing among other things, non-compliance with the doctrine of exhaustion.
23. The court delivered a ruling dismissing that Preliminary objection, and cannot now revisit the issue of jurisdiction having substantively addressed the issue in its ruling aforesaid, and the Respondent's only recourse is on appeal.

Whether the Ex-parte Applicant has the requisite locus to institute these proceedings

24. It was the Respondent's assertion that the Ex-parte Applicant did not have locus to institute the proceedings herein on account of the fact that he was not an employee of Migori County. He cited a number of authorities whose main thrust was that an employer-employee relationship as contemplated in Article 162(2) of *the Constitution* and Section 12(1) of the ELRC Act was a prerequisite for filing any labour suit.
25. The Ex-Parte Applicant on his part avers that he has locus based on entrenchment of judicial review in *the Constitution*, which in essence allows anyone to commence proceedings protecting any violation of rights.
26. The Ex parte Applicant moved this court arguing that the Respondent violated specific provisions of *the Constitution*, to wit Articles 27, 29, 36, 38, 47 and 50(1).
27. Article 3(1) generally provides for every person's right to uphold and defend *the Constitution*, while Article 22 of *the Constitution* of Kenya, 2010 encompasses threatened violations of rights and fundamental freedoms.
28. Article 22 states:

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.”

29. In *Judicial Service Commission V Mbalu Mutava & another* (2015) eKLR, the Court of Appeal stated as follows;

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of powers of state organs and other administrative bodies, but also entrenches the right to fair administrative actions in the Bill of rights.

The right to fair administrative action is a reflection of some of the national values in article 10 such as rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”



30. Article 23 of *the Constitution*, mandates the High Court (read ELRC) to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Right.
31. Further, Section 5 (2) (b) & (c) of the Fair Administrative Actions Act, empowers anyone to apply for review of administrative action and to institute legal proceedings for remedies under any written law.
32. In light of the foregoing, I find and hold that the Ex Parte Applicant has locus to institute the instant proceedings, and is properly before this court.

Whether the advertisements of 5th May, 2023, and the consequent recruitments were in violation of the law.
33. The recruitments subject of the advertisements dated 5th May, 2023 relate to contracted security guards and temporary employees, who were to be hired on 3 months' fixed term contract terms.
34. The Respondent's assertion is that he placed the advertisements pursuant to a directive by the County Executive Committee of Migori County through the County Secretary who is the head of the County Public Service.
35. He further avers that the County Public Service Board (CPSB) through its Chief Executive Officer, processed the applications and engaged the 200 security guards.
36. It is worth noting that though the Respondent states on one hand that the security guards were appointed for three months (5th July, 2023 to 4th September, 2023) he proceeds to depose that the persons appointed have acquired rights and which rights have vested. This without doubt is double speak and does not give the court the clear position as to whether the persons recruited are in office or not.
37. Section 59 (1) of the County Government Act details the functions of the County Public Service Board as follows: -

“The functions of the County Public Service Board shall be, on behalf of the county government, to—

- a. establish and abolish offices in the county public service;
- b. appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments;
- c. exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under this Part;
- d. prepare regular reports for submission to the county assembly on the execution of the functions of the Board;
- e. promote in the county public service the values and principles referred to in Articles 10 and 232;
- f. evaluate and report to the county assembly on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the county public service;



- g. facilitate the development of coherent, integrated human resource planning and budgeting for personnel emoluments in counties;
 - h. advise the county government on human resource management and development;
 - i. advise county government on implementation and monitoring of the national performance management system in counties;
1. Section 63 goes on to spell out how the CPSB exercises its power to make appointments as follows: -

“Except as provided for in *the Constitution* or legislation, the County Public Service Board has the power to make appointments including promotions in respect of offices in the county public service.

The power of the County Public Service Board under subsection (1) shall be exercised—

- a. at the request of the relevant county chief officer of the department to which the appointment is to be made;
 - b. at the request of the clerk of the county assembly; or
 - c. on the County Public Service Board’s own motion on account of best interest of the county public service and parity of treatment of public officers taking into account the circumstances of each case.”
39. The Respondent’s assertion that he advertised the impugned vacancies pursuant to a directive issued to him by the County Executive Committee does not bear legal basis.
40. The functions of the County Executive Committee detailed under Section 36 of the County Government Act, and the mandate of the County Secretary under Section 44 (3) of the same Act, does not include recruitment and appointments of office holders at the County. This is a role saved solely for the CPSB, and which function is not transferable.
41. By the foregone provisions, it is abundantly clear that a County government can only recruit and appoint through the CPSB. The Respondent was thus bound to make a request for the appointments to the CPBS, and not directly proceed to place the advertisement contrary to the law.
42. Although the Respondent alleges that the appointments were processed by the CPSB, nothing shows this to have been the position. The CPSB being an entity of the County Government would simply have filed an affidavit to support the Respondent’s assertion. It did not.
43. In the end, I find the motion merited and make orders as follows: -
- i. That an Order of Certiorari be and is hereby issued to remove into this court for purposes of quashing the impugned decisions of the Respondent herein, reposed in public advertisements both dated 5th May 2023 as referenced CGM/PSMD/001/2023 and CGM/PSMD/002/2023, and all the consequential actions, decisions and proceedings thereon.
 - ii. That an Order of Prohibition be and is hereby issued to prohibit the Respondent either by himself, agents or employees from implementing, operationalizing, validating and/or



giving effect to the impugned decision reposed in the public advertisements both dated 5th May 2023 as referenced CGM/PSMD/001/2023 and CGM/PSMD/002/2023 and all consequential actions, decisions and proceedings thereon; or in any way howsoever manner or form interfering with the management and operations of the Migori County Public Service Board contrary to the law.

iii. That the Respondent shall bear the costs of the suit.

44. It is ordered.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 2ND DAY OF MAY, 2024.

C. N. BAARI

JUDGE

Appearance:

Mr. Lusi present for the Ex. Parte Applicant

Ms. Achieng present for the Respondent & I. Party

Erwin Ongor - C/A

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