



Republic v Principal Secretary, Ministry of Lands and Physical Planning & 2 others; Ndambuki (Exparte Applicant) (Judicial Review E003 of 2022) [2024] KEELRC 13640 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEELRC 13640 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
JUDICIAL REVIEW E003 OF 2022**

**AK NZEI, J
MAY 9, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

PRINCIPAL SECRETARY, MINISTRY OF LANDS AND PHYSICAL PLANNING 1ST RESPONDENT

CABINET SECTERARY, MINISTRY OF LANDS AND PHYSICAL PLANNING 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

RACHEL MUTHEU NDAMBUKI EXPARTE APPLICANT

RULING

1. This Court delivered a Ruling in the Judicial Review Cause herein on 2/3/2023 and made the following orders: -
 - a. an order of certiorari is hereby issued bringing to this Honourable Court the decision of the 2nd Respondent to transfer the Ex-parte Applicant to the Ministry of Petroleum and Mining dated 27th June 2022 for purposes of quashing, and the same is hereby quashed.
 - b. an order of mandamus is hereby issued compelling the Respondents to pay the Ex-parte Applicant her salary arrears accrued from February 2022 immediately, if the same has not been paid, and thereafter, monthly.



- c. an order of mandamus is hereby issued compelling the Respondent to comply with and to satisfy this Court's decree dated 6th October 2020 in Mombasa ELRC Constitutional Petition No. 2 of 2019 within fourteen (14) days of this order.
 - d. an order of mandamus is hereby issued compelling the Respondent to handover the survey office, Taita Taveta to the Ex-parte Applicant as the in-charge under the supervision of the Director of surveys.
 - e. an order of mandamus is hereby issued compelling the Respondents to pay the Ex-parte Applicant the ksh. 3,500,000 awarded and decreed as general damages in this Court's Mombasa ELRC Constitutional Petition No. 2 of 2019 within fourteen (14) days of this order.
 - f. in default of compliance with the compelling orders herein, the Respondents shall be cited for contempt of Court.
2. The foregoing orders determined the Ex-parte Applicant's substantive motion herein dated 8/8/2022 and brought the Judicial Review proceedings herein to a close.
 3. On 10/7/2023, however, the Ex-parte Applicant filed a Notice of Motion dated 27/6/2023, seeking the following orders:-
 - a. that the Court be pleased to find the 2nd Respondent (Zacharia Mwangi Njeru), and the 1st Respondent (Nixon Korir) to be in contempt of the Court's orders granted on 2nd March 2022.
 - b. that the Court be pleased to order that the 2nd Respondent, Zacharia Mwangi Njeru, and the 1st Respondent, Nixon Korir, be arrested and committed to civil jail for a term not exceeding six months.
 - c. that the Court be pleased to order that the Respondents should not be heard by the Court until they purge the contempt.
 - d. that the Court be pleased to award damages, to be assessed to compensate the Ex-parte Applicant.
 4. The application is supported by the Ex-parte Applicant's affidavit sworn on 27/6/2023. Before the Respondents could respond to the said application, the Ex-parte Applicant filed yet another application on 18/7/2023, evenly dated, seeking the following orders:-
 - a. that the Court be pleased to order a stay of the dismissal of the Ex-parte Applicant by the Respondents vide their letter dated 13th July 2023 pending the hearing and determination of the contempt proceedings herein.
 - b. that the Court be pleased to order that the letter by the Respondents dated 13th July 2023 for the dismissal of the Ex-parte Applicant was issued in contempt of this Court's orders of 2nd March 2023, and is null and void.
 - c. that costs of the application be borne by the Respondents.
 5. The said application, dated 18/7/2023, is supported by the Ex-parte Applicant's affidavit sworn on even date. Among the documents annexed to the said supporting affidavit is the claimant's dismissal letter dated 13/7/2023, dismissing her from service with effect from 16th September 2019 on account of desertion. The application was presented to this Court under a certificate of urgency on 19/7/2023, and the Ex-parte Applicant was directed to serve the same on the Respondents. The Respondents did not attend Court on 25/7/2023 when the application came up in Court for directions, though served.



An interim order staying the dismissal shown to have been made in contempt of Court was granted. The Respondents subsequently responded to the application vide a replying affidavit of one Janerose Karanja sworn on an unspecified date.

6. Regarding the Ex-parte Applicant's application dated 27/6/2023, the Respondents filed grounds of opposition dated 20/7/2023 and an evenly dated Notice of preliminary Objection. When the Ex-parte Applicant's said two applications came up for directions on 9/10/2023, Counsel for the Respondents sought to have the Respondents' said preliminary objection heard first; and the Court gave directions on disposal of the same by way of written submissions.
7. The Respondents' preliminary objection dated 20/7/2023 is therefore before me for determination. The Respondents seek to have the Ex-parte Applicant's Notice of Motion dated 27/6/2023 dismissed on the following grounds:-
 - a. that the application raises new issues which were never part of (the) trial, and hence were never determined by this Court.
 - b. that the application is framed to be a contempt application and yet it is introducing a new cause of action which has not been litigated on, and hence not determined by the Court.
 - c. that the Applicant has not specified exactly which orders the 1st and 2nd Respondents are in contempt of warranting their committal to civil jail.
8. The Respondents have raised matters of fact which they wish to urge as a preliminary point. It was stated as follows in the case of MUKISA BISCUITS MANUFACTURING CO. LTD -VS- WEST END LTD [1969] E.A. 696:-

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if urged as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
9. It was further stated as follows in the Mukisa Biscuits case (supra):-

“...a Preliminary Objection is in the nature of what used to be called a demurrer. It raised a pure point of law, which was urged on assumption that all the other facts pleaded by the other party were correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion...”
10. What amounts or does not amount to a cause of action or what amounts to a different or separate cause of action within any particular suit are matters of fact that can only be ascertained from pleaded facts or facts presented before the Court in evidence. The Respondents' preliminary objection raises matters of fact that cannot be determined as preliminary points of law.
11. It is worthy noting, however, that the suit herein stands determined, and that this Court cannot be called upon to determine, within the suit herein, any matter or dispute arising between the parties herein after 2/3/2023 when the Court pronounced itself on the Judicial Review Application herein. That said, it is incumbent upon the Ex-parte Applicant to decide on how to proceed with the two pending applications dated 27/6/2023 and 18/7/2023 respectively, if that will be necessary.



12. Consequently, and having considered the written submissions filed on behalf of the parties herein, I find no merit in the preliminary objection dated 20/7/2023, and the same is hereby dismissed with no order as to costs.

13. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH MAY 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Applicant

.....Respondent

