



**Omondi v Migori County Government, Office of the County Public Service Board
(Judicial Review E006 of 2024) [2024] KEELRC 2039 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2039 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW E006 OF 2024**

CN BAARI, J

JULY 25, 2024

BETWEEN

CPA, MARVIN NGEI OMONDI APPLICANT

AND

**MIGORI COUNTY GOVERNMENT, OFFICE OF THE COUNTY PUBLIC
SERVICE BOARD RESPONDENT**

RULING

1. The Applicant's Notice of Motion is dated 4th March, 2024, brought pursuant to Articles 23(3), 47, 165 and 258 of *the Constitution* of Kenya (2010), and Sections 3, 5, 7, 9 & 12 of the Fair Administrative Actions Act, 2015, seeking the following reliefs: -
 - i. Spent.
 - ii. That Pending the interpartes hearing and determination of the Chamber Summons Application dated 27th February, 2024, or such further Order as may be appropriate the Honourable court be pleased to issue an interim conservatory order restraining the implementation, operationalization. validation and/or bringing into effect the Respondent's impugned decision reposed in the blatantly illegal and unfair administrative action reposed in the advertisement of vacancies vide the publication in the standard newspaper of 16th February, 2024, and any further advertisements declaring vacancies and invitations of recruitments and all consequential actions, decisions and proceedings thereon.
 - iii. That the costs abide the outcome of the proceedings herein.
2. The Motion is supported by grounds on the face thereof and the affidavit of CPA, Marvin Ngei Omondi, the Applicant herein. The Applicant argues that if the orders sought are not granted the proceedings herein will be rendered moot, futile, otiose and the hearing thereon perfunctory and trifling.



3. It is the Applicant's assertion that the interlocutory conservatory order in the nature of a restraint and temporary interdict under Section 11(1)(b) & (i), FAAA, 2011, sought herein pending further directions of the Hon. Court, is intended to preserve & conserve the substratum of these legal proceedings, that risks being obviated and rendered otiose, as well as preserve & conserve the evidently significant public interest as set out under para 4(i)to(iv) ensuring prudent use of limited public resources.
4. It is urged that this Application does not re-urge, nor re-prosecute the clear merit of the pending leave application dated 27th February, 2024 (now heard and determined) which restrained a materially similar illegal and unlawful administrative action.
5. The Respondent opposed the motion vide grounds of opposition dated 18th March, 2024. The Respondent argues that since the Applicant had not been granted leave to institute the motion herein, this court does not have jurisdiction to grant the orders sought.
6. It is the Respondent's assertion that a conservatory order cannot issue absent in the absence of the substantive motion.
7. The Respondent further contends that no administrative action has been taken against the Applicant herein contrary to the article 47 of *the Constitution* to warrant grant of the orders sought as contemplated under article 235 of *the Constitution*.
8. The Respondent avers that there is still to be filed a substantive motion for judicial review orders against the Respondent and the instant motion is meant to mislead this court to construe the instant motion as a contempt application aimed at enforcing orders issued in a previous suit being JR No. E003 of 2024.
9. Parties canvassed the motion by way of written submissions and which have been duly considered.

Analysis and Determination

10. The singular issue for determination is whether the Applicant is entitled to the orders sought. The Respondent contends that the Court lacks jurisdiction to grant the orders sought on the basis that the instant motion was lodged as a Judicial Review application, and which motion was lodged before the grant of leave to file for judicial review proceedings was granted.
11. The Respondent further argues that the order sought herein, has since been overtaken by events, the same having been sought to be issued pending interparties hearing of the motion herein.
12. The Applicant sought leave to file for judicial review orders vide an chamber summons application dated 27th February, 2024, and which application was heard and determined by this Court on 13th March, 2024.
13. The instant motion having been filed on 4th March, 2024, is therefore confirmation that the motion was indeed filed before leave to do so was granted.
14. The applicable law on leave to commence judicial review proceedings is provided for under Order 53 Rule 1 of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The reason for the leave was spelt out in the case of *Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996* in the followings:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or



hopeless, and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... ”.

15. The enactment of the Fair Administrative Actions Act (The FAAA) expanded the scope of reliefs available under judicial review, but the Act did not provide an alternative procedure of moving the court under judicial review. It is also true that Order 53 of the Civil Procedure Rules was not repealed, and it thus remains the provision governing invocation of judicial review jurisdiction. In *Felix Kiprono Matagei v Attorney General & Law Society of Kenya (Amicus Curiae)* [2021] eKLR the court held that the procedural rules in Order 53 of the CPR governed judicial review prior to the promulgation of *the Constitution* and are still in force as they have not been repealed.
16. In view of the foregoing, I find the motion fatally defective for flouting clear statutory provisions, and is hereby dismissed with costs to the Respondent.
17. It is ordered.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 25TH DAY OF JULY, 2024.

C. N. BAARI

JUDGE

Appearance:

Mr. Lusi present for the Applicant

Ms. Achieng h/b for Mr. Okong'o for the Respondent

Anjeline & Debra - C/As

