



**Were v Board of Directors National Transport Safety Authority & another; Njao (Interested Party) (Petition E002 of 2023) [2024] KEELRC 2057 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2057 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E002 OF 2023**

**B ONGAYA, J  
JULY 26, 2024**

**BETWEEN**

**EDWIN ODUOR WERE ..... PETITIONER**

**AND**

**BOARD OF DIRECTORS NATIONAL TRANSPORT SAFETY  
AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY MINISTRY OF ROADS AND  
TRANSPORT ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**GEORGE NJAO ..... INTERESTED PARTY**

**RULING**

1. The petitioner filed the notice of motion dated 20<sup>th</sup> March, 2024 through B.O Ochola & Co Advocates. The application was under sections 1A, 1B, 3, 3A of the [Civil Procedure Act](#), order 45 rule 1 of the [Civil Procedure Rules](#) and all other enabling provisions of law. The application was for the following orders:
  - a. That the Honourable Court be pleased to certified as urgent and grant the orders sought.
  - b. That this Honourable Court be pleased to quash the impugned consent as adopted on the January 16, 2023, which was anchored on the non-participation, knowledge and authority of the petitioner to his instructing advocate.
  - c. That the Honourable Court be pleased to rescind, vary, vacate and or set aside its judgement emanating from the adoption of the said orders.
  - d. That pending the hearing of and determination of the said application the Honourable Court be pleased to reinstate orders as issued on the 05.01.2023.



- e. That the Honourable court be pleased to reinstate the said petition at the stage before the adoption of the impugned consent.
  - f. That the costs of the application be awarded to the Applicant.
2. The application was based upon the grounds set out in the application as well as the supporting affidavit of the applicant filed together with the application and sworn on 20.03.2024. The applicant's case is as follows;
- a. That through his previous advocates Okoth & Co. Advocates he brought an application to the Honourable Court dated 30.12.2022 where he was seeking orders of having the Director General National Transport and Safety Authority discharged from office based on reasonable and legal grounds as contained in the application which same prayers were allowed by the Honourable Court vide a ruling issued on the 05.01.2023 that gave interim orders.
  - b. That further to the foregoing and without reasonable grounds and breach of fiduciary duty owed to the applicant by Jacob Auma Okoth an advocate of the High court working in the style of Okoth & Co. Advocates drafted, filed impugned consent dated 16.01.2023 without the applicant's knowledge or approval. The consent was adopted in court and the same caused the discharge of the interim order issued on the 01.05.2023.
  - c. That a ruling dated 10.02.2023 was issued in view of the opposition of adoption of the consent dated 16.01.2023 allowing the said consent to be adopted.
  - d. The applicant instructed the firm of Musyoki Mogaka & Co Advocates who came on record on the 26.03.2023 and did an application dated 27.03.2023 praying for orders to review or directions from the consent dated 16.03.2023. The court gave directions to have the application dated 27.03.2023 expunged since the firm of Musyoki Mogaka & Co Advocates had not obtained leave of court to come on record for the applicant after the judgement.
  - e. That the applicant prays for the orders issued on the 05.01.2023 be reinstated for reasons he did not give authority nor was he aware of the said consent dated 16.01.2023 which objection of the said consent has since kept the applicant away from his family and has absconded his place of employment due to the security risk and by extension threat of life.
  - f. That it is imperative that the application be certified urgent as the consent touches on an issue of public interest.
3. In response to the application herein, the 1<sup>st</sup> respondent and the interested party through Prof. Albert Mumma & Co. Advocates filed three documents. A replying affidavit sworn by Judith Opili Sirai, senior legal officer of the respondent; a notice of preliminary objection and a notice to cross-examine all dated the 05.07.2024.
4. The preliminary objection was on grounds that;
- a. This Honourable Court lacks the requisite jurisdiction to entertain, hear, determine and/or grant the orders sought in the application.
  - b. The application as filed is res judicata, the issues raised therein having been dealt with exhaustively and settled in the ruling of this Honourable Court delivered herein on 10<sup>th</sup> February 2023, which ruling has neither been appealed against nor reviewed by any court of competent jurisdiction.



- c. The application as filed and the orders sought therein irregularly invites the Honourable court to sit on appeal on its own decision as delivered on 10<sup>th</sup> February 2023, which jurisdiction this Honourable court does not possess.
  - d. The application is frivolous, vexatious and blatant abuse of the Court process.
5. The notice to cross – examine (Under order 19 rule 2 of the [Civil Procedure Rules](#)) stated as follows:
  - a. That the 1<sup>st</sup> respondent and the interested party, shall at the time of hearing of the application dated 20.03.2024 require the attendance of Edwin Owuor Were for purposes of being cross examined on the contents of the supporting affidavit sworn on 20.03.2024 and that an application will be applied that the said Edwin Owuor Were be committed to civil jail upon such cross examination in the event that it is confirmed that they falsified the contents of his affidavit.
6. The replying affidavit repeated the contents of the preliminary objection and the deponent further stated as follows:
  - a. That the petitioner has brought this application to court over one year later after the matter was determined and consent adopted.
  - b. That the issues raised herein were also determined in Kiambu High Court constitutional petition No. E021 of 2023 – Road Safety Association of Kenya suing through David Kiarie Chairman –versus- The Board of Directors National Transport Safety Authority where similar issues have been dealt with exhaustively and settled in judgment delivered on 19.10.23. they attached a copy of the judgement.
  - c. That the petition mentioned above was filed by the same advocates herein and are hence forum shopping. That they are also prosecuting another matter being JR no. 163 of 2023 Road Safety Association of Kenya –Versus- The National Transport and Safety Authority & 10 others which is still in court.
  - d. That similar parties also have a matter that is actively being litigated in the Constitutional and Human Rights Division in Nairobi High Court over similar issues being Petition no. E041 of 2023.
  - e. That the petitioner is at liberty to appeal the decision of this Court as delivered on 10.02.2023 since this Honourable Court cannot sit on its own appeal.
7. They concluded by urging that this Honourable Court strikes out or dismisses the application on grounds of res judicata.
8. Both parties submitted orally in court on 09.07.2024. The court has considered the parties’ respective cases and makes finding as follows:
  - a. As submitted for the respondent, the issue whether the consent and the subsequent adoption of the consent by the Court has been subject of a previous application and the Court has rendered a ruling. The instant application is an abuse of Court process as is res judicata. The applicant ought to have appealed if he was dissatisfied. It is obvious from the record that the applicant had instructed counsel who signed and filed a consent in Court and which was adopted by the Court as an order. Any want of instructions on the part of the client, the applicant, falls for professional disciplinary processes. The Court repeats that finding.



- b. The applicant does not deny the respondent's position that there is a previously decided suit determining similar matters based on same causer of action and further, there are pending suits on similar matters in dispute in the instant petition. In that consideration the petitioner appears to have avenues for justice to be served on the merits of the dispute herein but for the consent order.
- c. As the application is found to abuse court process, the applicant will pay costs of the application.

In conclusion, the application dated 20.03.2024 filed for the petitioner here in is hereby dismissed with costs as the preliminary objection is upheld as found by the Court.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 26<sup>TH</sup> JULY 2024.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

