



**Opiyo, Chairperson & 5 others v Migori County Assembly & 6 others (Civil Appeal E174 of 2023) [2024] KECA 529 (KLR) (14 May 2024) (Judgment)**

Neutral citation: [2024] KECA 529 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL E174 OF 2023  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
MAY 14, 2024**

**BETWEEN**

**HON JARED ODHIAMBO OPIYO, CHAIRPERSON ..... 1<sup>ST</sup> APPELLANT  
MS JEMIMAH ADHIAMBO WERE, VICE- CHAIRPERSON .... 2<sup>ND</sup> APPELLANT  
MR HESBON OTIENO OMWA, MEMBER ..... 3<sup>RD</sup> APPELLANT  
MR ENOCK ODHIAMBO ACHIENG', MEMBER ..... 4<sup>TH</sup> APPELLANT  
MS PHOEBE ADHIAMBO ALOO, MEMBER ..... 5<sup>TH</sup> APPELLANT  
MR RANGE MWITA MAROA, MEMBER ..... 6<sup>TH</sup> APPELLANT**

**AND**

**THE MIGORI COUNTY ASSEMBLY ..... 1<sup>ST</sup> RESPONDENT  
THE COUNTY PUBLIC SERVICE BOARDS NATIONAL CONSULTATIVE  
FORUM ..... 2<sup>ND</sup> RESPONDENT  
HON CHARLES OYUGI OWINO ..... 3<sup>RD</sup> RESPONDENT  
MR SOLOMON OLUOCH, DIRECTOR HUMAN RESOURCE MIGORI  
COUNTY ..... 4<sup>TH</sup> RESPONDENT  
HON OCHILLO AYACKO ..... 5<sup>TH</sup> RESPONDENT  
HON VINCENSIA OWINO KIONGE ..... 6<sup>TH</sup> RESPONDENT  
MS RUTH ADHIAMBO OKOWA, MR BARRACK OKALLO OGAI, MS  
EUNICE ATIENO ONYANGO, MR BARRACK OKALLO OGAL, MR HOLLY  
EDWARD OKWAMA & MS JUDITH ACHIENG ODODA, SUED JOINTLY AND  
SEVERALLY AS THE SELECTION PANEL FOR THE RECRUITMENT OF  
THE CHAIRPERSON AND MEMBERS OF THE MIGORI COUNTY PUBLIC  
BOARD ..... 7<sup>TH</sup> RESPONDENT**



***(Being an appeal from the Ruling of the High Court of Kenya at Migori (Wendoh, J.) dated 31st May, 2023 in HCCC NO. JR. E003 OF 2023, FORMERLY NAIROBI HCCC JR. NO. E017 OF 2023)***

**JUDGMENT**

1. The substratum of this appeal stems from the appellants' ex- parte chamber summons application dated 14<sup>th</sup> February, 2023, which was before the High Court sitting at Nairobi seeking certain orders against the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein. The 1<sup>st</sup> and 2<sup>nd</sup> respondents were the respondent and interested party, respectively, in the said application whilst the appellants were the ex-parte applicants. The orders sought, reproduced verbatim, were as follows:
  1. Spent
  2. That leave be granted to the applicant to apply to this Honorable Court for declaratory orders that the Unfair Administrative Action Reposed In The House Resolution On The Petition For The Removal Of The Chairperson And Members Of The Migori County Public Service Board As Adopted By The Migori County Assembly On 6<sup>th</sup> Of February, 2023; is in breach of the applicants' rights;
  3. That leave be granted to the applicants to apply to this Honorable Court for orders of certiorari to call, remove, deliver up to the court and quash the Unfair Administrative Action Reposed In The House Resolution On The Petition For The Removal Of The Chairperson And Members Of The Migori County Public Service Board As Adopted By The Migori County Assembly On 6<sup>th</sup> Of February, 2023; and all actions and/or decisions made subsequent thereon;
  4. That leave be granted to the applicant to apply to this Honorable Court for orders of prohibition to restrain the respondent whether by itself or through its agents or officers; or anyone claiming under the authority of the impugned administrative action, from implementing, acting upon or in anyway howsoever giving effect to or enforcing in any manner or form interfering with the applicants, on account of the Unfair Administrative Action Reposed In The House Resolution on thePetition For The Removal of theChairperson And Members of theMigori County Public Service Board As Adopted By The Migori County Assembly on 6<sup>th</sup> of February, 2023;
  5. That the grant of such leave under prayer 2, 3 and 4 above, to operate as a stay against the implementation, operationalization, validity, execution and/or coming into effect of the impugned decision, resolution, recommendations and or directive by the respondents in the Unfair Administrative Action Reposed In The House Resolution on thePetition For The Removal ofThe Chairperson And Members Of The Migori County Public Service Board asAdopted By The Migori County Assembly on6<sup>th</sup> of February, 2023; and all actions and/or decisions made subsequent thereon pending the hearing and determination of the substantive application for judicial review herein.
  6. That this Honourable Court to grant any further and or consequential orders necessary to give effect to the justice of the matters herein, including directions on an expeditious filing and hearing of the substantive judicial review motion herein; and,
  7. That the costs of this application be provided for in the cause.



2. The application was supported by the grounds on its body and a supporting affidavit of Hon. Jared Odhiambo Opiyo, the 1<sup>st</sup> appellant herein, on behalf of all the appellants, sworn on 14<sup>th</sup> February, 2023. It gave the factual background to the application as follows.
3. The Migori County Public Service Board members which comprises of all the appellants herein, were appointed for a non- renewable term of six years, running from the 27<sup>th</sup> February, 2020 to 26<sup>th</sup> February, 2026, in accordance with section 58(4) of the [County Governments Act](#). However, sometime in October, 2022, the Board members were exposed to what they deem to be “unlawful actions by the County Executive.” This, they say, included non-allocation of resources to undertake their functions; unlawful countermanding of their decisions as a Board, which included recruitment of casual employees, usurpation of the County Public Service Board’s role to create offices in Public Service Board; and usurpation of their statutory role of appointing officers in acting and substantive capacities. Further, in January 2023, their offices were “unlawfully cordoned off by police officers, locks to their offices changed, their motor vehicles withdrawn and the Board secretariat unilaterally sent on compulsory leave.” Consequently, these violations culminated into petitions for their removal from office lodged on 9<sup>th</sup> January, 2023. Thereafter, a Special Sitting of the Assembly was gazetted, hurriedly in their view, on 11<sup>th</sup> January, 2023, and held on 16<sup>th</sup> January, 2023.
4. Displeased by the unfolding events which they deemed unlawful and inimical to their employment, the appellants sought judicial relief at the [Employment and Labour Relations Court \(ELRC\), Kisumu via Kisumu ELRC No. E002 of 2023](#). They were, however, not successful in obtaining the temporary orders of injunction that they sought.
5. Thereafter, Mokoro Jared John and Beatrice Aoko Ochieng, approached the Migori Chief Magistrate’s Court in Migori CMCC E012 of 2023, Mokoro Jared John & Another v Speaker, County Assembly of Migori & 2 Others. The suit was against the Speaker, County Assembly of Migori; Clerk, County Assembly of Migori and the County Assembly itself. It sought interim injunctive orders restraining the respondents from commencing and/or proceeding with a special sitting which was to be held on 31/01/2023 for consideration of the County Assembly’s Ad Hoc Committee’s report on the petition for the removal of the Chairperson and members of Migori County Public Service Board. It is not clear in what capacity the said Mokoro Jared John and Beatrice Aoko Ochieng sued. However, the interim orders they sought were granted by the Magistrate’s Court on 30/01/2023. This forced the respondents in that action to file a Judicial Review application at the ELRC, Kisumu being Kisumu ELRC JR No. E001 of 2023. The suit sought, primarily, an order quashing the ex parte proceedings and orders in Migori CMCC E012 of 2023. The ELRC granted leave to the ex parte applicants to bring judicial review proceedings and allowed the leave to operate as stay of the orders dated 30/01/2023.
6. Meanwhile, the 1<sup>st</sup> respondent proceeded to hold sittings on 31<sup>st</sup> January, 2023, and 6<sup>th</sup> February, 2023, whereby the impugned resolution was adopted. Afterwards, the 1<sup>st</sup> respondent issued them with a formal invitation vide a letter dated 31<sup>st</sup> January, 2023, to appear before the Migori County Assembly and defend themselves on the issues under consideration. In any event, the appellants say that despite preparing a joint memorandum responding to the allegations in the report under consideration and appearing before the County Assembly with a legal representative, they were denied audience and their memorandum rejected. Further, they say that they were never given the opportunity to cross-examine the petitioners as to the veracity of the allegations in their petitions, nor were members of public allowed to participate, which, they say, is a legal requirement. They claim that several other illegalities were evident in the process, chiefly that one of the documents relied on by the Migori County Assembly was an annexure which, they say, explicitly violated section 3(1) of the [Petition to County Assemblies \(Procedure\) Act, 2020](#).



7. The appellants, then, filed the judicial review application that gave rise to the present appeal. The application, dated 14<sup>th</sup> February, 2023, was first placed before Chigiti, J. sitting at Milimani High Court (Judicial Review Division) on 15<sup>th</sup> February, 2023. The learned judge granted the appellants leave to commence judicial review proceedings against the adoption of the resolution by the Migori County Assembly on 6<sup>th</sup> February, 2023. He also directed that the leave granted do operate as a stay in the terms of order 5 of the appellant’s application, which read as follows:

“ 5) That the grant of such leave under prayer 2, 3 and 4 above, to operate as a stay against the implementation, operationalization, validity, execution and/or coming into effect of the impugned decision, resolution, recommendations and or directive by the respondents in the Unfair Administrative Action Reposed In The House Resolution on thePetition For The Removal of theChairperson And Members of theMigori County Public Service Board As Adopted By The Migori County Assembly on 6<sup>th</sup> of February, 2023; and all actions and/or decisions made subsequent thereon pending the hearing and determination of the substantive application for judicial review herein.”

8. The file was, thereafter, transferred to Migori High Court subsequent to which the parties filed numerous interlocutory applications and preliminary objections on various issues. The High Court (Wendoh, J.) directed that she would consider all the applications and preliminary objections and give a consolidated ruling, which is the impugned ruling before us. In brief, the following applications and notices of preliminary objections were before the learned Judge for a ruling:

- a. A notice of motion application dated 19<sup>th</sup> February, 2023 by the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents herein sought for orders that: leave granted to the appellants vide their notice of motion dated 14<sup>th</sup> February, 2023, be set aside; directions to be issued that the proceedings be stayed and consolidated with previous suits filed at the instance of the appellants, that is, Kisumu ELRC Petition No. E002 of 2023, Kisumu ELRC JR. No. E001 of 2023 and Migori CMCC No. 12 of 2023 for purposes of hearing and determination since they all revolved around the same subject matter of petitions challenging the removal from office of the appellants by the County Assembly of Migori; and the appellant’s notice of motion struck out; among other orders
- b. A notice of motion dated 2<sup>nd</sup> March, 2023 by the appellants. This application named the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> respondents herein as contemnors for failing to observe and comply with the court order issued on 15<sup>th</sup> February, 2023. Consequently, the application prayed for: orders directing the observance and compliance of the court orders issued on 15<sup>th</sup> February, 2023 and 17<sup>th</sup> February, 2023; orders suspending the purported declaration of vacancies in the office of the chairperson and members of the Migori County Public Service Board; orders suspending the purported appointment of Members of the Selection Panel for the recruitment of chairperson and members of the Migori County Public Service Board as gazette on 17<sup>th</sup> February, 2023, despite the stay order issued on 15<sup>th</sup> February, 2023; orders that pending the hearing of the application, the respondents and contemnors be barred and/or otherwise denied audience before the court in respect of any other proceedings therein save for responding to the application for citation of contempt, unless and until they purge the contempt and comply with the subsisting orders; their summons before court to show cause for their willful and deliberate disobedience and defiance of court orders issued on 15<sup>th</sup> February, 2023; issuance of warrants of arrest against the contemnors; among others.



- c. A notice of motion application dated 13<sup>th</sup> April, 2023 by the appellants. This application sought for: orders of injunction restraining and barring the vetting and approval interviews of individuals recruited as chairpersons and members of the selection panel for selecting candidates for appointment as chairperson and members of the Migori County Public Service Board in compliance with the subsisting order issued on 15<sup>th</sup> February, 2023; an order directing the Director Human Resource Migori County to immediately reinstate the appellants into the Migori County Public Service payroll in compliance with the subsisting orders issued on 15<sup>th</sup> February, 2023; issuance of summons requiring personal attendance of the said contemnors to show cause for their willful and deliberate aggravated disobedience and defiance of court orders issued on 15<sup>th</sup> February, 2023; issuance of warrants of arrest of the said contemnors; among others.
  - d. The 1<sup>st</sup> respondent also filed a Notice of Preliminary Objection dated 6<sup>th</sup> March, 2023.
  - e. The 5<sup>th</sup> Respondent filed a Preliminary Objection dated 18<sup>th</sup> April, 2023.
  - f. The 6<sup>th</sup> Respondent filed a Notice of Motion dated 8<sup>th</sup> March, 2023 and a Notice of Preliminary Objection dated 9<sup>th</sup> March, 2023.
  - g. Finally, the 3<sup>rd</sup> and 4<sup>th</sup> respondents filed a Notice of Preliminary Objection dated 18<sup>th</sup> April, 2023.
9. Suffice to say, all the other interlocutory applications and preliminary objections filed by parties which orders are not specifically described above were with respect to the jurisdiction of the court to entertain the matter and sought the striking out of the appellant's notice of motion dated 14<sup>th</sup> February, 2023; 13<sup>th</sup> April, 2023, and another dated 15<sup>th</sup> March, 2023. The last application was for commencement of judicial review proceedings pursuant to the leave granted by the court on 15<sup>th</sup> February, 2023.
10. Upon considering the applications on record, the preliminary objections and the submissions filed by the parties, the learned judge, Wendoh, J., in a carefully written judgment, coined two issues of determination as follows:

**1. Whether the court had jurisdiction to hear and determine the substantive motion dated 15<sup>th</sup> March, 2023 in light of: -**

- a. The judicial review proceedings being sub judice in light of the pending cases filed in Kisumu ELRC No. E002 of 2023, Kisumu ELRC JR No. E001 of 2023 and Migori CCMC No. 12 of 2023.
- b. Whether the issues arising out of the dispute are employer-employee related.
- c. Whether the substantive notice of motion was filed out of time.

**2. Whether the alleged contemnors should be found guilty of contempt of the orders of the court issued on 15/2/2023 and 17/2/2023.**

- 11. On whether the judicial review proceedings were sub judice, the learned judge cited section 6 of the *Civil Procedure Act* and relied on the decisions in the case of Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties [2020] eKLR; and Kenya Bankers Association v Kenya Revenue Authority [2019] eKLR; all of which dealt with the doctrine of sub judice and the principles that ought to be followed in that regard.
- 12. After due analysis, the learned Judge found that the disputes filed in Kisumu ELRC E002 of 2023; Kisumu JR No. E001 of 2023; Migori CMCC No. E012 of 2023 and the appellant's application



dated 14<sup>th</sup> February, 2023, to commence judicial review proceedings (which gave rise to the subject of the present appeal) revolved around the same subject matter, namely, the legality of the process of the appellants removal from office as chairperson and members of the Migori County Public Service Board. Accordingly, she concluded that the suit before her was sub judice.

13. On jurisdiction, the learned Judge cited Article 162(2)(a) of *the Constitution*; section 12 of the *Employment and Labour Relations Court Act*; and Article 165(5) of *the Constitution* and the court's decisions in *United States International University (USIU) v Attorney General* [2012] eKLR; and *Daniel N. Mugendi v Kenyatta University & 3 Others* CACA No. 6 of 2012 [2013] eKLR; *Republic v Kenya Ordinance Factories Corporation Ex-Parte Anne Gichimo* [2014] eKLR; *Republic v Mwangi S. Kimenyi Ex-Parte Kenya Institute for Public Policy and Research Analysis (KIPPR)* [2013] eKLR; and *Ali Jarso Wako & Another v Ministry of Interior & Coordination of National Government & 5 Others*; *Public Service Commission & 5 Others (Interested Parties)* (2020) eKLR; wherein the court held that the Employment and Labour Relations Court has the jurisdiction to deal with cases in which individuals rights and fundamental freedoms have been violated, arising from the relationships defined in section 12 of the *Employment and Labour Relations Court Act*.
14. Drawing from those provisions of the law and decided cases, the learned judge held that, since the central issue to be determined revolved around the legality of the removal from office of the appellants, it did not matter if the removal was being conducted through the County Assembly, a private entity or an individual. It was her view that whatever the case, the fact that the appellants claimed that their fundamental rights were breached in whatever form in relation to their employment contract, the matter is to be resolved by the Employment and Labour Relations Court pursuant to Article 165(5) of *the Constitution* as read together with section 12 of the *Employment and Labour Relations Court Act* and Rule 28 of the Employment and Labour Relations Rules, 2016. She opined that the appellants were right to seek the appropriate reliefs before the Employment and Labour Relations Court in Kisumu ELRC No. E002 of 2023, which they ought to have pursued to its finality. Thus, the suit filed on their behalf in Migori CMCC No. E012 of 2023 and their application dated 14<sup>th</sup> February, 2023, for commencement of judicial review proceedings “smacked of forum shopping” and were an abuse of the court process.
15. Further, the learned judge stated that, at the time the court pronounced itself on the matter, the same had already been determined to finality in the judgment by Radido, J. in Kisumu ELRC No. E002 of 2023, wherein he said the following with respect to the conduct of the appellants:

“It is also noteworthy that the Petitioners also approached the High Court after approaching this court in Nairobi Judicial Review Case No. E017 of 2023, to challenge their removal (the proceedings were transferred to the High Court sitting in Migori. The Petitioners also amended the Petition herein to reflect the new circumstances) without disclosing that fact to this Court (this Court is not aware whether a material disclosure of pending proceedings was made to the High Court). The course taken by and or on behalf of the Petitioners has the potential to seriously erode public confidence in the administration of justice since the Petitioners have approached separate Courts with distinct jurisdictions. It would not be out of the ordinary to suppose that different conclusions may be reached by the Courts causing outward embarrassment to the Judiciary. In the course of the proceedings, it also emerged that a Magistrate's Court had been approached to stop the process before the County Assembly, and it did issue injunctive orders.”



16. The learned Judge, consequently, held that the issues arising out of the disputes were employer-employee related and that, therefore, the High Court lacked jurisdiction to hear and determine the judicial review proceedings before it.
17. The learned judge also held that the appellants had failed to file their notice of motion within the time directed by the court under Order 53 Rule 3 of the Civil Procedure Rules and neither did they seek for an extension of time to file the same. Thus, the learned Judge concluded that there was no valid substantive judicial review application before the court and further that the stay orders granted at the commencement of judicial review proceedings had automatically lapsed by operation of law.  

Consequently, the learned judge held that the appellants' substantive motion dated 15<sup>th</sup> March, 2023, was a nullity by virtue of being filed outside the period of 21 days and the court could not assume jurisdiction to determine any pending subsequent matters which arose within the course of the said judicial review proceedings.
18. Lastly, as regards whether the alleged contemnors should be found guilty of contempt of the orders of the court issued on 15/2/2023 and 17/2/2023; the learned judge stated that while the appellants application dated 2<sup>nd</sup> March, 2023, which was filed during the period before the expiry of the 21 days during which the appellants were supposed to have filed their substantive notice of motion gave the court jurisdiction to deal with it, the alleged contemnors were not part of the initial proceedings that sought leave to commence judicial review proceedings. As such, it was not proper to simply "add" them into the proceedings and then cite them for contempt without first seeking their joinder. It was her view that the alleged contemnors had a right to be heard and it was not fair and in the best interest of justice to direct orders to them without affording them a right to be heard.
19. The learned judge also noted that, taking into consideration all the facts surrounding the issuance of the stay orders granted on 15<sup>th</sup> February, 2023, the court could not grant the orders of contempt because they were obtained following material non-disclosure. In this regard, she pointed out that at the time, the court in Kisumu ELRC Petition No. E002 of 2023 had just declined to grant the same orders and the appellants went ahead and obtained stay orders from another court which was "grossly irregular." It was her view that the appellants abused the court process and, as a result, the court could not exercise its discretion in considering the appellants application dated 2<sup>nd</sup> March, 2023, for contempt against the respondents. Consequently, the said application automatically fell by the way side.
20. Additionally, the learned judge stated that the appellants' notice of motion dated 14<sup>th</sup> February, 2023, sought to quash the decision of the Migori County Assembly dated 6<sup>th</sup> February, 2023, which implemented the decision of the Ad Hoc Committee to remove the appellants from their respective positions in the Migori County Assembly Public Service Board. However, the appellants failed to annex to the verifying affidavit sworn by Jared Odhiambo Opiyo, the alleged proceedings of 6<sup>th</sup> February, 2023. In this regard, the learned Judge held that it is now well settled that the basic requirement in moving a court to quash a decision, is an attachment by the applicant of the impugned decision he/she/it seeks to be quashed. It is not enough for the applicant to state that they have knowledge of the impugned decision that was made. For this argument, she relied on the case of Republic vs. Prof. Mwangi Kaimenyi Ex-parte KIIPRA, Civil Appeal No. 160 of 2008, wherein it was held that the court cannot act in vain against a non-existent decision. In that case, there was no decision or letter filed by the applicant in respect of the decision of that was sought to be quashed. She opined that based on that ground alone, there was no legal basis for granting the appellants leave to commence judicial review proceedings.



21. The learned judge also pointed out the judicial review proceedings were irregular for yet another reason: that declaratory orders cannot be sought in judicial review proceedings given that judicial review proceedings are a special species of litigation. Therefore, the learned Judge opined that the judicial review proceedings commenced by the appellants was defective and bad in law.
22. In the end, the learned judge concluded that the High Court was bereft of jurisdiction on account of the subject matter of the suit being an employer-employee dispute; that the appellants' application dated 14<sup>th</sup> February, 2023, was an abuse of the court process on account of non-disclosure and forum shopping; that that, in any event, was sub judice the matters already pending in Kisumu ELRC No. E002 of 2023 and Kisumu JR ELRC No. E001 of 2023. Consequently, the learned Judge dismissed the appellants' application and issued the following orders:
  - a. This court is bereft of jurisdiction on account of the subject matter being an employer-employee dispute.
  - b. These proceedings are sub judice the matter already pending before the Kisumu ELRC No. E002 and Kisumu JR No. E001 of 2023.
  - c. The substantive Notice of Motion dated 15/2/2023 is a nullity having been filed out of time.
  - d. The contempt proceeding are hereby dismissed.
  - e. The judicial review proceedings are hereby dismissed.
  - f. The respondents will have costs of the application.
23. Aggrieved by the decision of the High Court, the appellants filed a Notice of Appeal dated 24<sup>th</sup> May, 2023, and a Memorandum of Appeal dated 20<sup>th</sup> July, 2023, in which they raised eleven (11) grounds of appeal. These are that the learned judge erred in law and fact:
  1. By holding that the reliefs in the application for judicial review are limited to certiorari, mandamus or prohibition.
  2. By finding that the subject judicial review proceedings were defective and a nullity, with no basis to grant leave; because, whereas the appellants sought inter alia to quash the Resolution by the 1<sup>st</sup> respondent on 6<sup>th</sup> February, 2023, they had not attached the impugned decision or proceedings thereon.
  3. By holding that the appellant had concealed material facts that they had filed other related cases in Migori CMCC and Kisumu ELRC.
  4. By failing to enquire into and issue an order of debarment from audience of the 1<sup>st</sup> and 3<sup>rd</sup> respondent to 7<sup>th</sup> respondents (as alleged contemnors); for repeated disobedience and compliance with the orders of the Hon. Court of 15<sup>th</sup> February, 2023 as variously restated and the orders of the Hon. Court of 11<sup>th</sup> May, 2023; as they interfered with the court's adjudication of the subject matter.
  5. By holding that the court was bereft of jurisdiction on account of the subject matter being an employer-employee dispute.
  6. By holding that the proceedings were sub judice ELRC (KSM) Pet E002 of 2023 and ELRC (KSM) JR E001 of 2023.



7. By finding that contempt proceedings were commenced irregularly against the 3<sup>rd</sup> to 7<sup>th</sup> respondents, since they were not parties to the leave application where an order of stay in rem was issued.
  8. In finding that the delay in lodging the substantive judicial review was unexplained and not responded to by the appellants.
  9. In finding that the delay in filing and lodging the substantive judicial review automatically terminates judicial review proceedings.
  10. In faulting the appellants for lodging the instant proceedings at the High Court in Nairobi and not in Migori.
  11. By failing to determine the substantive merits of the application for citation of contempt and substantive judicial review motion.
24. Consequently, the appellants prayed that the appeal be allowed in the following terms:
1. The ruling of the High Court at Migori by Lady Justice R. Wendoh, delivered on 31<sup>st</sup> May, 2023 in HC (Migori) JR E003 of 2023, be as is hereby set aside in its entirety.
  2. The substantive judicial review motion vide the Notice of Motion Application dated 15<sup>th</sup> March, 2023 in HC (Migori) JR E003 of 2023, be and is hereby remitted for expeditious hearing and disposal on its merit before a differently constituted bench.
  3. An order hereby issues maintaining status quo as per the order of the Hon. Mr. Chigiti, S.C. as at 15<sup>th</sup> February, 2023, restraining the implementation, operationalization, validation, execution and/or bringing into effect the impugned Resolution the Migori County Assembly of 6<sup>th</sup> February, 2023 on the hearing and determination of the Petition(s) for the removal of the Chairperson and Members of the Migori County Public Service Board; and all actions and/or decisions made subsequent thereon including barring any consequent action towards reconstitution of the Migori County Public Service Board, or depriving the appellants of the access and benefit of their office pending the hearing and determination of the remitted substantive application for judicial review.
  4. Any and all decisions and/or actions implementing, operationalizing, validating, executing and/or bringing into effect the impugned Resolution the Migori County Assembly of 6<sup>th</sup> February, 2023 on the hearing and determination of the Petition(s) for the removal of the Chairperson and Members of the Migori County Public Service Board including the reconstitution of the Migori County Public Service Board, or deprivation of the appellants access and benefit of their office, is null and void ab intio in light of the restraining order of the Hon. Mr. Justice Chigiti, S.C. of 15<sup>th</sup> February, 2023.
  5. This Honourable Court be pleased to cite the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> 6<sup>th</sup> and 7<sup>th</sup> respondents jointly and severally for contempt of court for their willful and deliberate disobedience and defiance of the court order made on 15<sup>th</sup> February, 2023 by Hon. Mr. Justice Chigiti, S.C.; and restated by Hon. Mr. Justice Chigiti, S.C. on 27<sup>th</sup> February, 2023, 3<sup>rd</sup> March, 2023, and 27<sup>th</sup> March, 2023, of one part and on 28<sup>th</sup> March, 2023, 29<sup>th</sup> March, 2023, 18<sup>th</sup> April, 2023 and 11<sup>th</sup> May, 2023.
  6. Consequently, upon mitigation sentence them each to a custodial sentence of not less than one (1) year, and each a monetary fine for the sum not less than Kenya Shillings Five Million (KES 5,000,000).



7. The appellants costs for this appeal be provided for.
25. During the virtual hearing of the appeal, learned counsels, Mr. Lusi and Ms. Muchiri appeared for the appellants; learned counsel Mr. Okong'o appeared for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents; learned counsel Mr. Ngwele appeared for the 2<sup>nd</sup> respondent; learned counsel Mr. Omondi appeared for the 5<sup>th</sup> respondent; and learned counsel Mr. Nyamori appeared for the 6<sup>th</sup> and 7<sup>th</sup> respondents. Other than the 2<sup>nd</sup> respondent, all other parties filed written submissions and relied entirely on them. The 2<sup>nd</sup> respondent made oral submissions. All the respondents other than the 2<sup>nd</sup> respondent opposed the appeal. The positions and arguments taken by these respondents in opposition to the appeal are generally the same and will be presented in this judgment collectively, unless specifically indicated otherwise.
26. We have perused and analyzed the voluminous record as we should as the first appellate court, whereby our mandate is to review issues of both facts and law afresh and come to our own independent conclusions. (See *Selle v Associated Motor Boat Co. Limited* [1968] EA 123).
27. In spite of the stridency and volume of the submissions, multiplicity of suits, interlocutory applications and preliminary objections and polycentricity of parties, we can easily discern the matters that need our attention as an appellate court – and, fortunately, they are easy to untangle. We have disentangled them and listed them in a manner that seems logical to us as follows:
  - a. Whether the judicial review proceedings dated 15<sup>th</sup> March, 2023 were irregular for including declaratory reliefs as prayers.
  - b. Whether the judicial review proceedings dated 15<sup>th</sup> March, 2023 were void for failing to attach a copy of the impugned order or decision.
  - c. Whether the judicial review proceedings dated 15<sup>th</sup> March, 2023 were void for not being brought within 21 days as directed by the order of Chigiti, J. on 15<sup>th</sup> February, 2023.
  - d. Whether the judicial review proceedings dated 15<sup>th</sup> March, 2023 were sub judge Kisumu ELRC Case No. E002 of 2023 and Kisumu ELRC JR Case No. E001 of 2023.
  - e. Whether the appellants were guilty of material non- disclosure entitling the court to set aside the orders granting leave to bring the judicial review proceedings.
  - f. Whether the High Court had jurisdiction to hear the judicial review proceedings in the circumstances of this case.
  - g. Whether the High Court was right to refuse to cite and punish the alleged contemnors for contempt of court.
28. We will deal with the questions in seriatim.
29. The High Court ruled that the judicial review proceedings were improper because judicial review under Order 53 of the *Civil Procedure Act* is limited orders for certiorari, mandamus or prohibition. All the respondents other than the 2<sup>nd</sup> respondent support the learned Judge's position on this point citing the text of Order 53. Naturally, the appellants disagree. They contend that the reliefs in an application for judicial review are not limited to certiorari, mandamus or prohibition. Counsel for the appellants, Mr. Lusi, submitted that that on the face of the substantive judicial review application vide the notice of motion application dated 15<sup>th</sup> March, 2023, they invoked the jurisdiction under section 11(1)(a) of the Fair and Administrative Actions Act (FAAA) which provides verbatim that the proceedings for judicial review under section 8(1) [sic, meant to be 9(1)], the court may grant any order that is



just and equitable, including a declaratory order of the rights of the parties in respect to any matter to which the administrative action relates. He argued that under our emerging jurisprudence spawned by Constitution 2010, the scope and breadth in the regulation of administrative actions or decisions as defined by section 2 of the FAAA and Articles 47, 165(3)(d)(ii) and 6 of *the Constitution*, has been expanded. For this proposition, he relied on Republic vs. Kenya Revenue Authority Ex-parte Stanely Mombo Amuti [2018] eKLR, wherein it was held that judicial review powers that were previously regulated by the common law under the prerogative and principles developed by the courts to control the exercise of public power are now regulated by *the Constitution*. He also relied on Edwin H.D. Dande & Others vs. Inspector General of Police & Others, SC. Pet No. 6 (E007) of 2022 consolidated with Pet. No. 4(E005) & 8(E010) of 2022, which affirmed that judicial review is no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in *the Constitution*.

30. Counsel for the appellants further submitted that Article 47, and 165(3)(d)(ii) and 6 of *the Constitution* as read with section 9(1) of the FAAA (as invoked by the appellants) empower a person who is aggrieved by an administrative action to apply for judicial review of any administrative action to the High Court or to a subordinate court, upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*. He argued that when a court admits a claim under judicial review, it may grant reliefs that it deems just and equitable; which relief under section 11(1)(a) of the FAAA are not limited to grant of reliefs in the nature of certiorari, mandamus or prohibition, but also include declaratory orders.

31. On this issue, we agree with the appellant. Our recent jurisprudence now holds that judicial review remedies have expanded beyond the traditional three of certiorari, mandamus and prohibition. The nature of Judicial Review has fundamentally changed as a result of application of Articles 23 and 47 of *the Constitution*. It is no longer restricted to the three prerogative writs. For example, in Dande & 3 others v Inspector General, National Police Service & 5 others [2023] KESC 40 (KLR) (16 June 2023), the Supreme Court said:

However, the entrenchment of judicial review under *the Constitution* of Kenya 2010 elevated it to a substantive and justiciable right under *the Constitution*. Accordingly, judicial review is no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in *the Constitution*. Thus, article 47 provides that 'every person has a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

32. Similarly, in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others SC [2014] eKLR the Supreme Court stated that:

[355] However, notwithstanding our findings based on the common law principles of estoppel and res-judicata, we remain keenly aware that *the Constitution* of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. By clothing their grievance as a constitutional question, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the appellants (respondents herein) were entitled to approach the court and have their grievance resolved on the basis of articles 22 and 23 of *the Constitution*.

33. To respond to the first issue raised by the present appeal, therefore, we find that it was an error for the learned Judge of the High Court to conclude that the judicial review application was improperly before the court for the reason only that the applicants before the court had included a declaratory prayer.



34. The second question we must resolve is whether the judicial review proceedings were void only for the reason that the appellants failed to attach a copy of the impugned decision. The learned Judge concluded that they were. The respondents, other than the 2<sup>nd</sup> respondent, support the decision. In reaching this decision, the learned judge held that it is now well settled that the basic requirement in moving a court to quash a decision, is an attachment by the applicant of the impugned decision he/she/it seeks to be quashed. It is not enough for the applicant to state that they have knowledge of the impugned decision that was made. For this argument, the learned Judge relied on *Republic vs. Prof. Mwangi Kaimenyi Ex-parte KIIPRA*, Civil Appeal No. 160 of 2008, wherein it was held that the court cannot act in vain against a non-existent decision.
35. The appellants attack this position holding that it is incongruent with the current trends in judicial review jurisprudence. They cite decision in *Republic vs. Firearms Licensing Board & Another Ex-Parte Boniface Mwaura* [2019] eKLR, following the decision in *Republic vs. Speaker of the Senate & Another Ex-Parte Afrison Export Import Limited & Another* [2018] eKLR, where the court observed that judicial review is no longer a common law prerogative, but a constitutional principle to safeguard the constitutional principles, values and purposes. Further, the court also held that all an applicant is required to do in an application for judicial review proceedings, is to demonstrate that the impugned decision whether it is oral, a letter, an order or proceedings, violates or threatens to violate the Bill of Rights or violates *the Constitution*.
36. On our part, we would disagree with the learned Judge's analysis on two grounds. First, the issue of regularity of an application for judicial review application is determined at the leave stage. Once a judge has given leave to bring substantive judicial review proceedings after satisfying himself that the pre-conditions have been satisfied, it is not open for a judge of concurrent jurisdiction to revoke that determination afterwards. This would be akin to the second judge sitting on appeal of a colleague of concurrent jurisdiction. Second, the requirement for a copy of the impugned decision to be attached to the judicial review proceedings is no longer an iron-clad talismanic requirement under our new jurisprudence where rigid technical requirements are unmoored by Article 159(2)(d) of *the Constitution*. This is to say that there may be circumstances where a party may benefit from a merit consideration of their judicial review application absent the impugned decision – for example, where it is unreasonably difficult to get the order; or where the existence of the decision is not contested; or where the decision is within the possession of the adversary who refuses to make it available to the applicant. In the present case, there is no indication that the learned Judge engaged in that kind of analysis before holding the proceedings irregular merely for the absence of a copy of the impugned decision even though none of the respondents denied the existence of the decision.
37. We next turn to the question whether the judicial review proceedings were null for the failure to file them outside the twenty-one day period window as directed by the court. The learned Judge concluded that there was no substantive judicial review application before the court and further that the stay orders granted at the commencement of judicial review proceedings had automatically lapsed by operation of law by virtue of being filed outside the 21-day period stipulated by the court and Order 53.
38. The respondents, other than the 2<sup>nd</sup> respondent, support the High Court's ruling on the point. They contend that an applicant must adhere to express directions given to it by the court. In this regard, the respondents relied on the decision by Odunga, J. (as he then was) in *Republic v Cabinet Secretary*,



Information Communication & Technology & Another Ex-parte Celestine Okuta & Others [2016] eKLR, wherein the learned Judge stated thus:

“The applicants expect this court to ignore express directions of the Court and treat their failure to comply with the Court’s direction as inconsequential. That position with due respect is untenable.”

In this regard, Odunga, J., associated himself with this Court’s decision in *United Housing Estate Limited v Nyals (Kenya) Limited*, Civil Appl. No. Nai. 84 of 1996, wherein it was held that a party who obtains a court order on certain specified conditions can only continue enjoying the benefits of that order if the conditions attaching to it are scrupulously honoured and in the event of a proved failure to comply with the attached condition, the court has inherent power to recall or vacate such an order. Drawing from the stated decision of this Court, Odunga, J., took the view that a party cannot unilaterally decide not to comply with the conditions attached to the exercise of discretion in his or her favour on the ground that he or she ought to have access to justice. In that case, the appellants had the option of moving the court to extend time or seek to regularize the record where the motion had been filed. Therefore, by failing to exercise any of the available options, the applicants disentitled themselves of the favourable exercise of discretion.

39. The respondents (other than the 2<sup>nd</sup> respondent) take the view that in the context of Order 53, the requirement to file a substantive notice of motion within twenty-one days is couched in mandatory terms and the period there is not open to extension. They argue that any substantive motion pursuant to Order 53 that is filed outside the mandatory period of 21 days, is incompetent and bad in law. Based on this score alone, they argue that the application dated 15<sup>th</sup> March, 2023, had to fail for want of compliance with the law and was validly dismissed; and all the interlocutory motions that were anchored on it had to be terminated.
40. The appellants argue that the “inadvertent and explained delay” in filing and lodging the substantive judicial review, was caused by inefficiency in the court’s registry’s operations and that the excusable failure could not automatically terminate the judicial review proceedings. In this regard, the appellants submitted that the replying affidavit of Jared Opiyo dated 24<sup>th</sup> March, 2023, explained the transfer of the file from Nairobi and directions by the court following which the registry in Migori formally observed that they did not have the court file record from Nairobi to enable the issuance of a new case number to facilitate the filing of the main motion and any new emergent matters (if at all). He further submitted that the record of the court proceedings, captured the appellants’ explanation with respect to the difficulty they encountered on account of miscommunication between the registries in Nairobi and Migori. The appellants, therefore, argue that the learned judge erred in finding that the delay in lodging the substantive judicial review was unexplained and not responded to by the appellants.
41. The appellants relied on *Republic vs. Kenya Revenue Authority Commissioner for Investigation and Enforcement Department Ex-Parte Centrica Investments* [2019] eKLR, wherein the court held that since our Constitution guarantees access to justice, Parliament should consider the relevancy and constitutionality of the provisions of the [Law Reform Act](#) and the Civil Procedure Rules, 2010 which prescribes that a litigant must seek court’s leave before approaching the court. The court viewed that the constitutional guarantee to the right to access to courts fundamentally shifted the ground and rendered the provisions of the Civil Procedure Rules, 2010 and the [Law Reform Act](#) that require a party to seek court’s leave to approach it, obsolete.
42. Drawing from this authority, counsel submitted that the determination of disputes on merit, especially cases involving critical public interest matters must supersede strict application of technical procedural requirements under the previously existing regime in light of the provisions of Paragraph 7(1), Part 2



- of the Sixth Schedule of *the Constitution*. He further submitted that the court proceedings showed that the 1<sup>st</sup> respondent abandoned prayer (b) and (d) of its application dated 27<sup>th</sup> February, 2023, in which they sought leave to be vacated and the suit be struck out. Therefore, those issues were unavailable for interrogation by the court.
43. Whereas we are generally sympathetic to the appellants' position regarding the effect of rigid technicalities on substantive justice, we are not prepared to accept the view that the imprimatur of Article 159(2)(c) of *the Constitution* is to permit litigants to disregard all rules of procedure with licentious abandon. The constitutional provision exists, as we pointed out above, to relieve conscientious litigants of the oppression occasioned by the rigid application of procedural rules. It does not exist to give warrant/licence to litigants to ignore directions of the court when those directions have been issued to ensure the orderly regulation and determination of disputes.
  44. In the present case, as the learned Judge pointed out, the appellants were late in filing their substantive judicial review application. They may well be right that the delay was excusable, and was, perhaps, even caused by the court registry. In such a situation, however, the appropriate recourse for a litigant cannot be to ignore the court or a rule-based time limitation by simply terming it a "technicality". The proper recourse would be to approach the court under a certificate of urgency seeking for extension of time to make the filing. At the very least, a litigant in that position ought to file a contemporaneous application seeking the court's permission to deem the application filed late, as properly filed.
  45. In the present case, the appellants did not as much as seek oral leave to have the application dated 15<sup>th</sup> March, 2023 deemed to be regularly filed. There are outer limits to the organic plasticity purchased by the existence of Article 159(2)(c) of *the Constitution*— and the circumstances here find that limit: Article 159(2)(c) of *the Constitution* cannot be cited to aid a litigant who explicitly fails to timeously abide by the court's direction without seeking the court's discretion to extend time. On this score, therefore, we would agree with the learned Judge.
  46. Probably the most consequential conclusion by the learned Judge in her impugned ruling was the finding that the suit before her was sub judice Kisumu ELRC Case No. E002 of 2023 and Kisumu ELRC JR Case No. E001 of 2023.
  47. The appellants are most aggrieved by this finding. They vehemently argue that the disparate legal proceedings are founded on different and distinct causes of action as well as jurisdiction. They argued that appellants did not and are not arguing any violations of their employment contracts in the judicial review application or this appeal. Rather, the subject matter and core fracture of the dispute herein is an interrogation on whether the Migori County Assembly acted within the law in admitting, considering and making resolutions of 6<sup>th</sup> February, 2023.
  48. The appellants contended that the case in Kisumu ELRC No. E002 of 2023 was lodged by the appellants as against very specific persons for identified employment and labour relations constitutional violations whereas the case in Kisumu ELRC JR No. E001 of 2023, was lodged by the 1<sup>st</sup> respondent against Mokoro Jared and Beatrice Aoko, two members of the public from Migori, who had on, their own, challenged the 1<sup>st</sup> respondent in Migori CMCC No. E019 of 2023. Counsel for the appellants pointed out that the 1<sup>st</sup> respondent did not join the appellants in Kisumu ELRC JR No. E001 of 2023, not even as an interested party, presumably since they did not see any nexus with the appellants or the issues in the appellants' disparate but subsisting suits. Further, counsel for the appellants insisted that the issues presented in Kisumu ELRC No. E002 of 2023 even before the impugned decision of the 1<sup>st</sup> respondent on 6<sup>th</sup> February, 2023, were jurisdictionally and factually dissimilar to those arising in the present appeal. For this proposition, he relied on *Thika Min Hydro Co. Ltd vs. Josephat Karu Ndwiga* [2013] eKLR, and argued that the proceedings though related,



vary and differ from one another, including the causes of action and jurisdiction invoked. Thus, the appellants ponderously argue that there is absolutely no remote risk of any court decision arising from the disparate suits contradicting the other as none of the issues posed in any of the suits arise in any of the others. Additionally, they argue, no former suit exists where the appellants are party to, where the court had been invited to interrogate the propriety, instance, and manner of exercise of the Migori County Assembly's legal mandate, save for the judicial review matter that is subject of this present appeal.

49. As a whole, the respondents other than the 2<sup>nd</sup> respondent, support the High Court's position that the three matters were related and among the same parties. Counsel for the 1<sup>st</sup> respondent, in an argument mirrored by all the other respondents who opposed the appeal, argued that the learned Judge correctly found that the judicial review proceedings were sub judice to Kisumu ELRC No. E002 of 2023 and Kisumu ELRC JR. No. E001 of 2023, and urged this Court to look at the Petition dated 24 January, 2023, and the Notice of Motion dated 24<sup>th</sup> February, 2023, for conservatory orders; whose factual and legal predicates, he contended, are completely similar to the judicial review whose ruling is impugned. He contended that before the appellants approached the High Court and succeeded in obtaining leave to commence judicial review proceedings, they had initially approached the ELRC vide Kisumu ELRC No. E002 of 2023, to stop their removal from office. However, the court, in a ruling dated 31<sup>st</sup> January, 2023, declined to issue interim conservatory orders to stop the process of their removal from office; and in a final judgement dated 24<sup>th</sup> May, 2023, declined the invitation to stop their removal from office as members of the County Assembly Service Board.
50. We have carefully parsed the available information in the three suits in question. We regret that the foundational pleadings in the suits were not included in the Record of Appeal and so we were unable to rely on our own reading of the same. However, the material included in the record gives us sufficient information to make a determination.
51. The starting point for a proper analysis of whether a matter is sub judice is section 6 of the [Civil Procedure Act](#). The section provides as follows:
- “6. 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.”
52. Applying this section, we can outrightly point out that there is no proper basis for holding that Kisumu ELRC JR No. E001 of 2023 is sub judice Migori High Court JR No. 3 of 2023 (the case under appeal). By the learned Judge's own analysis, the former case arose out of Migori CMCC No. E012 of 2023. In that case, the plaintiffs were two persons other than the appellants. While it is obvious that the learned Judge suspected that the two plaintiffs had some connection with the appellants and were doing their bidding, such an unproven suspicion cannot be a valid basis for holding a suit sub judice. There was no demonstration that Migori CMCC No. E012 of 2023 was brought by the appellants or under people acting under their instructions to warrant the finding that it was sub judice Migori High Court JR No. 3 of 2023. We would, therefore, determine that it was an error for the learned Judge to make that finding.
53. In our view, however, the position is different when we compare Migori High Court JR No. 3 of 2023 and Kisumu ELRC No. E002 of 2023. The appellants concede that the parties were the same in the



two suits but voluminously protest that the former raises questions about the standards applicable in the exercise of constitutional duties by the County Assembly of Migori while the latter raises questions related to the employment of the appellants in the County Service Board and their removal therefrom. They say that the matter at hand concerns “a challenge on the propriety, instance, and manner of exercise of the Migori County Assembly’s mandate under Article 37 of *the Constitution* as read with petitions to County Assembly’s act” and that the suit “has no employer-employee relationship pleaded nor proved.” We do think that it is possible, in the theoretical realm, to frame the two suits as disparate. However, as framed and presented in court, the two suits are conceptually indistinguishable.

54. As reproduced in paragraph 1 of this judgment in their application dated 14<sup>th</sup> February, 2023 in the instant suit, the appellants sought leave to bring an action seeking three principal reliefs:

- a. Declaratory orders that the resolution by the Migori County Assembly made on 6<sup>th</sup> February, 2023 regarding the removal of the appellants as Chairperson and members of the Migori County Public Service Board is in breach of the appellants’ rights and is an unfair administrative action;
- b. Certiorari to call, remove, deliver up to the court and quash the said Migori County Assembly resolution and all actions and/or decisions made subsequent thereon;
- c. Prohibitory orders restraining the Migori County Assembly from acting on the said resolution to remove from office the appellants.

55. It is readily obvious that the principal concern, and the tenor of the suit is concern about what the appellants deem to be the unfair administrative action and procedurally unfair procedures that were deployed to remove them from office. As framed, the suit is not about “the manner and instance of exercise of the Migori County Assembly’s authority on a petition by members of the public” as the appellants now seek to demonstrate.

56. In other words, the judicial review proceedings before the learned judge was essentially about the same subject matter – the alleged procedurally and administratively unfair removal of the appellants from their positions as Chair person and members of the Migori County Public Service Board. We can easily tell that Kisumu ELRC No. E002 of 2023 was about the same subject matter from the final decision given in the case by Radido, J. in the final judgment dated 24<sup>th</sup> May, 2023, the learned Judge reproduced the prayers in the Amended Petition before him as follows:

12. In the Amended Petition, the Petitioners sought the following remedies:

- i. A declaration be and is hereby issued to declare that the purported appointment of Judith Okinda as the ag Secretary/CEO, Migori County Public Service Board vide letter dated 11<sup>th</sup> October 2022 and referenced CGM/GVN/MCPSB.22/Vol. 1.002 and variously extended is unconstitutional for violating sections 58(1)(c), 59(1)(b), 63(1), 64(1), 65(1)(b) and 75 *County Governments Act* as read with Article 10 and 232, Constitution.
- ii. A declaration be and is hereby issued that the impugned actions of the Respondents, itemised inter alia at paragraphs 18 to 29, 21 to 39 hereof are an unlawful abridgment on the independence of the Migori County Public Service Board, and its members’ labour rights.
- iii. A declaration be and is hereby issued that the invocation of the authority and/or discretion of the Respondents to facilitate removal process of members of the Migori County Public Service Board is amenable and/or subject to oversight and supervision by this Hon Court where it is alleged that the same is not ripe or crystallised?



- iv. A declaration be and is hereby issued that commenced (sic) process of removal of the Petitioners as chairperson, vice-chairperson and members of Migori county public service board violates the Petitioners' rights to fair labour practices, due process, equal protection of the law and non-discrimination, right to human dignity, freedom and security of the person, right to property, right to fair administrative action and right to fair hearing enshrined in Articles 27, 28, 29, 40,41 and 47 of *the Constitution* as particularised in this Petition and further violates the values of public service and national values under Articles 232 and 10 of *the Constitution* respectively, having been nefariously precipitated.
  - v. A judicial review order of certiorari be and is hereby issued calling up and quashing the impugned decision of the 1<sup>st</sup> Respondent reposed in the letter dated 11<sup>th</sup> October 2022 ref CGM/GVN/MCPSB.22/Vol. 1.002 and all subsequent extensions, purportedly appointing Judith Okinda, as the ag Secretary/CEO, Migori County Public Service Board, and all consequential actions undertaken and decisions thereon.
  - vi. A judicial review order of prohibition be and is hereby issued barring the Respondents from in any way howsoever, commencing and proceeding with the process of removal of the Petitioners as chairperson, vice-chairperson, and members of the Migori County Public Service Board as commenced via the Gazette Notice published on 11<sup>th</sup> January 2023.
  - vii. A judicial review order of prohibition be and is hereby issued barring the Respondents, jointly or severally, directly or indirectly from in any way howsoever interfering with the independence of the County Public Service Board and the Petitioners' lawful execution of their mandate.
  - viii. A judicial review order of mandamus be and is hereby issued directing the Respondents, and their agents to restore the Petitioners' access to the Board's offices including returning all necessary equipment, documents, and tools necessary for the effective execution of their mandate, immediately nonetheless within three (3) days of the order of the Hon Court.
  - ix. The Hon Court be pleased to award a reasonable amount in general damages for the violations of the Petitioners' fundamental rights and freedoms, as evinced herein.
  - x. Costs of the Petition be awarded for each of the Petitioners on a full indemnity basis.
57. To put the matter to rest, we reproduce in extenso the findings of the learned Judge in the same ELRC judgment:

The lawfulness of the removal process

47. The removal process of a member of a county public service board is underpinned by both *the Constitution* and various statutes including the *County Governments Act*, the Petitions to the County Assemblies (Procedure) Act, 2020 and the relevant Standing Orders.
48. The function of inquiring into and determining whether a member of the county public service board should be removed from office is reposed at the first instance upon the County Assembly by section 58(5) of the *County Governments Act*.
49. When performing the function, the County Assembly exercises quasi-judicial power.
50. Needless to say, in the exercise of such functions, Courts should only interfere with functions of the legislative arm before the function is completed where exceptional circumstances are demonstrated to show manifest unlawfulness. Such a principle is not only legally sound



because of separation of powers concerns but also because of the need to allow exhaustion of other ordained dispute resolution avenues.

.....

54. The Court has set out its role in these types of cases and it would now be germane to look at the facts advanced by the parties.
  55. On or around 9 January 2023, the County Assembly received 3 Petitions seeking the removal of the Petitioners from their offices as members of the Board.
  56. Under section 4 of the Petition to County Assemblies (Procedure) Act, it is the statutory duty of the Clerk to receive Petitions from members of the public.
  57. Upon satisfying himself or herself that the Petition passes legal muster, section 5 of the Act demands that the Clerk forwards the Petition to the Speaker of the County Assembly for reporting to the Assembly.
  58. In the case under consideration, the Speaker of the County Assembly and the Clerk are the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
  59. The Petitioners have not shown in what way or how these 2 Respondents acted outside the statutory framework guiding the receipt and processing of the removal Petitions. Neither have the Petitioners demonstrated how the commissions and or omissions of the 2 Respondents if any violated their rights and fundamental freedoms.
  60. The Petitioners also joined the Governor as the 1<sup>st</sup> Respondent. No evidence was placed before the Court to interdict the conduct of the Governor in the removal process.
  61. The Court will now discuss the process and proceedings before the County Assembly, noting at this stage that the County Assembly as the organ with the mandate to inquire into the removal process was not a party to these proceedings.
  62. The Petitioners alleged that their removal process was engineered by the Respondents for nefarious purposes and that the notice given to them was short, there was no quorum when the Ad Hoc Committee was constituted, the police had been used to intimidate them, and that the staff of the Board had been frustrated.
  63. The Petitioners also alleged the removal process was a violation or threatened violation of their rights and fundamental freedoms by asserting that the Ad Hoc Committee had no jurisdiction to consider the removal Petitions as the mandate should have been carried out by the sectoral Committees in place.
- .....
69. The Petitioners have not demonstrated through evidence that the 3 Petitions or the removal process were initiated at the behest of any of the Respondents or that the Petitions in themselves violated their rights or fundamental freedoms.
- .....
75. It is also noteworthy that the Petitioners also approached the High Court after approaching this Court in Nairobi Judicial Review Case No. E017 of 2023, to challenge their removal (the proceedings were transferred to the High Court sitting in Migori. The Petitioners also amended the Petition herein to reflect the new circumstances) without disclosing that fact to



this Court (this Court is not aware whether a material disclosure of pending proceedings was made to the High Court).

76. The course taken by and or on behalf of the Petitioners has the potential to seriously erode public confidence in the administration of justice since the Petitioners have approached separate Courts with distinct jurisdictions.
77. It would not be out of the ordinary to suppose that different conclusions may be reached by the different Courts causing untoward embarrassment to the judiciary.
58. We have quoted the decision of the Employment and Labour Relations extensively because we believe that it demonstrates quite eloquently that the issues that the appellants had raised before the High Court were the same ones they had raised before the ELRC. The arguments the appellants have raised before this Court are a rather transparent attempt to transmogrify straightforward complaints about the removal process the appellants were subjected to into lofty considerations of the constitutional standards of review of legislative bodies when considering petitions by members of the public for the removal of public officers; and the constitutionally-permissible levels of scrutiny by courts in the process. The case at hand could plausibly have been framed as the latter – but it was not: the case presented to the High Court, as reproduced in paragraph 1 of this judgment was a challenge to the removal proceedings of the appellants.
59. On this score, while we agree with Mr. Ngwele, counsel for the 2<sup>nd</sup> respondent, that the facts in the case could, plausibly, be framed to raise important constitutional issues relating to the removal of members of the County Public Service Board, the truth of the matter is that in the present case, they were not so framed. So, while the question whether County Public Service Board are body cooperates whereby only a single member can be removed at a time and whether it is, therefore, improper to collectively remove their members is an important one that needs legal resolution, that was not the legal question presented by the appellants in this case. That legal question will have to await a future case for determination.
60. Having determined the last question presented in the manner that we did, it readily answers the other two questions presented in this appeal. If the matter presented to the High Court was essentially similar to the one before the ELRC in Kisumu ELRC No. E002 of 2023, it follows that the ELRC had jurisdiction to hear and determine it; and it did, in fact, so do. We do not need to belabor the point. The appellants simply presented to both the ELRC and the High Court substantially the same case related to their employment. It also follows that their failure to disclose to Chigiti, J. when they appeared *ex parte* at the leave stage, that there were parallel proceedings at the ELRC was material non-disclosure which would have militated against the grant of the orders they sought.
61. Finally, we will briefly turn to the question of contempt of court. The appellants are persuaded that the learned Judge should have found that the respondents (or at least some of them) were guilty of contempt of court. In short, we agree with the learned Judge’s analysis of the legal situation. The only contempt of court application that was legally feasible – since the ELRC stayed the orders of the Magistrate’s court on 6<sup>th</sup> February, 2023 – was the one dated 2<sup>nd</sup> March, 2023 which sought to cite the alleged contemnors respecting the orders issued by Chigiti J. on 15<sup>th</sup> February, 2023. However, we would further agree with the learned Judge that it would have been improper to have cited the alleged contemnors yet they were not part of the original suit; and before they had been formally enjoined. The rules of natural justice and fair trial would require otherwise. Secondly, as the learned Judge reasoned, in the totality of circumstances in this case, contempt proceedings would have been inappropriate in view of the analysis whether the orders allegedly disobeyed were properly sought anyway.



62. In the end, therefore, we find no merit in the appeal. We, however, agree that the issues pursued in the appeal and at the High Court had some public interest implications as outlined in paragraphs 58 and 59. We, therefore, direct that each party bears its own costs.

**DATED AND DELIVERED AT KISUMU THIS 14TH DAY OF MAY, 2024.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

.....

**JUDGE OF APPEAL**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

