



**Ochola v County Executive Officer, Siaya County Public Service Board & 2 others  
(Judicial Review E033 of 2024) [2025] KEELRC 106 (KLR) (22 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 106 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
JUDICIAL REVIEW E033 OF 2024**

**NZIOKI WA MAKAU, J**

**JANUARY 22, 2025**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO COMMENCE  
PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF: ARTICLE 23(3)(F) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTIONS ACT  
2015 & SECTION 21 OF THE GOVERNMENT PROCEEDINGS ACT**

**AND**

**IN THE MATTER OF: SECTIONS 8 AND 9 OF THE  
LAW REFORM ACT CAP 26 LAWS OF KENYA**

**BETWEEN**

**ERIC JUMA OCHOLA ..... APPLICANT**

**AND**

**COUNTY EXECUTIVE OFFICER, SIAYA COUNTY PUBLIC SERVICE  
BOARD ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY EXECUTIVE MEMBER FINANCE & ECONOMIC PLANNING SIAYA  
COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF OFFICER DEPARTMENT OF FINANCE AND ECONOMIC  
PLANNING ..... 3<sup>RD</sup> RESPONDENT**



## RULING

1. Eric Juma Ochola (hereinafter referred to simply as “the Applicant”) filed the Chamber Summons dated 11<sup>th</sup> October 2024 seeking leave to institute Judicial Review proceedings for the following orders:
  - a. An Order of Mandamus compelling the 1<sup>st</sup> Respondent to issue him with a letter of employment and allow him to report to work.
  - b. An Order of Mandamus compelling the 3<sup>rd</sup> Respondent to pay him the decretal sum of Kshs 8,430,144/-.
2. The Applicant further requested the court to issue directions regarding the timeframe for the execution of these orders, should they be granted. The Application is premised on the fact that the he had secured a judgment dated 26<sup>th</sup> June 2024 against the Siaya County Public Service Board in Kisumu ELRC Petition No. E014 of 2024, which directed that he be issued with an appointment letter within 14 days together with the decretal sum of Kshs 8,430,144/-.
3. That despite fulfilling all the necessary prerequisites for execution against the Government, including obtaining a certificate of order against the Government and sending several reminders, the Respondents have failed to comply with the decree. That additionally, there are no orders preventing the execution of the judgment.
4. In response, the Respondents filed a replying affidavit sworn by Mr. Wilfred Nyagudi, the 1<sup>st</sup> Respondent, in which it was deposed that the Chamber Summons was filed in bad faith, as it was submitted during the pendency of an application to set aside the judgment. The Respondents further assert that the Applicant was fully aware of the application, as he had even a raised a Preliminary Objection in the same suit which the Court had ordered to be heard first.
5. It was also deposed that the Applicant acted maliciously by serving the Chamber Summons dated 11<sup>th</sup> October 2024 on 5<sup>th</sup> November 2024. The Respondents thus contend that the Applicant is deliberately trying to prevent them from having their day in court, a course of action that could cause them irreparable harm.
6. On 20<sup>th</sup> November 2024 parties agreed to canvass the application by way of written submissions.

### **Applicant’s Submissions**

7. The Applicant submits that he has met all the necessary prerequisites for leave to commence execution against the Government. He points to the Respondents, who are a County Government, and references the relevant provisions of Order 53 Rule 1 of the *Civil Procedure Rules*, which require leave before initiating judicial review, as well as section 21 of the *Government Proceedings Act*, which mandates obtaining a certificate of order against the Government. In urging the court to grant leave, the Applicant emphasizes that the Respondents have not contested the existence of the decree being executed. He further asserts that the purpose of requiring leave is to filter out frivolous or vexatious applications and deter those who are not genuinely aggrieved. He contends that a cursory review of the evidence by the Court would suffice in granting him leave. In support, the Applicant cites the case



of *Republic v County Council of Kwale & another Ex-Parte Kondo & 57 others* [1988] eKLR where the court held that:

“Leave may only be granted if, on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant; the test being whether there is a case fit for further investigation at a full inter parties hearing of the substantive application for judicial review. Granting of leave to file for judicial review is an exercise of the court’s discretion, but as always it has to be exercised judiciously”

8. As to whether the application is premature due to the pending application to set aside the decree, the Applicant submits that no law prohibits applying for leave while an application to set aside the decree is still pending. Furthermore, he asserts that the Respondents have not cited any such law. In light of the Respondents’ awareness of the decree, the sufficient notice given to comply, and their failure to do so, the Applicant submits that they have demonstrated an arguable case.

### **Respondent’s submissions**

9. The Respondents submit that the chamber summons is unmerited, citing inconsistencies between its prayers and the statutory statement. They refer to Order 53 Rule 1 of the *Civil Procedure Rules*, which outlines the necessary accompaniments for an application for leave. Furthermore, the Respondents contend that if the Applicant is permitted to proceed to the substantive stage, the application to set aside the decree will become irrelevant, thus extinguishing any chance for justice. They assert that the Applicant’s failure to disclose the pending application to set aside the judgment violates Order 53 Rule 1 of the *Civil Procedure Rules*, which justifies the dismissal of the chamber summons. In support of this argument, they cite the case of *Multiline Services Limited v Nairobi City County Government* (judicial Review Application E025 of 2023) [2023] KEHC 23794 (Judicial Review) (19 October 2023) (Ruling), which emphasized that the purpose of seeking leave is to eliminate frivolity, triviality, and uncertainty for public officers in deciding whether to proceed with administrative action.
10. The Respondents further argue that they are not under any public duty to act due to the pending application to set aside the judgment. They assert that the Applicant has failed to demonstrate an outright refusal or unreasonable delay in the performance of any duty, and that the Applicant’s claim of lacking any other adequate remedy does not apply in this case. To support this position, the Respondents cite the conditions for mandamus outlined in *Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another* [2018] eKLR in the following terms:
  - i. There must be a public legal duty to act;
  - ii. The duty must be owed to the Applicants;
  - iii. There must be a clear right to the performance of that duty, meaning that:
    - a. The Applicants have satisfied all conditions precedent; and
    - b. There must have been:
      - i. A prior demand for performance;
      - ii. A reasonable time to comply with the demand, unless there was outright refusal; and
      - iii. An express refusal or an implied refusal though unreasonable delay;



- iv. No other adequate remedy is available to the Applicants;
- v. The Order sought must be of some practical value or effect;
- vi. There is no equitable bar to the relief sought;
- vii. On a balance of convenience, mandamus should lie.

11. They thus assert there is no basis for the grant of the orders sought by the Applicant and insist the application is for dismissal.

12. The Court has considered the application, the annexures thereto, the reply by the Respondent and the submissions of the parties in coming to this decision. The Applicant herein, who was the Petitioner in the suit that precipitated the current court action, premises the order of mandamus on the suit he had filed being ELRC Petition E014 of 2024 reported as *Ochola v Siaya County Public Service Board* [2024] KEELRC 1596 (KLR). In the judgment given on 26<sup>th</sup> June 2024, the Court granted the following reliefs:

#### Conclusion and Orders

1. From the above, the Court orders:

- i. A declaration be and is hereby issued that the offer of appointment issued to the Petitioner by the County Public Service Board, Siaya constituted a valid and enforceable contract of service.
- ii. A declaration be and is hereby issued that the County Public Service Board, Siaya has breached the contract of service and the Petitioner's legitimate expectation.
- iii. A declaration be and is hereby issued that the failure by the County Public Service Board, Siaya to issue a contract or allow the Petitioner to commence work amounts to an unfair labour practice.
- iv. An order be and is hereby issued compelling the County Public Service Board, Siaya to issue the Petitioner an appointment letter/contract of service within 14 days of this Honourable Court's judgment.
- v. An order be and is hereby issued that the County Public Service Board, Siaya allow the Petitioner to report to work within 14 days of this Honourable Court's judgment.
- vi. The Petitioner is awarded lost income of Kshs 4,836,510/-.

2. The award of lost income to attract interest at court rates from 5 April 2019.

3. The Petitioner to have costs of the Petition.

13. The Applicant was required to execute the award if not settled hence the move to have orders of mandamus as the Respondent is a Government entity which is not run as private enterprises are run. The Applicant opted to move the Court for orders of Mandamus once it was clear he was not going to be paid without further action. The term mandamus has been used in the application and simply



put, mandamus which comes from the Latin 'We command', is an order to a public officer to carry out his duty. The Respondent asserts that it is being shafted as there is a correlated matter where the Respondent seeks to reopen the case and be given a hearing. The Court is unimpressed by the conduct of the Respondent. It was duly served with pleadings, repeatedly notified when the case was coming up in Court and ultimately has come to Court with unclean hands. It is trite that he who seeks equity must do so with clean hands. Tied to that is the Latin maxim "nullus commodum capere potest de iniuria sua propria" - A party may not derive an advantage from its own unlawful acts. The Respondent cannot draw an advantage from its refusal to comply with the order and decree of this Court. The Respondent has not demonstrated it was not granted an opportunity to be heard before my brother Radido J. condemned it in judgment. Post judgment, the Respondent has repeatedly declined to carry out the statutory duty which is to obey the judgment of the Court. As such, having not offered any meaningful resistance to the command to pay, the Respondent is at fault. It is my determination that the order of mandamus lies. The Applicant's motion is granted as prayed at prayers a) and b) of the Chamber Summons herein. The Applicant will also have the costs of this application.

It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 22<sup>ND</sup> DAY OF JANUARY 2025**

**NZIOKI WA MAKAU, MCIArb.**

**JUDGE**

