



Adul & 49 others v Clerk, County Assembly of Kisumu & 2 others (Judicial Review E035 of 2024) [2025] KEELRC 400 (KLR) (17 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 400 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW E035 OF 2024**

JK GAKERI, J

FEBRUARY 17, 2025

BETWEEN

ANNE ATIENO ADUL & 49 OTHERS & 49 OTHERS & 49 OTHERS & 49 OTHERS APPLICANT

AND

CLERK, COUNTY ASSEMBLY OF KISUMU 1ST RESPONDENT

KISUMU COUNTY ASSEMBLY SERVICE BOARD 2ND RESPONDENT

LOCAL AUTHORITY FUND (LAPF) 3RD RESPONDENT

RULING

1. Before the court for determination is the applicant’s Chamber Summons dated 16th October, 2024 file under Certificate of Urgency seeking Orders that: -
 1. Spent.
 2. Leave be granted to the applicant to apply for an Order of judicial review in the nature of mandamus directed to the Respondents compelling them to pay the ex parte applicants the sum of Kshs.338,783.00 being the certified costs in Kisumu ELRC Cause No. 382 “A” of 2018 between *Anne Atieno Adul & 49 Others v The Clerk County Assembly of Kisumu & 2 Others*.
 3. Costs of this application be provide for.
2. The Chamber Summons is expressed under Order 53 Rule 4(1) of the *Civil Procedure rules* and is based on the grounds set out in the statement dated 16th October, 2024 and the Verifying Affidavit sworn by Agnes Akinyi on 16th day of October, 2024.
3. The affiant deposes that the law firm was instructed to file a suit against the respondent in 2018 *vide* Kisumu ELRC Cause No. 382 of 2018 and parties entered into a consent on 4/12/2019 and the 1st



respondent was to pay outstanding gratuity of Kshs.13,719,887 and costs to be agreed and the party to party bill of costs dated 18/01/2023 and a Certificate of Taxation issued on 2nd May, 2024 a sum the respondent has not paid without justification.

Grounds of opposition

4. In their grounds of opposition dated 5th November, 2024, the respondents argued that the application:
 1. Is incompetent, misconceived, improper and otherwise an abuse of the due court process.
 2. The prayers sought are monumental, procedural and substantive legal nullity based in law, misconceived and therefore rendered totally incurably defective.
 3. Offends and does not meet the requirements of Order 53 rule 1, 3 and 4 of the [Civil Procedure Rules 2010](#) and prayed for dismissal of the same with costs.
5. The *Ex parte* applicant did not file submissions opting to rely on the Verifying Affidavit.

Respondent's submissions

6. On compliance with Order 53 Rule (1) of the [Civil Procedure Rules](#) counsel itemised the requirements for leave as a statement outlining the applicant's identity relief sought and the grounds upon which it is sought and a Verifying Affidavit confirming that there are no pending or previous proceedings concerning the same matter.
7. Counsel urges that the application is defiant as it omits the specific identities of the 49 applicants generalizing them as male and female adults and the non-disclosure prejudices the respondent by obstructing adequate defence preparation and accusations faced.
8. That the Verifying Affidavit was not executed by the applicants or their consent and thus violates Order 53 Rule 1(2)(b) requirements as it is the foundational document.
9. That the affidavit on record does not aver that there is no pending or previous proceedings concerning the same subject matter.
10. Reliance is made on the decision in [Ibrahim & Another V GDC Saving and Co-operative Society Ltd \[2022\] KEHC 14643 \(KLR\)](#) where the court deemed a suit incurably defective for the absence of a Verifying Affidavit underscoring the critical nature of such procedural documentation.
11. Counsel urges that the applicant's failure to properly disclose and verify compromises the respondents right to a fair and well prepared defence.

Analysis

12. The singular issue for determination is whether the ex parte applicant's Chamber Summons dated 16th October, 2024 is merited.
13. In their Notice of Preliminary Objection dated 5th November, 2024, the respondents raised similar grounds and the court, by a ruling delivered on 5th December, 2024 dismissed the Preliminary Objection for want of merit.
14. The court was satisfied that the Ex Parte Applicant's Chamber Summons dated 16th October, 2024 met the threshold prescribed by Order 53 Rule (1) and (2) of the [Civil Procedure Rule, 2010](#) on account that;



- i. The Notice of Preliminary Objection made no specific reference to the inadequacies of the statement as the 49 persons named in the suit are not parties to the instant Judicial Review Application and thus need not be specifically identified as applicants.
In the court's view, while the 49 were the parties to the suit, their counsel is the applicant in the instant application.
 - ii. The Chamber Summons is accompanied by a Verifying Affidavit sworn by Agnes Akinyi Advocate on 16th October, 2024 attesting to the facts and although it did not specifically state that no other case or previous proceedings are pending on the same matter, the court was not persuaded that the omission rendered the Verifying Affidavit fatally defective as the parties were aware of the suit in respect of which they consented to pay gratuity of Kshs.13,719,887.00.
15. The foregoing is indeed fortified by the decision in *Ahmed Eddle & Ibrahim & Another V GDC Saving and Co-operative Society Ltd* (*Supra*) cited by the respondent's counsel, where Kasango J held as follows:
- This case, in the present condition it is, does not have the verifying affidavit of the 1st plaintiff and the affidavit filed by the director of the 2nd plaintiff is not supported by the requisite authority of the 2nd defendant as envisaged under Order 4 Rule 1 (4) of the Rules. What then should be the fate of this action in the light of the above anomalies? The answer I believe lies in close consideration of the provision of Order 4 Rule 1 of the Rules. In my view, the anomalies hereof do not make the case entirely incompetent. There is indeed, a verifying affidavit sworn by a director of the 2nd plaintiff. The plaint therefore is competent. The absence of authority for that director to swear that verifying affidavit is not fatal to the claim..."
16. The learned Judge was persuaded by the sentiments of Ringera J in *Microsoft Corporation V Mitsuni Computer Garage Ltd & Another* [2001] eKLR where the Ringera J observed as follows:
- ...Rules of Procedure are the hand maidens and not mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair, orderly and predictable manner not to fetter or choke it. In my opinion, where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form and procedure which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances, the court should rise to its higher calling to do justice by saving the proceedings in issue. In the matter at hand, I am of the view that the error manifest in the verifying affidavit neither goes to the jurisdiction of the court nor prejudice the defendants in any fundamental respect.
- Indeed, no prejudice has been alleged".
17. These sentiments apply on all fours to the circumstances in this case.
18. In the *Ibrahim & Another v GDC Case* (*Supra*) Kasango J was satisfied that the plaintiffs had attempted to comply with the requirement of filing a verifying affidavit but it did not meet the requirements.



19. The learned Judge was unambiguous that:

The anomalies do not require the striking out of the claim. The claim is redeemable because the anomalies are lapses which do not go to the jurisdiction of the matter. The defendant's objection in the first limb therefore fails and is dismissed".

20. Worthy of note, the defendant's Preliminary Objection was that the absence of a verifying affidavit rendered the suit incurably defective and incompetent.

21. See also *Kenya National Chamber of Commerce V County Council of Makueni* [2003] eKLR, and the sentiments of W. Korir (as he then was) in *Matagei V Attorney General; Law Society of Kenya (Amicus Curie)* [2021] KEHC 460 (KLR) on the applicability of Order 53 of the Civil Procedure Rules in the post *Constitution of Kenya, 2010* era.

22. In the ruling on the respondent's Notice of Preliminary Objection, the court observed that the provisions of Article 159(2)(d) of the *Constitution* of Kenya 2010 could be invoked to cure the defect relied upon by the respondents as courts and tribunals are enjoined to exercise judicial authority without undue regard to procedural technicalities, much as procedures ought not to be disregarded. (See *Republic V Speaker of Nairobi County Assembly & Another Ex Parte Evans Kidero* [2017] eKLR).

23. Significantly, and as held in *Republic V County counsel of Kwale & Another Ex parte Kondo & 57 Others* HCCC No. 384 of 1996, the purpose of application for leave to apply for Judicial review is to inter alia eliminate frivolous, vexatious and hopeless applications.

24. The court is persuaded that that the instant application may be categorized as such.

25. It is common ground that services were rendered and parties agreed and it is only fair that the ex parte applicant be allowed to prosecute his substantive motion for outstanding costs.

26. Guided by the sentiments of Githua J. in *Republic V Permanent Secretary, Ministry of State for Provincial Administration & Internal Security Ex Parte Fredrick Manoah* [2012] eKLR the court is satisfied that the Ex Parte application has demonstrated a case for the grant of leave to apply for an Order of judicial review in the nature of mandamus to compel the respondents to pay the sum of Kshs.338,783.00 as costs in Kisumu ELRC Cause No. 382 'A' of 2018 *Anne Atieno Adul & 49 Others V the Clerk County Assembly of Kisumu & 2 Others*.

27. In the upshot, the Ex Parte applicants Chamber Summons dated 16th October, 2024 is allowed with no Orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 17TH DAY OF FEBRUARY, 2025.

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the *Constitution* which requires the court to eschew undue technicalities in delivering justice, the



right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

