



Republic v Elgeyo Marakwet County Assembly Service Board & 2 others; Kiptum (Exparte Applicant) (Judicial Review E004 of 2023) [2024] KEELRC 652 (KLR) (14 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 652 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
JUDICIAL REVIEW E004 OF 2023**

MA ONYANGO, J

MARCH 14, 2024

**IN THE MATTER OF ARTICLES 1,2,3(1),22,27,28,32,47,48,50
AND 159 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT,2015

AND

IN THE MATTER OF THE COUNTY ASSEMBLY SERVICES ACT, NO. 27 OF 2017

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT, NO. 17 OF 2012

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES,2010

AND

**IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW
REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA**

BETWEEN

REPUBLIC APPLICANT

AND

**THE ELGEYO MARAKWET COUNTY ASSEMBLY SERVICE
BOARD 1ST RESPONDENT**

THE ELGEYO MARAKWET COUNTY ASSEMBLY 2ND RESPONDENT

**THE HONOURABLE SPEAKER, ELGEYO MARAKWET COUNTY
ASSEMBLY 3RD RESPONDENT**

AND



RULING

1. This is a Ruling on the Preliminary Objection dated 12th February 2024 raised by the 1st Respondent in this suit.
2. The Objector seeks orders that the Ex-Parte Applicant’s entire Judicial Review Application be dismissed for reasons that:
 - i. The Honourable Court’s jurisdiction has been prematurely invoked in that the statutory process provided under section 23 of the *County Assembly Services Act* for the removal of the Clerk from office has not been exhausted and that:
 - ii. The Ex-Parte Applicant still has an opportunity to defend herself before the select Committee of the 2nd Respondent as envisaged under section 23(3) and (4) of the *Act*, and;
 - iii. A vote on the Ex-Parte Applicant’s removal will still be taken in before the full house of the 2nd Respondent as required by section 23(7) and (8) of the *Act*.
 - iv. The Application runs counter to the principles enunciated by the Supreme Court in *Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another* (2017) eKLR and several decisions which requires that processes being undertaken by coordinate arms of government to be challenged upon conclusion of the process being undertaken by the coordinate arm.
 - v. The Applicant has not demonstrated any exceptional circumstances to warrant the invocation of this court’s jurisdiction in a summary manner without giving room for due process to run its course.
3. The background to the Preliminary Objection is relevant here. The Ex-parte Applicant filed the instant Judicial Review Application on 29th November 2023 after she was allegedly suspended from duty and subsequently served with a charge sheet on 26th November 2023 containing various allegations against her and inviting her to make her representation on 2nd November 2023. It is the Ex-parte Applicant’s case that after the hearing on 2nd November 2023, she received communication from the Speaker on 15th November 2023 indicating that a Select Committee of the County Assembly had been constituted to consider the Board’s recommendation that her appointment be revoked.
4. According to the Ex-parte Applicant, a cursory look at the Report of the Board clearly shows that there are documents which the Ex-parte Applicant was never shown when she appeared before the Board yet the documents were used to make adverse decisions against her and the same documents were being forwarded to the Select Committee to consider while making its decision.
5. It is the Ex-parte Applicant’s case that clearly, there will be no other outcome from the proceedings of the Select Committee other than the revocation of the Ex-parte Applicant’s appointment since the Committee will be relying on a report of the Board which is a product of the unjust process.
6. The 1st Respondent filed its written submissions on the Preliminary Objection on 28th February 2024. The 2nd and 3rd Respondents’ submissions were filed on 29th February 2024. The Ex-Parte Applicant’s submissions were filed on 11th March 2024.



The 1st Respondent's submissions

7. In its submissions dated 26th February 2024, it is the 1st Respondent's contention that the process of removal of the Clerk of a County Assembly is a statutory process in that very step and player including their role are statutorily set out. It is submitted that the players are the Board, the Clerk with or without legal counsel, the Speaker, the Select Committee and the Assembly.
8. The 1st Respondent submits that from the facts of this case, it has not been represented that the Respondents by-passed any of the procedural steps set out in section 23 of the [County Assembly Services Act](#).
9. The 1st Respondent thus submits that as section 23 of the [County Assembly Services Act](#) sets out an elaborate procedure for the removal of a Clerk of a County Assembly the statutory process ought to be allowed to run its full course.
10. Further, the 1st Respondent submits that any and all grievances the Ex Parte Applicant has raised regarding the process of her removal can be well raised before the Select Committee for its consideration.
11. The 1st Respondent submitted that the Ex-parte Applicant has prematurely invoked the jurisdiction of this court without demonstrating any exceptional circumstances to warrant the said invocation.
12. The 1st Respondent urged the court to dismiss the instant application, set aside the conservatory orders granted so as to pave way for the statutory process being conducted by the Assembly to conclude.

The 2nd and 3rd Respondent's Submissions

13. The 2nd and 3rd Respondents support the 1st Respondent's position that the Ex-parte Applicant prematurely invoked the jurisdiction of this court. They submitted that the instant motion has been filed without adherence to the doctrine of exhaustion since the process of disciplinary hearings and processes that have commenced against the Ex Parte Applicant are still in process and the present judicial review has been deliberately filed to usurp the powers of the Respondents in performing their functions as contemplated under the [County Assembly Services Act](#), [County Government Act](#) as well as the [County Assemblies Powers and Privileges Act](#).
14. According to the 2nd and 3rd Respondents, the processes undertaken by arms of governments should be challenged upon conclusion by the co-ordinate arm. They submit that the Ex-parte Applicant did not wait for the Respondents to complete the disciplinary proceedings.
15. It is the 2nd and 3rd Respondent's submission that the Ex Parte Applicant did not adhere to the doctrine of exhaustion and that she has not demonstrated to this court why there should be a need for its interference in an administrative process of the constitutional mandate of the Respondents.
16. The 2nd and 3rd Respondents submitted that the jurisdiction of this Court has been prematurely invoked and thus it should down its tools and strike out the motion.

The Ex Parte Applicant's Submissions

17. In her submissions, the Ex-parte Applicant identified the issues for determination to be:
18. Whether the Preliminary Objection meets the requisite threshold;
19. Whether the provisions of section 23 of the [County Assembly Service Act](#) ousts the jurisdiction of this Court;



20. Whether the suit offends the doctrine of separation of Powers.
21. On the first issue, it is the Ex-parte Applicant's position that the grounds for the Preliminary Objection are not self-proving and that they need evidence to be led to demonstrate their existence. It is submitted that the 1st Respondent is alleging that the proceedings subject to the instant suit were conducted in accordance with the provisions of section 23 of the County Assembly Service Act. According to the Applicant, this is a matter of fact that requires proof of compliance with the mentioned provision.
22. The Ex-parte Applicant submits that it is trite that a preliminary objection can only be based on a presumption that the facts pleaded are correct or that the facts are agreed. It is submitted that the Respondents already filed a replying Affidavit sworn by P.K. Sabulei in response to the Notice of Motion expressly challenging the facts set out by the Ex-Parte Applicant and it is clear that the facts are contentious. That there can never be a presumption of correctness in view of the two versions presented by the disputants.
23. The Ex-parte Applicant further submits that the Respondents have not pointed out a specific provision under the County Assembly Act ousting the jurisdiction of this court but have basically relied on the doctrine of exhaustion of remedies. According to the Ex-parte Applicant, the said doctrine is only operative where the internal processes are effective to redress violations of rights. The court was urged to make a finding that the provisions of section 23 of the County Assembly Service Act does not oust the jurisdiction of this court.
24. Consequently, the court was urged to find the Preliminary objection dated 12th February 2024 to be without merit and proceed to dismiss the same with costs to the Applicant.

Determination

25. The issue for determination is whether the Preliminary Objection before court is merited.
26. The threshold of a Preliminary Objection was set out in the Court of Appeal decision cited by the Ex-parte Applicant of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 as follows:
 - a. "...a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit."
27. The Preliminary Objection in this matter is founded on the allegation by the Respondents that the Ex Parte Applicant has prematurely invoked the jurisdiction of this court, that is, on the doctrine of exhaustion and the doctrine of separation of powers. The 1st Respondent avers that the Ex Parte Applicant has not demonstrated the need for intervention of the court at this stage of the hearing of her removal proceedings.
28. According to the 1st Respondent, the Ex parte Applicant filed the instant suit before the Select Committee had sat to consider the Motion from the County Assembly Public Service Board. That there was no report to the full Assembly from the said Committee.
29. It is the 1st Respondent's case that the Ex-parte Applicant has not demonstrated in any way that the 1st Respondent has not complied with the constitutional edict in discharging its functions thus intervention of this Court at this stage will be premature and unnecessary.
30. In the case of Oraro v Mbaja [2005] eKLR 141 the court observed that:



- a. “A preliminary objection is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”
31. Considering the facts of this case, the instant suit was filed by the Ex-parte Applicant on the apprehension that the Board that conducted her disciplinary hearing on 2nd November 2023 intended to forward its Report to the Select Committee together with documents which the Ex-parte Applicant was never supplied with before she appeared before the Board. She is apprehensive that the documents will be used to make adverse decisions against her. The Ex-parte Applicant is convinced that the Select committee will consider them while making its decision to recommend the revocation of her appointment.
32. Although the court appreciates the issue raised by the Respondents that the Ex-parte Applicant has prematurely invoked the jurisdiction of this court to be legitimate, the court is mandated to interfere with the process should it find that the statutory process is wanting as the same would fall within the exceptions that allow the Court to intervene.
33. The 1st Respondent cited the case of *Krystalline Salt Limited v Kenya Revenue Authority* (2019) eKLR in its submissions to buttress the position that this court should not interfere with its statutory processes. In that case the court held as follows:
- “What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile....this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy.”
34. The Ex-parte Applicant has submitted that under section 23(4) of the *County Assembly Act*, the Board is required to submit a Motion to the Speaker seeking that the County Assembly revokes the appointment of the Clerk. It is her position that no such Motion was placed before the speaker. That on the contrary, the speaker reported to the Assembly and received a report from the Board recommending that the Ex-parte Applicant’s Appointment to be revoked.
35. Section 23 of the *County Assembly Services Act* provides for the procedure of removal of a Clerk as follows:
- 23.
- (1) Where the Board considers it necessary to remove the Clerk under section 20, the Board shall-



- i. frame a charge or charges against the Clerk;
 - ii. forward the statement of the said charge or charges to the Clerk together with a brief statement of the allegations in support of the charges;
 - iii. invite the Clerk to respond to the allegations in writing setting out the grounds on which the Clerk relies to exculpate himself or herself; and
 - iv. invite the Clerk to appear before the Board, either personally or with an advocate as he or she may opt, on a day to be specified, to exculpate himself or herself.
- (2) If the Clerk does not furnish a reply to the charge or charges within the period specified, or if in the opinion of the Board the Clerk fails to exculpate himself or herself, the Board shall submit a notice of a motion to the Speaker seeking that the county assembly revokes the appointment of the Clerk.
 - (3) A motion under subsection (1) shall specify
 - (a) the grounds set out in section 21 in which the Clerk is in breach; and
 - b. the facts constituting that ground.
 - (4) Upon notice of the motion under subsection (2), the Speaker shall refer the matter to a select committee of the assembly consisting of eleven members and established in accordance with the Standing Orders of the assembly to investigate the matter within ten days of receipt of the motion.
 - (5) The select committee shall, within ten days, report to the assembly whether it finds the allegations against the Clerk to be substantiated.
 - (6) The Clerk shall have the right to appear and be represented before the select committee during its investigations.
 - (7) The assembly shall consider the report of the select committee and resolve whether to approve the motion.
 - (8) If the assembly approves a motion filed under this section, the Clerk against whom the motion was filed shall be deemed to have been removed from office from the date the motion was approved.
36. The Ex Parte Applicant avers that the Motion for her removal was never placed before the Speaker. That there was no compliance with sections 23(2), 23(3) and 23(4) of the [County Assembly Services Act](#).
 37. The Respondents have filed a replying affidavit contesting some of the averments by the Ex Parte Applicant. It is evident that there is no consensus on facts and that the issues raised in the preliminary objection require that the court hears and determines the factual position.
 38. It is my view that the issues raised in the preliminary objection are issues that should have been raised as a defence to the Ex Parte Applicant's application. The court is disappointed that the Respondents decided to raise a preliminary objection rather than proceeding with the hearing of the motion, thus delaying the resolution of this matter which because of its nature, require to be resolved expeditiously so that the same does not negatively affect the operations of the county assembly.



39. Consequently, I find the Preliminary Objection dated 12th February 2024 to be unmerited and I hereby dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 14TH DAY OF MARCH 2024

MAUREEN ONYANGO

JUDGE

