



Republic v Private Security Regulatory Authority & 4 others; Protective and Safety Association of Kenya (Exparte Applicant) (Judicial Review E043 of 2023) [2024] KEELRC 471 (KLR) (1 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 471 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW E043 OF 2023
AN MWAURE, J
MARCH 1, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

PRIVATE SECURITY REGULATORY AUTHORITY 1ST RESPONDENT

FAZUL MOHAMMED 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

**CABINET SECRETARY, MINISTRY OF INTERIOR & NATIONAL
ADMINISTRAION 4TH RESPONDENT**

**CABINET SECRETARY, MINISTRY OF LABOUR & SOCIAL
PROTECTION 5TH RESPONDENT**

AND

**PROTECTIVE AND SAFETY ASSOCIATION OF KENYA EXPARTE
APPLICANT**

RULING

1. The 1st Respondent filed a Notice of Preliminary Objection dated 19th December 2023 in opposition to ex-parte Applicant’s Judicial Review Application dated 4th December 2023 as that:

- 1. the suit is incompetent and in bad in law as it is instituted in the name of an association which is not a body corporate for it sue as a legal personality in its own name. That being so it lacks capacity to institute proceedings in its own name.



2. this Court lacks jurisdiction to hear this matter since the ex-parte Applicant has not exhausted the statutory/Administrative remedies set out under section 43 of the [Private Security Regulation Act](#) No. 13 of 2016.
 3. this suit is sub judice for reasons that the issues canvassed in it are currently under active consideration in Petition No. E018 of 2023 in the High Court of Kenya at Eldoret which was filed on 30.11.2023 preceding the filing of this Judicial Review application.
 4. both suits challenge the same Legal Notice PSRA/005/2023 on the same grounds, cite similar issues, similar facts, and the prayers sought are wholly if not substantially the same.
 5. a temporary order of stay of Legal Notice PSRA/005/2023 was issued on 04.12.2023 in Petition No. E018 of 2023 by Hon. Justice Wananda J.R. Anuro.
 6. the ex-parte Applicant and its members are in continuous violation of the law and commission of an Offence under Section 69(1) of the [Private Security Regulation Act](#) by engaging in the provision of private security without being holders of valid licences contrary to the mandatory licencing requirement under section 6,28 and 31 of the Act. All proceedings based on an illegality are null and void ab initio and no benefit can accrue.
 7. this suit is bad in law for reasons that it is an abuse of the court process.
2. The Notice of Preliminary Objection was canvassed by way of written submissions.

1st and 2nd Respondents' Submissions

3. It is the Respondents submission that it is trite law that a preliminary objection must raise a pure point of law as held in in the landmark case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA. The Respondents preliminary objection is founded on locus standi, doctrine of exhaustion, doctrine of sub judice and jurisdiction which constitute pure points of law hence satisfy the threshold.
4. The Respondents submitted that the ex-parte Applicant has pleaded in its statutory statement that it is an association registered under the [Societies Act](#). Societies do not have capacity to sue in their own names as held in Trustees Kenya Redeemed Church & another vs. Samuel M'Obiya & 5 others [2011] eKLR.
5. The Respondents submitted that the issues in the instant petition are sub judice as they are currently under active consideration in Petition No. E018 of 2023 in the High Court of Kenya at Eldoret which was filed on 30.11.2023 by an affiliate association of the ex-parte Applicant. Both suits challenge Legal Notice PSRA/005/2023 on the same grounds, similar issues, similar facts and the prayers sought are wholly if not substantially the same.
6. The Respondents submitted that Hon. Justice Wananda J.R. Anuro issued a temporary order of stay of Legal Notice PSRA/005/2023 on 04.12.2023. This renders this suit useless as a second trial on the same issues would entail duplication of work. It is desirable that such issues be resolved by one court to avoid conflicting decisions.
7. The Respondents submitted that permitting the concurrent progression of this suit alongside Petition No. E018 of 2023 would prejudice the Respondents as it would force them to mount a defence against the same legal action and confront identical issues twice. This will place undue burden on the Respondents and risks undermining the principles of fairness and efficiency within the legal proceedings.



8. The Respondents submitted that section 43 of the *Private Security Regulation Act* provides for appeals to the Cabinet Secretary and it is proper for the ex-parte Applicant to submit itself to the statutory appeal mechanism. It is the Respondent's submission that where a dispute resolution mechanism exists outside courts, the same should be exhausted before the jurisdiction of the Court is invoked. Courts ought to be the last resort as Article 159 of *the Constitution* commands courts to encourage alternative means of dispute resolution.
9. The Respondents submitted that the ex-parte Applicant by its own admission stated that its members are private security firms engaged in offering private security and safety services. The members together with their employees have not undergone the mandatory security vetting, registration and licencing which is an offence. Section 69(1)(a) of the *Private Security Regulation Act* makes it an offence for any person to engage in the provision of private security services without being the holder of a valid licence contrary to the mandatory licencing requirement under section 6 and 28 of the Act.
10. The Respondents submitted that a party cannot benefit from an illegality and any proceedings based on an illegality are null and void ab initio and no benefit accrue thereof. The action of the ex-parte Applicant and its members are inconsistent with Kenya's public policy

Ex-parte Applicant's Case

11. It is the ex-parte Applicant's submission that although it is not a body corporate, it is representing the valid interests of its members who are or will be directly affected by the administrative decision of the Respondents hence it has the right to challenge that decision. Locus standi can either emanate from the statute or *the Constitution* or both. In this case the ex-parte Applicant's locus standi to bring this suit emanates from Article 47, 258 and 260 of *the Constitution*.
12. The ex-parte Applicant submitted that it is protected under *the Constitution* to bring this suit as an incorporated body and association suing to protect the rights and interests of its members against the unconstitutional and ultra vires actions of the Respondents as it has a genuine claim and grievance. It relied on Kenya Association of Music Producers (KAMP) and 3 Others Ex parte Pubs, Entertainment and Restaurants Association of Kenya (PERAK) JR No 335 of 2013.
13. It is the ex-parte Applicant's submission that the Respondents are inviting this court to look into the facts, and issues raised in this judicial review application against the Eldoret Petition No. E018 of 2023 to determine whether this application is sub judice. This then ceases to be a point of law since the court must interrogate the facts of the two cases.
14. The ex-parte Applicant submitted that it is not a party or petitioner to the Eldoret Petition No. E018 of 2023, the petitioner therein is Association of North Rift Security Firms, it is not the same entity as the ex-parte Applicant herein. Further, the prayers in that petition are not similar to the prayers in this application.
15. The ex-parte Applicant submitted that the Respondents' actions are illegal ab initio and ultra vires since they lack powers to determine minimum wage which falls in the interested party's docket. The Respondents acted in excess of their jurisdiction and powers and appealing before Cabinet Secretary to determine on a decision they lack jurisdiction and power is inconsequential.
16. It is the ex-parte Applicant's submission that Section 44 of the *Private Security Regulation Act* allows a party aggrieved by the decision of the Authority or Cabinet Secretary under the act to appeal to a court of competent jurisdiction. Therefore, this court is competent to hear and determine this suit challenging the acts of the 1st and 2nd Respondents issuing a gazette notice relating to minimum wage.



17. The ex-parte Applicant submitted that decision challenged by the Application is administrative brought under Articles 22, 23 and 47 of *the Constitution*. Thus, there was no reason to move to the Cabinet Secretary for Interior as an appeal since section 43 of PSRA is not applicable in this case; the 1st and 2nd Respondents have acted ultra vires with impunity and frivolity, therefore, the argument of doctrine of exhaustion should also fail.
18. The ex-parte Applicant submitted that the Respondents' accusations that its members have been offering security services without mandatory vetting, registration and licensing which is an offence under sections 6, 28 and 69(1)(a) of PSRA are factual pleas that require its members to be accorded time for defence. This is contrary to what constitutes a preliminary objection which should only raise points of law.

Analysis and Determination

19. The first issue for determination is whether the ex-parte Applicant lacks locus standi to institute the main suit.
20. The Respondents submitted that the ex-parte Applicant being an association, it lacks capacity to sue in its own name. However, it is the ex-parte Applicant's submission that it has a right to challenge the Respondents' administrative decision as it is representing the valid interests of its members who are or will be directly affected it.
21. The Supreme Court, in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR held: -

“It is to be noted that the promulgation of the 2010 Constitution enlarged the scope of locus standi, in Kenya. Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the Courts, contesting any contravention of the Bill of Rights, or *the Constitution* in general. In *John Wekesa Khaoya v. Attorney General*, Petition No. 60 of 2012; [2013] eKLR the High Court thus expressed the principle (paragraph 4):

“...the locus standi to file judicial proceedings, representative or otherwise, has been greatly enlarged by *the Constitution* in Articles 22 and 258 of *the Constitution* which ensures unhindered access to justice...”

Article 22 of *the Constitution* thus provides:

- (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by–
 - (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members” [emphasis supplied].

And Article 258 of *the Constitution* thus provides:



- (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
 - (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members” (emphasis supplied).”
22. Further, Republic of Kenya v Cabinet Secretary-Ministry of Education Science and Technology & 2 others ex parte Musau Ndunda & 2 Others [2016] eKLR in the court held:

“Under our Constitution the issue of locus has been expanded and under Article 258(1) (b) of *the Constitution*, every person has the right to institute court proceedings, claiming that *the Constitution* has been contravened, or is threatened with contravention and such proceedings can be brought inter alia by a person acting as a member of, or in the interest of, a group or class of persons. Similarly, under Article 22(2)(b) of *the Constitution*, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

The applicants herein describe themselves as officials of a registered society under the *Societies Act*. No affidavit was sworn in opposition to the factual averments by the Applicants. In my view, under the aforesaid provisions of *the Constitution*, the applicants have locus to institute these judicial review proceedings if as it is claimed, the Respondent’s inactions have contributed to inability to have the constitutional rights relating to education realised.”

23. Accordingly, the ex-parte Applicant has locus standi to institute this suit on behalf of its members as they are and have been affected by the Respondents action. The locus standi emanates from Article 22 and 258 of *the Constitution*.
24. The second issue for determination is whether the judicial review application is sub judice.
25. The doctrine of sub judice is founded under Section 6 of the *Civil Procedure Act*, CAP. 21 which provides:

“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.

Explanation - The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court”.



26. In the case of Kenya National Commission on Human Rights Vs Attorney General; Independent Electoral & Boundaries Commission & 16 Others (2002) eKLR, the Supreme Court of Kenya held;
- “The purpose of sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter-----When two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives”.
27. The 1st Respondent’s ground for preliminary objection is that this suit is sub judice as the issues canvassed are currently under active consideration in Petition No. E018 of 2023 in the High Court of Kenya at Eldoret which was filed on 30.11.2023 preceding the filing of this Judicial Review application.
28. However, the ex-parte Applicant submitted that it is not a party to the Eldoret Petition No. E018 of 2023 in which the petitioner is Association of North Rift Security Firms which is a different entity from itself. The parties to that case are not the same to this case. Further, the prayers in the petition are not similar to the prayers in this application.
29. The reliefs sought by the ex-parte Applicant in its statutory declaration are:
1. That the Court be pleased to grant leave to the Applicant to apply for an order of Certiorari removing to this Court for purposes of being quashed, the Legal Notice No. PSRA/005/2023 issued by the 1st and 2nd Respondents herein.
 2. That the Court be pleased to grant leave to the Applicant to apply for an order of Prohibition to prohibit and restrain the 1st and 2nd Respondents either by themselves, their authorised agents, employees and/or whatsoever from taking any steps, actions and measures to enforce, implement and/or operationalise Legal Notice No. PSRA/005/2023.
 3. That the grant of leave do operate as a stay of Legal Notice No. PSRA/005/2023 until the hearing and determine of the application herein.
30. On the other hand, the reliefs sought in Petition No. E018 of 2023 in the High Court of Kenya at Eldoret are:
1. An order of Certiorari bringing into this Honourable Court and quashing Legal Notice No. PSRA/005/2023 dated 2/11/2023 proposing new remuneration for basic pay, house allowance, overtime allowance and any other benefits thereto.
 2. An order of Prohibition prohibiting the Respondents from effecting, implementing and/or causing the implementation of the impugned Legal Notice No. PSRA/005/2023.
 3. A declaration that there was no public participation resulting in Legal Notice No. PSRA/005/2023 issued on 2/11/2023.
 4. A declaration that all public information and all subsequent public information and or legal notices be published immediately they are issued and made public immediately.



5. Any other order or writ that this Court may deem just and appropriate to grant.
6. Cost of the Petition with interest.
31. Further, on 01.12.2023, Hon. Justice Wananda J.R Anuro issued order in Petition No. E018 of 2023 in the High Court of Kenya at Eldoret as follows“an interim, temporary order of stay of Legal Notice No. PSRA/005/2023 dated 2/11/2023 and all consequential orders arising therefrom pending the hearing and determination of this Application inter parties be and is hereby issued.”
32. From the above it is very clear the reliefs sought in both suits are similar and dispute emanates from the 1st and 2nd Respondents Legal Notice No. PSRA/005/2023 dated 2/11/2023. Further, the Respondents in both suits are the same the only difference is that Petition No. E018 of 2023 in the High Court of Kenya at Eldoret was instituted by Association of North Rift Security Firms, a registered association formulated by registered private security firms within Uasin Gishu county while the instant suit is instituted by the ex-parte Applicant which is an umbrella association composed of several private security firms. Both associations are composed private security firms and the only difference is there geographical coverage.
33. In view of the foregoing, the instant suit is sub judice as Petition No. E018 of 2023 in the High Court of Kenya at Eldoret emanates from the same subject matter, it was instituted before this suit and it involves the same parties or their representatives.
34. Lastly, the Respondents objected to the judicial review application herein as this Court lacks jurisdiction to hear this matter since the ex-parte Applicant has not exhausted the statutory/ Administrative remedies set out under section 43 of the *Private Security Regulation Act* No. 13 of 2016.
35. Section 43 and 44 of the *Private Security Regulation Act* No. 13 of 2016, deals with appeals of the 1st Respondent’s decision as follows:

“ 43. Appeals to the Cabinet Secretary

- (1) Any person aggrieved by a decision of the Authority may within thirty days of such decision, appeal to the Cabinet Secretary.
- (2) The Cabinet Secretary shall within seven days of receipt, constitute an ad hoc committee, comprising of not more than three persons to hear and determine the appeal.
- (3) The Cabinet Secretary shall ensure that any appeal brought before him or her is heard and determined within thirty days of receipt.
- (4) The Cabinet Secretary shall within fourteen days of the hearing of an appeal under this section deliver his or her decision in writing.
- (5) Where an appeal is lodged under this section, the Authority shall not take any action until the appeal has been heard and determined.
- (6) Any person making an appeal under this section may either in person or by his or her representative make oral or written submissions to the Cabinet Secretary or the Committee established under subsection (2).

44. Appeals to courts



Any person aggrieved by a decision of the Authority or the Cabinet Secretary under this Act may appeal to any court of competent jurisdiction.”

36. Hon. Justice Gakeri in *Muema v Independent Electoral & Boundaries Commission* (Petition E013 of 2023) [2023] KEELRC 1141 (KLR) (11 May 2023) (Ruling) held as follows:

“Section 9(4) of the *Fair Administrative Action Act*, 2015 provides that;

Notwithstanding subsection (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

Whereas the court is in agreement with the sentiments of the court in *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* (supra), cited by the respondent, that internal dispute resolution mechanisms should be exhausted before the court’s jurisdiction is invoked and courts should be the fora of last resort and accords with the promotion of alternative dispute resolution mechanisms, it is also alive to the centrality of section 9(4) cited herein above on exceptional circumstances and as expounded in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others* (supra) as follows;

“ . . . the first principle is that the High Court may in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised. The second principle is that the jurisdiction of the courts to consider valid grievances from parties who lack adequate audience before the forum created by a statute or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted.”

The court is in agreement with these sentiments.”

37. Although, section 43(1) of the *Private Security Regulation Act* No. 13 of 2016 provides that any person aggrieved by a decision of the 1st Respondent may within thirty days of such decision, appeal to the Cabinet Secretary; section 44 proceeds to also state that any person aggrieved by a decision of the 1st Respondent or the Cabinet Secretary under this Act may appeal to any court of competent jurisdiction.
38. The Act provides that a party aggrieved by the 1st Respondent’s decision may appeal to either the Cabinet Secretary or any court of competent jurisdiction. Therefore, the doctrine of exhaustion is not mandatory and no wonder it reads may not should.
39. As for the doctrine of subjudice this is a point of law since the case of *Association of North Rift Security Firms* dated 30th November 2023 E018/2023 which was filed before E043/2023 raises same issues and having been filed earlier than this one filed on 19th December 2023 must be struck off and the first suit be allowed to proceed. In that case preliminary objection dated 4th December 2023 is merited and is allowed and this notice of motion and judicial review dated 19th December 2023 are struck off and each party will meet their respective costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 1ST DAY OF MARCH, 2024.

ANNA NGIBUINI MWAURE



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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

