



**Republic v Homa Bay County Government & 2 others; Odera
& 118 others (Exparte Applicants) (Judicial Review Application
E044 of 2023) [2024] KEELRC 497 (KLR) (6 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 497 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

JUDICIAL REVIEW APPLICATION E044 OF 2023

S RADIDO, J

MARCH 6, 2024

**IN THE MATTER OF AN APPLICATION BY PETER OTIENO ODERA,
REGINAL OWAKA OCHOLA, ANTONEY GAYA TINDI & 116 OTHERS
TO APPLY FOR JUDICIAL REVIEW ORDERS OF MANDAMUS**

AND

IN THE MATTER OF ARTICLE 47 AND 48 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 21 OF THE GOVERNMENT PROCEEDINGS ACT, CAP 40

AND

**IN THE MATTER OF EXECUTION OF THE JUDGMENT AND DECREE
IN KISUMU EMPLOYMENT AND LABOUR RELATIONS COURT
ELRC CAUSE NO. 3 OF 2018 ISSUED ON 24TH DAY OF OCTOBER 2019**

BETWEEN

REPUBLIC APPLICANT

AND

HOMA BAY COUNTY GOVERNMENT 1ST RESPONDENT

HOMA BAY COUNTY SERVICE BOARD 2ND RESPONDENT

**COUNTY EXECUTIVE COMMITTEE MEMBER, FINANCE, HOMA BAY
COUNTY 3RD RESPONDENT**

AND

PETER OTIENO ODERA EXPARTE APPLICANT

REGINAL OWAKA OCHOLA EXPARTE APPLICANT



JUDGMENT

1. The Court granted leave to Peter Otieno Odera, Reginal Owaka Ochola, Antoney Gaya Tindi & 116 others (*ex-parte* applicants) on 11 December 2023 to commence judicial review proceedings against the County Government of Homa Bay, the County Service Board, Homa Bay and the County Executive Committee member, Finance, County Government of Homa Bay.
2. The *ex-parte* applicants filed a Motion on 11 December 2023, and an Amended Motion on 18 January 2024.
3. The Respondents filed a replying affidavit on 24 January 2024, and the Court gave directions on 25 January 2024.
4. Pursuant to the directions, the *ex-parte* applicants filed a further affidavit and submissions on 31 January 2024.
5. The Respondents filed their submissions on 29 February 2024.
6. The Court has considered the Motion, affidavits and submissions.

Competency of the Motion

7. Order 53 Rule 4 of the [Civil Procedure Rules](#) requires an *ex-parte* applicant to serve a Notice of Motion seeking judicial review orders together with the statutory statement filed at the leave stage.
8. The *ex-parte* applicants herein did not attach or exhibit a copy of the statement accompanying the application for leave to or with the Motion.
9. Further, Order 53 Rule 4 of the [Civil Procedure Rules](#) demands that affidavits filed at the leave phase be served with the Motion.
10. In the case at hand, the *ex-parte* applicants did not attach the affidavits filed with the leave application to the Motion, but instead, a fresh affidavit sworn on 11 January 2024 (filed without leave being sought).
11. Lastly, the *ex-parte* applicants introduced an Amended Motion on 17 January 2024, without securing leave either before or after its filing. The Amended Motion had a new affidavit sworn on 17 January 2024.
12. For the above reasons, the Court finds the present Motion incompetent.
13. However, on the assumption that the Court is wrong on that conclusion, the Court will examine the merits of the Motion.

Merits of the Motion

14. On 24 October 2019, the Court entered judgment for the *ex-parte* applicants in the following terms:
 - (a) Maximum compensation equivalent to twelve (12) months' salary to each of the Claimants in the consolidated suit.
 - (b) One-month salary in lieu of termination notice to each Claimant.



- (c) 15 days' salary for each completed year of service by each Claimant.
 - (d) Three (3) months' salary in lieu of leave days not taken to all the Claimants who have served for more than three (3) years and any lesser payment in lieu of leave days not taken with regard to those who had served for less than three years. This order recognises the three (3) year limitation period within which claims may be filed.
 - (e) Certificate of Service to each of the Claimants.
 - (f) The Respondent to compute the award in respect of each Claimant, serve on the Claimants and file the same within 45 days from todate failing which the Claimants to file their computation within 15 days of expiry of the 45 days above.
 - (g) The Respondents to pay costs of the suit.
15. A decree was issued on 24 October 2019.
 16. The Respondents did not comply with the order to file computations within 45 days and the *ex-parte* applicants filed their own computations which were adopted by the Court on 16 July 2020.
 17. Upon the adoption of the computations by the Court, the Court issued another decree on 16 July 2020 setting out the amounts owing to each of the Claimants.
 18. The *ex-parte* applicants thereafter attempted to execute. The attempts did not succeed.
 19. On 5 March 2021, the parties entered a consent in the following terms:
 1. The decretal sum herein be settled in two instalments as follows
 - (a) Kenya Shillings Fifteen million (Kshs 15,000,000/-) on or before the end of financial year 2020/2021.
 - (b) The balance to be paid in the first half of the financial year 2021/2022.
 2. That in default of the above execution to issue.
 20. The Court adopted the consent on 8 March 2021.
 21. The Claimants thereafter caused their Bill of Costs to be taxed at Kshs 732,533/- on 25 September 2020.
 22. The *ex-parte* applicants now assert that the Respondents paid Kshs 17,000,000/- leaving a balance of Kshs 31,931,786/- (inclusive of costs and interest according to the further affidavit).
 23. The Respondents however deny the correctness of the assertions by the *ex-parte* applicants. The Respondents state that they have paid the *ex-parte* applicants a total of Kshs 30,100,620/-.
 24. The Respondents further contend that the *ex-parte* applicants had stated in the mother suit, Kisumu Cause No. 3 of 2018, *Peter Otieno Odera & Ors v County Government of Homa Bay & Ors* that Kshs 10,000,000/- had been paid while they now admit payment of Kshs 17,000,000/-.
 25. According to the Respondents, the outstanding balance was in the region of Kshs 4,358,414/-.
 26. In a brief rejoinder, the *ex-parte* applicants contended that some of the payments cited by the Respondents related to other legal proceedings.



27. The gravamen of the instant dispute would be resolved by a simple reconciliation of accounts between the parties. The Respondents have not denied owing the *ex-parte* applicants but they question the balances claimed.
28. In the humble view of this Court, the resolution of such a dispute does not lend itself to an adjudication through the avenue of judicial review proceedings.
29. In other words, the Court is not ready to exercise its discretion to grant an order of judicial review to compel payment when the sums said to be due are not certain.
30. Judicial review orders may be declined even when warranted and this is one such case.

Conclusion and Orders

31. In light of the above, the Court finds that the (Amended) Motion was not only incompetent, but the judicial review orders sought are not available to the *ex-parte* applicants.
32. The Motion and Amended Motion is/are dismissed with costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 6TH DAY OF MARCH 2024.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For *ex-parte* applicants H. Obach & Partners Advocates

For Respondents Wilberforce Akello & Co. Advocates

Court Assistant Chrispo/Chemwolo

