



**Republic v County Assembly of Siaya Service Board & 2 others; Olwero  
 (Exparte Applicant) (Judicial Review Application E037 of 2023)  
 [2024] KEELRC 1021 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1021 (KLR)

**REPUBLIC OF KENYA  
 IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
 JUDICIAL REVIEW APPLICATION E037 OF 2023**

**CN BAARI, J**

**APRIL 18, 2024**

**IN THE MATTER OF ARTICLES 10,22,23,41,47,73,79,96(3),226(2)  
 AND 229(8) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF SECTIONS 5, 10(5) AND 13 OF THE EMPLOYMENT ACT,2007**

**AND**

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

**AND**

**IN THE MATTER OF SECTIONS 7 & 8 OF THE  
 FAIR ADMINISTRATIVE ACTIONS ACT 2015**

**AND**

**IN THE MATTER OF SECTION 4(1) OF SIAYA COUNTY LOAN AND MORTGAGE ACT**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COUNTY ASSEMBLY OF SIAYA SERVICE BOARD ..... 1<sup>ST</sup> RESPONDENT**

**SPEAKER COUNTY ASSEMBLY OF SIAYA ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY ASSEMBLY OF SIAYA ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**ISAAC FELIX OLWERO ..... EXPARTE APPLICANT**



## JUDGMENT

1. This judgment relates to the Ex-parte Applicant's notice of motion application dated 26<sup>th</sup> September, 2023. The Applicant seeks the following reliefs;
  - a. That an order of Certiorari do issue to bring into this court for the purposes of being quashed the decision of the 1<sup>st</sup> Respondent to initiate disciplinary proceedings against the Ex parte Applicant on allegations of financial impropriety by allegedly conferring upon himself an undeserved benefit when the benefit in question, a car mortgage, is expressly conferred by the Siaya County Loan and Mortgage Act, and the Salary and Remuneration Commission (SRC) vide its circulars Ref. SRC/ADM/CIR/1/13 Vol III 128 dated 17<sup>th</sup> December 2014 and circular Ref. SRC/ADM/CIR/1/13NOL. LII (130) dated 29<sup>th</sup> January 2015, for purposes of its being quashed.
  - b. That an order of Certiorari do issue to bring into this court the charge sheet framed by the 1<sup>st</sup> Respondent herein pursuant to its decision to initiate disciplinary proceedings against the Ex parte Applicant herein, which charge sheet discloses alleged offences over which the 1<sup>st</sup> Respondent does not have jurisdiction to consider, for the purposes of its being quashed.
  - c. That an order of Prohibition do issue directed against the Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from commencing or continuing with disciplinary proceedings against the Ex parte Applicant herein, based on an Internal Audit report presented to the 1<sup>st</sup> Respondent on 26<sup>th</sup> February 2019.
  - d. That an order of Prohibition do issue restraining the Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from commencing or continuing with disciplinary proceedings against the Ex parte Applicant based/anchored upon the charge sheet presented by the 1<sup>st</sup> Respondent to the Ex Parte Applicant herein.
  - e. That the court may be pleased to grant any other or further relief that it may deem fit and just to grant in the circumstances.
  - f. That the costs of this application be provided to the Ex parte Applicant.
2. The application is supported by the grounds disclosed on the face thereof and the verifying affidavit sworn by the Ex parte Applicant on 21<sup>st</sup> September and the documents attached thereto.
3. The crux of the motion being that the Ex-parte Applicant was appointed Clerk of the County Assembly of Siaya on 30<sup>th</sup> July, 2014, which designation doubled up as the 2<sup>nd</sup> Respondent's accounting officer among other roles. He contends that he was suspended from service on account of gross misconduct on 1<sup>st</sup> March, 2019, without a formal charge sheet.
4. It is his assertion that he approached court on the lack of a formal charge sheet, which issue culminated with the Court of Appeal holding that a formal charge sheet was a prerequisite to commencement of disciplinary proceedings.



5. It is the Ex-parte Applicant's contention that pursuant to the Court of Appeal's Judgment, he received a formal charge sheet based on a 'special audit report' by the internal audit department dated 26<sup>th</sup> February, 2019.
6. He contends that upon review of the subject report, he noticed suspicious transactions, one of which was that he was the beneficiary of a car loan, and secondly, that despite four people being involved, he was the only one who was 'disciplined' and finally, that the report recommended further investigations and a more comprehensive audit, which according to him, never took place.
7. It is his position that the foregoing is evidence that the action of the Respondents is a pre-determined scheme to get rid of him.
8. The Ex parte Applicant further avers that disciplinary proceedings premised on gross violation of the Public Finance Management Act against an accounting officer like him, could only be commenced by Senate or the County Assembly Finance Committee.
9. The Ex-parte Applicant further contends that the disciplinary action subject herein, is irregular/null and void for being contrary to Article 229(8) of the Constitution, which stipulates that an audit ought to be tabled and discussed in the assembly before action is taken.
10. The Applicant further asserts that Article 79 of the Constitution places the power to punish perpetrators of economic crimes on the Ethics and Anti-Corruption Commission, and not the 1st Respondent. In any case he contends that the car loan which forms the basis of the disciplinary process was a conferment of the law for a clerk of the County Assembly.
11. The Applicant prays that the disciplinary process subject herein, be quashed, and an order of prohibition issued to prohibit the Respondents from acting oppressively, illegally and maliciously.
12. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents opposed the motion vide a replying affidavit dated 15<sup>th</sup> December 202, sworn by Hon George Okode. The deponent confirmed that indeed the Ex-parte Applicant was the designated accounting officer of Siaya County Assembly.
13. It is his contention that vide a special audit of the Siaya County Assembly car loan and mortgage fund, it was concluded that the Ex-parte Applicant had drawn money without a loan application form, security and insurance.
14. The Respondents further aver that the audit findings necessitated the Applicant's suspension on account of gross misconduct. They contend that the disciplinary process they initiated was lawful, and which is evidenced by the fact that the Ex-parte Applicant acquiesced to a hearing and even requested for further evidence to prepare his defence and for some time took part in the hearings.
15. It is the Respondents' case that this suit is the Applicant's way of escaping accountability for misappropriation of Kshs 2,000,000/= from the County Assembly Car and Mortgage fund. They affirm that if the prayers are granted it would be tantamount to the court usurping the disciplinary role of the County Assembly.
16. The Motion was canvassed through written submissions, and submissions were filed for both parties.

**The Ex Parte Applicant's submissions.**

17. The Ex parte Applicant submits that the 1<sup>st</sup> Respondent is not lawfully clothed with jurisdiction to deal with the charges outlined in the charge sheet. He further submits that a car loan is a conferment of the law upon persons holding the office of Clerk of the County Assembly. He states that the loan was



- approved by the 2<sup>nd</sup> Respondent as the 1<sup>st</sup> Respondent's chairman, and signed by several other officers some of whom are leading the proceedings against him.
18. The Ex parte Applicant submits that Section 9 of the Siaya County and Mortgage Fund provides for the making of an application to the Board for a loan or a mortgage. At the bottom of the application, the Ex parte Applicant avers is the prescription for approval by two representatives, the speaker and one other member of the Board, and that the Board that duly approved the loan is the same board which is now prosecuting him.
  19. It is his submission that its curious that the loan forming the subject matter of the disciplinary proceedings was issued to two other people, Zilper Awino Omondi and Samuel Olasi, yet he is the only one being dragged through a disciplinary process. It is his submission that it is even more perturbing why the Respondents were hell bent on disciplining him yet the report showed that he had repaid Kshs 1,200,000/= of the Kshs 2,000,000/= loan.
  20. The Applicant firmly submits that the select committee appointed to hear the disciplinary case, has no jurisdiction to deal with the charges. The ex parte applicant asserts that under article 96(3) and 226(2) of *the Constitution* disciplinary action can only be undertaken by the County Assembly Public Finance Committee.
  21. On the question of prematurity of the charges, the Applicant cites the audit report which recommended further investigations and a comprehensive audit of the management of the fund. He asserts that he was suspended without such further investigations and /or audit being undertaken, and which according to him, points to a pre-determined scheme to get rid of him.
  22. It is the Applicant's submission that he has made a case for usurpation of powers by the 1<sup>st</sup> Respondent who is hell bent on proceeding with disciplinary action in complete disregard of the law.
  23. The Ex-parte Applicant further contends that the disciplinary action subject herein, is irregular/null and void for being contrary to Article 229(8) of *the Constitution*, which stipulates that an audit ought to be tabled and discussed in the assembly before action is taken.
  24. The Applicant further asserts that Article 79 of *the Constitution* places the power to punish perpetrators of economic crimes on the Ethics and Anti-Corruption Commission, and not the 1st Respondent. In any case he contends that the car loan which forms the basis of the disciplinary process was a conferment of the law for a clerk of the County.

### **The Respondents' Submissions**

25. The Respondents contend that this suit is an affront to the exhaustion doctrine. They submit that Section 9 of the Fair Administrative Actions Act, provides that a court shall not review administrative action unless internal appeal mechanisms have been exhausted. The Respondents submit further, that the Ex parte Applicant has fallen afoul of Clause 5.0 of the County Assembly of Siaya's Discipline and Grievance Procedure manual which provides for an appeal to the Public Service Commission in case of dissatisfaction with issues of exercise of disciplinary control. They had reliance in James Omariba Nyaoga vs The Chairman Kisii County Assembly Service Board and 3 Others where the court largely emphasised adherence to section 77 of the County Government Act.
26. It's the Respondents submission that prayers 2 and 4 of the Application were res judicata, having been previously dealt with by the ELRC court and the Court of Appeal. They draw this court's attention to the ELRC's court judgment in Petition No 16 of 2019 with the same parties in which an order of certiorari quashing a decision to revoke his appointment as clerk was issued.



27. It is submitted for the Respondents that the Court of Appeal clarified that the ELRC Court's judgment was not a bar to commencement of fresh disciplinary proceedings in respect of the withdrawal of funds by the Ex-parte Applicant. They sought to rely on Section 7 of the Civil Procedure Act and the Blacks Law Dictionary 10<sup>th</sup> Edition, on the definition of res judicata, as well as the holding in the case of Njangu vs Wambugu & another Nairobi HCCC No.2340 of 1991 to support this position.
28. The Respondents urge this court to only look at the legality of the disciplinary process and not the merits of the allegations forming the basis of the disciplinary proceedings. They placed reliance in the Court of Appeal decision in Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd Civil Appeal No.185 of 2001, where the court opined that judicial review was only concerned with the decision-making process, i.e whether the decision maker had jurisdiction, whether the decision maker took into account relevant or irrelevant matters or whether affected persons were heard before the decision was made.
29. It is their submission that they are well within their rights to subject the Ex-parte Applicant to disciplinary proceedings.
30. The Respondents submits that none of the provisions of the law cited by the Applicant explicitly stops the 1<sup>st</sup> Respondent from preparing a special audit report. They rely on the case of Ondago vs Natembeya & 15 others Constitutional Petition E003 of 2023[2023] KEHC 22268 (KLR) to support this position.
31. On whether the audit report ought to have been tabled in the assembly for debate and issuance of recommendations in line with Article 229 (8) of the Constitution, the Respondents submit that the Article is only applicable to reports by the Auditor General and not reports by internal auditors.
32. The Respondents contend that Article 79 of the Constitution does not oust the 1<sup>st</sup> Respondent's powers as conferred by Section 22 and 23 (1) of the County Assembly Services Act to remove or suspend the Applicant.
33. The Respondents submit that the disciplinary proceedings are not based on the Applicant's eligibility for the car loan, but on the unprocedural manner in which he acquired it. They stress that the 1<sup>st</sup> Respondent was not a member of the Siaya County Assembly Loans and Mortgage Fund Board, hence could not have participated in approval of the loan.
34. They assert that the Applicant was in breach of Sections 9 and 10 of the Siaya County Assembly Loans and Mortgage Fund Act, for lacking the details of guarantors, signature of the witness and dates for the first and last instalment and security or lien over the vehicle covered by the loan. These they state could not be merely wished away as missteps on the ex parte applicant's part.
35. In response to the Applicant's assertion that he was the only one taking the fall for the alleged misconduct, the Respondents submit that the other two were members of the County Assembly, hence the 1<sup>st</sup> Respondent did not have powers to discipline them.

### **Analysis and Determination**

36. Upon careful consideration of the respective facts as presented by the parties herein, together with the rival submissions, the issue that falls for determination is whether the Applicant merits the grant of the judicial review orders sought.



37. To answer this question, the role of the court is to determine whether the disciplinary proceedings against the Applicant are tainted with illegality, irrationality and/or procedural impropriety (See Pastoli...vs...Kabala District Local Government Canal & Others (2008) 2EA 300 at pages 300-304).

38. In the case of Republic vs National Land Commission and another; Ex parte Farmers Choice Limited [2020] eKLR, the Court explained the concept of judicial review, whilst relying on the case of Municipal Council of Mombasa vs Republic Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007 (2002) eKLR, in the following words: -

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters(emphasis own). These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review.”

39. The disciplinary proceedings against the Applicant were commenced by the County Assembly Service Board of Siaya, the 1<sup>st</sup> Respondent herein, vide a letter dated 15<sup>th</sup> August, 2023, after an earlier attempt to discipline the Applicant was stayed through a decision of this court (differently constituted).

40. Section 22 of the County Assemblies Service Act states thus on suspension and removal of a County Clerk: -

“The Board may suspend or remove from office, the Clerk for-

- a. inability to perform the functions of the office, whether arising from infirmity of body or mind;
- b. gross misconduct or misbehaviour;
- c. incompetence;
- d. bankruptcy;
- e. violation of the provisions of *the Constitution*, including Chapter Six of *the Constitution*; or
- f. violation of the provisions of this Act.”

41. Section 23 proceeds to stipulates the removal procedure as follows: -

“(1) Where the Board considers it necessary to remove the Clerk under section 20, the Board shall-

- a. frame a charge or charges against the Clerk;
- b. 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;



- c. 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
  - d. 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.”
42. In light of the foregoing, the Applicant’s assertion that his removal violated the *Public Finance Management Act*, on the basis that his removal could only be commenced by Senate or the County Assembly Finance Committee for being an accounting officer, is unfounded and without legal basis.
43. In the premise, I hold that the Respondents have jurisdiction to commence and concluded removal proceedings against the Ex parte Applicant pursuant to Sections 22 and 23 of the County Assemblies Service Act.
44. On whether the Applicant was heard, the letter of 15<sup>th</sup> August, 2023, commencing the impugned proceedings, invited the Ex parte Applicant for a hearing that was slated for the 8<sup>th</sup> September, 2023, and it is safe to conclude that the subsequent court orders may have derailed this hearing, and the Applicant cannot therefore be heard to say that he was denied a hearing, the disciplinary process having been put in abeyance by the orders of this court.
45. Finally, on whether the Respondents took into account irrelevant matters, the Applicant’s issue is that the Respondents sought to rely on a special audit report which in his opinion ought to have first been tabled before the county assembly per Article 229(8) of *the Constitution*.
46. Article 229 (8) states:

“Within three months after receiving an audit report, Parliament or the county assembly shall debate and consider the report and take appropriate action”.
47. As correctly submitted by the Respondents, the audit report referred to under the foregone Article of *the Constitution*, is the Auditor General’s Report, and not an audit report by internal auditors. There is therefore no requirement that the report subject of the disciplinary proceedings should first be tabled before the County Assembly before the findings and/or recommendation therein can be implemented.
48. Suffice it to say, that the Ex parte Applicant has confirmed receiving a charge sheet containing the allegations leveled against him, hence the issues subject of the disciplinary action are not in dispute.
49. The Court of Appeal in *Pastoli...vs...Kabala District Local Government Canal & Others* (2008) 2EA 300 at pages 300-304, stated that a Court must examine how the decision was arrived at, whether those who made the decision had the power to make it, whether the persons affected by the decision were heard before it was made, and whether the decision-making body took into account relevant or irrelevant matters/factors.
50. By the foregone analysis, I am satisfied that the disciplinary proceedings against the Applicant meet the threshold set in the *Pastoli vs Kabala District Local Government Canal & Others* (supra)
51. Finally, although the Ex parte Applicant has largely submitted on how he obtained the car loan, to go into whether he was entitled to the loan or whether he obtained the same procedurally, will no doubt amount to delving into the merits of the disciplinary proceedings which is not the province of judicial review proceedings.



52. In the end, I conclude that the disciplinary process commenced against the Ex parte Applicant by the Respondents, is within the law.
53. I proceed to dismiss the Applicant's motion dated 26<sup>th</sup> September 2023, and all the orders earlier issued pursuant to that motion.
54. The Ex parte Applicant shall bear the costs of the application.
55. Judgment accordingly.

**DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 18<sup>TH</sup> DAY OF APRIL, 2024.**

**CHRISTINE N. BAARI**

**JUDGE**

Appearance:

Ms. Owino h/b for Mr. Onyango for the Ex parte Applicant

Mr. Okoyo Omondi present for the Respondents

Erwin Ongor – C/A

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