



Abdi v Garissa County Public Service Board & another (Judicial Review Miscellaneous Application E049 of 2024) [2024] KEELRC 2798 (KLR) (14 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 2798 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E049 OF 2024
HS WASILWA, J
NOVEMBER 14, 2024**

BETWEEN

HARED SAMBUL ABDI APPLICANT

AND

THE GARISSA COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT

THE COUNTY GOVERNMENT OF GARISSA 2ND RESPONDENT

RULING

1. The Applicant through an application dated 18th September 2024 sought orders of prohibition against the Respondents from conducting any interviews, sittings or proceedings to deliberate on impugned shortlisted candidates for County Administrators and Deputy County Administrators.
2. The Applicant's application dated 18th September 2024 was based on the following grounds: -
 1. That the precipitate dispute is in its very nature revolving around interviews for the position of County Administrators and Deputy County Administrators which began on 16th September 2024 and the positions are held with others that this court gave order for the reinstatement to their previous positions in ELRC No. E205 of 2022.
 2. That owing to such contempt of court orders the interviewers and the interviewees are destined to making and/or arriving at a misconceived decision which ultimately shall be unlawful, oppressive and/or unfair.
 3. That the seizure of the precipitate dispute is an act of usurping and/or subverting the will of the people of who were affected by the unfair and unlawful dismissal that this court ordered to be reinstated to their previous position.



4. That the interviews and any decision thereof will disenfranchise the ex parte applicant's rights to a fair administrative action and the rest of the county employees who were unfairly and unlawfully dismissed as their positions will no longer be vacant.
 5. That the advertisement, subsequent shortlisting and now interview is illegal and a continuation of unlawful act of the respondents that this honorable court has heard and determined in ELRC No. E205 of 2022.
 6. That the process and procedure undertaken by the Respondents is not only a violation of the applicant and the aggrieved employees that were unlawfully dismissed rights, but also against *the constitution* as it is marred with nepotism and favoritism from the Respondents in choosing selection and shortlisting.
 7. That in principle and in the wider interest of justice, this honourable court be pleased to grant leave to the subject herein to apply for an order of prohibition against respondents from acting jointly and severally from conducting any interviews, sittings or proceedings to deliberate on the impugned shortlisted candidates for interviews for County Administrators started on 16th September 2024 which are to run until 20th September 2024 which any decision that might arise from the said shall be treated as annulity.
3. That upon hearing the application dated 18th September 2024, the Employment and Labour Relations Court in Nairobi made an order dated 19th September 2024 and gave the following directions: -
1. The application is urgent though overtaken by events since the interviews according to the application were to run from 16th September 2024 to 20th September 2024.
 2. The application should be served within 2 days hereof and response filed within 4 days thereof.
 3. Inter parties hearing to be on 3rd October 2024 before the trial court or any other judge of the division.
 4. The Respondents filed grounds of opposition in response dated 27th September 2024 and gave the following grounds: -
 1. That in Kenya National Examination Council v Republic Exparte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR, the Court of Appeal held that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision.
 2. That the Application is overtaken by events as the interviews whose conduct is sought to be stayed and/or prohibited have been concluded on 20th September 2024. Court orders cannot thus be issued in vain to stop an already implemented decision.
 3. That the Application is replete with dishonesty and material non-disclosure aimed at misleading this Honourable Court. Following a court supervised audit conducted by the Public Service Commission, only one (1) employee was found to have been regularly recruited and has since been return to the county payroll. All other aggrieved employees were found to be ghost works fraudulently added to the County payroll. ELRC No. 205 of 2022 was thus dismissed.
 4. That the Application for leave is bad in law as it was brought under a notice of motion in contravention of order 53 Rule 1 of the Civil Procedure Rules which stipulates that an Application for Judicial review shall be made by way of chamber summons.



5. That the Application is frivolous, vexatious and does not raise any reasonable cause of action.

Applicant's Submissions

5. The Applicant filed written submissions dated 7th October, 2020 and reiterated the prayers that had been sought on the application dated 18th September 2024 and raised three issues for determination: -
 - i. How does an order of prohibition work?
 - ii. Has the application been overtaken by events?
 - iii. Is the application bad in law?
6. On the first issue the Applicant began defining Judicial Review as per Halbury's Laws of England, 4th ed. vol. I (para. 60) which gives the following definition Judicial review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties...
7. Further the Applicant cited the High Court's decision (Visram, J, as he then was) in Republic V Permanent Secretary/Secretary to the Cabinet and Head of Public Service, Office of the President & Another ex parte Ng'ang'a and Others [2006] 2E.A. 294, in which the following passage appears (at pages 294-295):

“The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. The institution of a judicial review suit is not a bar to seeking other forms of relief as judicial [review posits] that as soon as a public body exceeds its jurisdiction, or acts unfairly or disregards the principles of natural justice, then the very act of the public body must be scrutinized.”
8. On the second issue the Applicant stated that the 3rd prayer sought for the respondents to be prohibited from acting upon any outcome of the interview which has already been concluded. The Applicant is only requesting the court to halt the process until his application is heard. The Applicant further states that there is an ongoing matter and an order directing that the Respondents should not advertise or hire until the matter is finalized and that the Respondents have failed to comply with two court orders. The Applicants submitted that their application has not been overtaken by events since the decision coming from the interview have not been made and prayed for the court to allow their application to proceed to conclusion and grant the prayers sought especially the third prayer.
9. On the third issue the Applicants state that the Respondents have stated that the Applicants application is in contravention of Order 53 rule 1 of the Civil Procedure Rules, however, *the Constitution* of Kenya under article 159 (2)(d) provides that " In exercising judicial authority, the courts and tribunals shall be guided by the following principles- justice shall be administered without undue regard to procedural technicalities." The Applicant states that he has complied with all the requirements enlisted in the above-mentioned application and any mistake cannot stop the Court from serving justice as *the Constitution* permits the court to act without considering the technicalities. The



Applicant cites the case of Kokwo v Akokor (Environment and Land Appeal E016 of 2022) [2023] KEELC 20783 (KLR) (18 October 2023) (Judgment) in the following words;

“Nevertheless, Article 159(2) (d) of *the Constitution* of Kenya obligates this Court to determine suits based on substantive justice rather than technicalities. But each case has to be decided

on its merits. I am of the view that the merits of this case warrant substance to be placed over procedure”

The Applicant concluded by stating his submission has not been overtaken by events and pray that he can be granted leave and the same be heard to its conclusion.

Respondent’s Submission

10. The Respondent filed written submissions dated 29th October 2024 and raised two issues for determination: -
 1. whether the applicant should be granted leave to apply for an order of prohibition against the respondents from acting jointly and severally from conducting any interviews, sittings or proceedings to deliberate on impugned shortlisted candidates for county administrators and deputy county administrators.
 2. Whether leave granted should operate as a stay.
11. On the first issue the Respondents argue that the Applicant’s claims of nepotism and favoritism are baseless and unsupported by evidence. Citing legal precedent *Matiba v Attorney General Nairobi H.C. Misc. Application No. 790 of 1993* and *Republic v Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321*, the Respondents emphasize that leave for judicial review should only be granted if there is an arguable case. Procedural Impropriety and Lack of Prima Facie Case: The Respondents note that the Applicant’s claim is procedurally flawed and lacks a prima facie case. The Applicant’s reliance on ELRC No. E205 of 2022 is misplaced, as that matter was dismissed and there are no existing orders for the reinstatement of the employees. Additionally, an independent audit by the Public Service Commission found that 1,053 employees were not lawfully employed, justifying the county’s decision to terminate their employment.
12. The Respondents contend that on the second issue the Applicant’s request for a stay order is inconsistent with the substantive order of prohibition, which seeks to stop the Respondents from conducting interviews rather than staying the implementation of decisions from those interviews. The Respondents argue that the prohibition order is futile, as the interviews were completed on 20th September 2024. Citing *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9others [1997]*, the Respondents state that a prohibition order is ineffective against actions already taken. The interviews and the recruitment process have concluded, making the Applicant’s request irrelevant.
13. The Respondents further submit that the court should not delve into the merits of administrative decisions, which fall outside the purview of judicial review. They argue that allegations of nepotism and favoritism should be addressed in a trial court rather than a judicial review court.
14. The Respondents submit that the Applicant’s application fails to meet the threshold for the grant of leave and is overtaken by events. They request that the court dismiss the application with costs, emphasizing that any prohibition order would be ineffective as the recruitment process has already concluded.



15. I have considered all the submissions and averments of the parties herein. The application by the applicant seeks to forestall the conclusion of interviews commenced by the respondents which were scheduled to happen in September 2024. Because the interview date has already passed, the orders being sought have already been overtaken by events and therefore cannot be granted
16. On whether the order to forestall implementation of the results of the interview can be granted, I note that the applicant also sought orders to stop the implementation of the interview results. The respondents in their grounds of opposition failed to indicate that they have already acted on the results of the interviews conducted. It is for this reason that I allow the order prohibiting the implementation of the results of the interview.
17. The applicant is therefore granted leave to initiate a JR application which order will act as a stay against the implementation of the results of the interview processes carried out by the Respondents. Costs of this application shall be in the JR Application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14TH DAY OF NOVEMBER, 2024.

HELLEN WASILWA

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.

HELLEN WASILWA

JUDGE

