



Achuti & 28 others v County Government of Nakuru & another (Miscellaneous Application E026 of 2024) [2024] KEELRC 13409 (KLR) (6 December 2024) (Ruling)

Neutral citation: [2024] KEELRC 13409 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
MISCELLANEOUS APPLICATION E026 OF 2024
AN MWAURE, J
DECEMBER 6, 2024**

**BETWEEN
REBECCA BITENGO ACHUTI & 28 OTHERS & 28 OTHERS APPLICANT
AND
COUNTY GOVERNMENT OF NAKURU 1ST RESPONDENT
NAKURU COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT**

RULING

ARGUMENTS

Introduction

1. The Applicant filed a Notice of Motion dated 18th April 2024 seeking orders that:
 1. This Honourable Court do hereby grant the Subjects an order of MANDAMUS directing/compelling the Respondents to pay each of the Subjects the following:
 - i. 1 month salary lieu of Notice
 - ii. Gratuity at 31% as per their contract of employment
 - iii. Compensation equivalent to 3 months' salary for unfair terminationBeing compensation awarded by the Court vide a judgment delivered on 31st October 2023 and the Decree and Order issued on 6th March 2024 by Hon. Justice Hellen Wasilwa in Nakuru ELRC No. E039 of 2022 Rebecca Bitengo Achuti & 28 others V County Government of Nakuru & Nakuru County Public Service Board.
2. The costs of this application



Respondent's Preliminary Objection

3. The Respondent filed a Preliminary Objection dated 30th July 2024 on the following grounds that:
 1. The application is vexatious, bad in law, incompetent, and an abuse of the court process.
 2. The application offends the provisions of the [Government Proceedings Act](#) Chapter 40 Laws of Kenya and that of execution against government.
 3. The application offends the mandatory provisions of sections 8 and 9 of the [Law Reform Act](#) Chapter 26 Laws of Kenya.
 4. The application offends the provisions of Order 53 rule 1, 2, and 3 of the Civil Procedure Rules 2010.
 5. The application and indeed the petition is bad in law, incompetent an abuse of the court process.
4. In addition, the Respondent further filed grounds of opposition dated on even date on the following grounds that:
 1. The application offends the provisions of the [Government Proceedings Act](#) Chapter 40 Laws of Kenya and that of execution against government.
 2. A stay of the proceedings was granted pending appeal in Nakuru ELRC No. E039 of 2022 Rebecca Bitengo Achuti & 28 Others V County Government of Nakuru & Nakuru County Public Service Board in a ruling delivered by Lady Justice Hellen Wasilwa on 18/9/2024.
 3. The applicant has not exhausted the avenues available for executing the decree before the instant application.
 4. The application and indeed the petition is bad in law, incompetent an abuse of the court process.
5. Both parties canvassed the Preliminary Objection by way of written submissions.

Applicant's submissions

6. The Applicant submitted that there is an order of stay pending appeal issued by Hon. Lady Justice Wasilwa in Nakuru ELRC Cause No. E039 of 2022 and the same should not act as stay of proceedings.
7. The Applicant relied on the case of Republic V Attorney General & Another Exparte James Alfred Koroso (2013) eKLR it was held that:

“It follows that the mere fact that a party intends to appeal or has even appealed does not entitle him automatic stay. A party who needs protection from the court ought to also apply for stay of proceedings. In this case, the Respondent neither applied for nor obtained an order for stay of proceedings.”
8. The Applicant submitted that the judicial review proceedings cannot be similar to stay of execution proceedings and such an order of stay cannot apply to judicial proceedings. Therefore, the Respondent should make an application to obtain an order of stay in these judicial proceedings.



9. In Republic V Attorney General & Another Ex parte James Alfred Koroso (supra) the court further held that:

“... it follows therefore that the institution of judicial review proceedings in the nature of mandamus cannot be equated with execution proceedings. In seeking an order of mandamus, the applicant is seeking, not relief against the Government, but to compel a government official to do what the Government, through parliament has directed him to do. The relief is not execution or attachment or process in the nature thereof. It is not to make any person “individually liable for any order for payment but merely to oblige a government officer to pay, out of the funds provided by parliament, a debt held to be due by the High Court in accordance with a duty cast upon him by parliament.”

10. The Applicant submitted that the Respondents were to pay the decretal amount according to the decree and certificate of order served upon them; therefore, they cannot evade their duty and obligation to pay the decretal amount due to the lack of a certificate of order.

11. In Republic V Independent Electoral and Boundaries Commission Ex parte Nyarabo Onditi (2021) eKLR the court held that there was no evidence of a certificate of order against the government issued in respect of the taxed costs nor evidence of the service of the same on the Respondent main objection. A decree and certificate of costs issued by the Deputy Registrar of the Court of Appeal are sufficient in accordance with section 21 of the *Government Proceedings Act*. The Ex-parte Applicant provided evidence that the certificate of costs was served on the Respondent, and the Respondent’s secretary acknowledged receipt thus the Respondent is under a duty to pay the total costs.

12. The Applicant submitted that the certificate of costs was not served as it is pending ruling as the Deputy Registrar handling the said certificate of costs went on transfer and opted to pursue compensation while awaiting the ruling of the Bill of costs.

13. The Applicant submitted that the order for leave to commence judicial review proceedings emanating from HCC Misc No. 115 of 2024 was erroneously filed in the High Court and was transferred to this Honourable Court (ELRC).

14. The Applicant submitted that a court of equal status can transfer a matter without dismissing it, as the court possesses the necessary jurisdiction. In Allan Mupe Bakari V Diani Sea Lodge (2020) eKLR the court held that such transfers are common practice and should not result in dismissal or striking out of the case. Instead, the receiving court accepted the transferred case and proceeded with it as if it had been originally filed there.

15. The Applicant submitted that the High Court transferred this case to this Honourable Court (ELRC) and that it should proceed to its conclusion. The Respondent argued that the Applicant needed to leave this Honourable Court, and the Applicant submitted that it would be too expensive and time-consuming as it would go against the spirit of *the constitution*.

16. The Applicant prays that this Honourable Court holds the preliminary objection lacks merit and should be dismissed.

Respondent’s submissions

17. The Respondent submitted that the application is bad in law as there is an order of stay pending appeal by Honourable Lady Justice Wasilwa in Nakuru ELRC Cause No. E039 of 2022. The stay order was granted on 18th September 2024, and requires the Respondents to deposit the decretal sum in a



joint interest-earning account within 90 days, or else execution may proceed. Therefore, the applicant's application cannot proceed in light of the stay order.

18. The Respondent relied on section 21 of the *Government Proceedings Act* provides for orders against the Government as follows:
- (1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:

Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.
 - (2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.
 - (3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:
 - (4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.
19. The Respondent submitted that the Applicant failed to follow the procedure including obtaining a certificate of order against the government as no execution can be issued and this Honourable court ought to strike out the application.
20. The Respondent submitted that leave was not sought despite the application being brought under Order 53 of the Civil Procedure Rules 2010. In *Wilson Njuguna Gakuru & Another V National Transport & Safety Authority & 2 others* [2016] eKLR the court stated that leave is required to commence judicial review proceedings.
21. The Respondent submitted that Honourable Justice Mohochi in HCCC Misc No. E115 of 2024 cannot be a basis for leave as it was a different cause. The Respondent argues that it would be a bad precedent if leave could be obtained from either the High Court or this Honourable Court (ELRC). The Respondent submitted that since the matter was transferred from the High Court to this court (ELRC), the Applicant should have obtained leave before taking out judicial review proceedings.
22. The Respondent submitted that the Preliminary Objection should be upheld and the application to be struck out.



Analysis and determination

23. The main issue of determination is whether the Preliminary Objection is merited.
24. In *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd. (1969) EA 696*, where the Court held as follows:
- “So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit or to refer the dispute to litigation.”
25. In *Independent Electoral & Boundaries Commission V Jane Cheperenger & 2 Others [2015] eKLR* the Supreme Court made the following observation as relates to Preliminary Objections:
- “... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”
26. In this instant case, leave for judicial review was granted on 12th April 2024 by the High Court in accordance with Order 53 of the Civil Procedure Rules. The case was later transferred from the High Court to this Honourable Court (ELRC). The Court is satisfied the leave granted by the High Court being a Court of concurrent jurisdiction is competent to apply in ELRC where the case was transferred due to the diverse jurisdiction of the two courts.
27. There are stay orders issued by Honourable Lady Justice Wasilwa in Nakuru ELRC Cause E039 of 2022 *Rebecca Bitengo Achuti & 28 others V County Government of Nakuru & Nakuru County Public Service Board*. The applicants were not required to file judicial proceedings knowing very well that stay orders halt the enforcement of the judgment until the appeal is heard and determined. The applicants have not demonstrated whether they complied with the orders issued in Nakuru ELRC Cause E039 of 2022 and whether they deposited the decretal sum in a joint account of the respective counsels as ordered by the court. They still however have a window to comply by 18th December 2024 and in default execution is to issue.
28. The proper procedure in execution against the government is as provided in the [*Government Proceedings Act*](#) Section 21 of the said Act provides as follows –
- (1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order: Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.



- (2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.
 - (3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:
 - (4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.”
29. The Respondent/Applicant has not demonstrated they followed the due process. There is no certificate of costs presented in court even as the Applicant seeks an order for Mandamus. The obtaining of the certificate is the first priority.
30. The period for paying the decretal sum in a joint account should be allowed to expire before execution can proceed. This according to the Ruling dated 18th September, 2024 was to be on 17th December 2024.
31. In view of the foregoing the court holds the preliminary objection dated 30th July 2024 is merited and is allowed.
32. The court orders costs of the preliminary objection to be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAKURU THIS 6TH DAY OF DECEMBER, 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

