



Adul & 49 others v Clerk, County Assembly of Kisumu & 2 others (Judicial Review E035 of 2024) [2024] KEELRC 13341 (KLR) (5 December 2024) (Ruling)

Neutral citation: [2024] KEELRC 13341 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW E035 OF 2024
JK GAKERI, J
DECEMBER 5, 2024

BETWEEN

ANNE ATIENO ADUL & 49 OTHERS APPLICANT

AND

THE CLERK, COUNTY ASSEMBLY OF KISUMU 1ST RESPONDENT

KISUMU COUNTY ASSEMBLY SERVICE BOARD 2ND RESPONDENT

LOCAL AUTHORITY FUND (LAPF) 3RD RESPONDENT

RULING

1. On 18th October, 2024, the law firm Bruce Odeny & Company Advocates filed a Chamber Summons Application dated 16th October, 2024 under Certificate of Urgency seeking leave to apply for an order of Judicial Review in the nature of mandamus directed at the respondents compelling them to pay the ex parte applicant the sum of Kshs.338,783.00 being the certified costs in Kisumu ELRC Cause No. 382 A of 2018 between Anne Atieno Adul & 49 Others V The Clerk County Assembly of Kisumu & 2 Others.
2. This is the application that precipitated the instant notice of Preliminary Objection.
3. When the matter came up on 23rd October, 2024, the Court directed that the Chamber summons be served on the respondents and responded to within 10 days pending inter partes hearing on 12th November, 2024 on which date Mr. Obiero of C. Obiero & Associates Advocates informed the Court that he had filed a Notice of Preliminary Objection as well as grounds of opposition raising the same issues.
4. The Court gave directions on the filing of submissions on the Notice of Preliminary Objection.
5. The Respondents contend that:



1. The Application before the Court is incompetent, misconceived, improper and otherwise an abuse of the due Court process.
2. The prayers sought are monumental procedural and substantive legal nullity bad in law, misconceived and therefore rendered fatally and incurably defective.
3. The application offends and does not meet the requirements of Order 53 of the Civil Procedure Rules, 2010 and ought to be dismissed with costs.

1st and 2nd Respondent's submissions

6. As to whether the application dated 16th October, 2024 meets the threshold of Order 53 of the Civil Procedure rules, Counsel cites Order 53 and decisions in Republic V National Land Commission & 4 Others Ex Parte Stephen N. Nyachae [2018] eKLR and Njenga V Njenga [2021] eKLR to submit that failure to disclose the identities of all parties and failing to present a sufficient verifying affidavit violates the procedural rules rendering the application incompetent as held in Benjo Amalgamated Ltd & Another V Kenya Commercial Bank Ltd [2014] eKLR, that a defective application cannot yield a substantive judicial intervention.
7. That the absence of identifiable parties prevents the respondents from understanding the full nature and scope of the claims against them as detailed in Commissioner of Lands V Kunste Hotel Ltd [1997] eKLR.
8. Reliance was also made on the decision in Republic V the Honourable Chief Justice of Kenya & Others, Ex Parte Moiyo Mataiya Ole Keiwa [2010] eKLR for the proposition that: -

“the failure to provide a verifying affidavit affirming the absence of parallel litigation or previous proceedings concerning the same subject matter violates the underlying purpose of fairness and transparency in judicial review proceedings”.
9. In conclusion, counsel submits that the Applicants' failure to comply with Order 53 Rules of the Civil Procedure Rules renders the application fatally defective and unsustainable in law.

Applicants submissions

10. On whether the application meets the threshold, the applicant submits that it does and cites the sentiments of the Court in Republic V Permanent Secretary Ministry of state for Provincial Administration & Internal Security Ex Parte Fredrick Manoah Equanza [2012] eKLR to urge that the relief of mandamus can only be accessed by way of Judicial Review as the applicant was awarded costs of Kshs.338,783.00 in Kisumu ELRC Cause No. 382A of 2018 and a certificate of taxation issued.
11. Reliance was also made on the decision in Republic V Principal Secretary Ministry of Internal Security & Another Ex Parte Schon Noorani & Another [2018] eKLR on the requirements of an order of Mandamus.
12. Finally, counsel submits that issue of identities of the parties is not in dispute as the same are disclosed on the face of the pleadings.

Analysis and determination

13. I have considered the Notice of Preliminary Objection and submissions by the parties and the only issue that commend itself for determination is whether the Preliminary Objection is merited.



14. There is no contest that the 1st and 2nd Respondent’s Notice of Preliminary Objection meets the threshold of a Preliminary Objection as elucidated in the famous rendition in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd* [1969] EA 696 where Law JA stated that

“...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...”

Sir Charles Newbold P stated;

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

15. The Supreme Court of Kenya made similar sentiments in *Hassan Ali Joho & Another V Suleiman Said Shabal & 2 Others* [2014] eKLR and *Hassan Nyanje Charo V Khatib Mwashetani & 3 Others* [2014] eKLR.

16. Clearly, a Preliminary Objection can only be raised on the basis of an established principle of law.

17. The 1st and 2nd respondents fault the application dated 16th October, 2024 on the premise that it falls below the threshold under Order 53 of the Civil Procedure Rules which states that

1. No application for an Order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.
2. An application for such leave shall be made *ex parte* to a judge in chambers and shall be accompanied by –
 - a. a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought; and
 - b. affidavits verifying the facts and averment that there is no other cause pending, and that there have been no previous proceedings in any Court between the applicant and the respondent, over the same matter and that the cause of action relates to the Applicants named in the application.

18. The Applicant’s Chamber Summons was made *ex parte* and the applicant law firm attached a statement of facts dated 16th October, 2024 and a Verifying Affidavit sworn by Agnes Akinyi Advocate, practicing in the law firm in the name and style of BRUCE ODENY & COMPANY ADVOCATES and other annexures.

19. Puzzlingly the Notice of Preliminary Objection is reticent on the real shortcomings of the application to sustain the allegation of its being improper, misconceived, incompetent, bad in law a nullity.

20. While the Court is in agreement with the decisions cited by the 1st and 2nd Respondent namely; *Republic V National Land Commission & 4 Others Ex parte Stephen N. Nyachae* (Supra), *Njenga V Njenga* (Supra) and *Benjoh Amalgamated & Another V Kenya Commercial Bank Ltd* (Supra) on adherence to procedural rules and ensuring an application is defect free in terms of documentation and their contents, it respectfully disagrees with the contention that the applicants application dated 16th October, 2024 is procedurally defective as no particular defect has been isolated and illustrated by the Notice of Preliminary Objection.



21. The statement of facts addresses the names and description of the Applicants, reliefs sought and the grounds on which the reliefs are sought.
22. Relatedly, the Verifying Affidavit sworn by Agnes Akinyi Advocate verifies the facts in the statement.
23. Although the 1st and 2nd respondents advert to insufficiency of the Verifying Affidavits that the identities of the 49 other applicants are not disclosed, the more salient issue is whether the alleged 49 are applicants in the Judicial Review Application which is exclusively on advocates outstanding party and party bill of costs dated 18th January, 2023 taxed on 24th April, 2024 at Kshs.338,783.00 and a certificate of taxation issued on 2nd May 2024.
24. The Court is not persuaded that clients are applicants in an application for payment of party to party bill of costs arising from a concluded case.
25. In any case the issue was not contested at any point.
26. It is correct that the Verifying Affidavit does not specifically state that there are no other pending causes or previous proceedings.
27. Does this omission renders the Verifying Affidavit procedurally defective? The Court is not so persuaded bearing in mind that the Respondents were aware of the suit and were parties to the consent to pay outstanding gratuity to the Claimants in the sum of Kshs.13,719,887.00 and costs were taxed as there was no agreement as per the consent.
28. More significantly, the provisions of Article 159(2)(d) of *the Constitution* of Kenya, the pre-eminent law of the land may be invoked to cure the defect.
29. The respondents cannot feign ignorance of the genesis of the matter before the Court.
30. The Court is guided by the sentiments of Githua J in Republic V Permanent Secretary, Ministry of State for Provincial Administration & Internal Security Ex Parte Fredrick Egunza (Supra) where the learned Judge stated thus:

Unlike other civil proceedings, where decrees for payment of money or costs has been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an Order of mandamus compelling the Accounting Officer in the relevant Ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the *Government Proceedings Act*”
31. Similarly, the sentiments of Mativo J. (as he then was) in Republic V Principal Secretary, Ministry of Internal Security & Another Ex Parte Schon Noorani & Another (Supra) are instructive that;

Mandamus is an equitable remedy that serves to compel a public authority to perform a public legal duty and it is a remedy that controls procedural delays...”
32. The Court is in agreement with these sentiments.
33. Flowing from the foregoing analysis, it is discernible that the 1st and 2nd Respondent’s Notice of Preliminary Objection dated 5th November, 2024 is bereft of merit and it is accordingly dismissed with no Orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 5TH DAY OF DECEMBER, 2024



DR. JACOB GAKERI

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 *Civil 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.

DR. JACOB GAKERI

JUDGE

DRAFT

