



REPUBLIC OF KENYA



KENYA LAW
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**Nekesa v County Assembly of Bungoma & 5 others (Judicial Review
1 of 2022) [2023] KEELRC 277 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 277 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
JUDICIAL REVIEW 1 OF 2022**

JW KELI, J

FEBRUARY 2, 2023

BETWEEN

RACHEL RAEL NEKESA APPLICANT

AND

COUNTY ASSEMBLY OF BUNGOMA 1ST RESPONDENT

BUNGOMA COUNTY ASSEMBLY SERVICE BOARD 2ND RESPONDENT

SPEAKER OF THE COUNTY ASSEMBLY OF BUNGOMA 3RD RESPONDENT

CLERK COUNTY ASSEMBLY OF BUNGOMA 4TH RESPONDENT

ETHICS AND ANTI -CORRUPTION COMMISSION 5TH RESPONDENT

ATTORNEY GENERAL 6TH RESPONDENT

RULING

1. The Ex-Parte Applicant, a member of the Bungoma County Assembly Service Board upon being barred from serving in the board brought under certificate of urgency chamber summons dated 13th October 2022 and received by court on 18th October 2022 seeking the following reliefs:-
 - (i) That the instant application be certified as urgent and fit to be heard ex-parte at the earliest opportune time and on priority basis at the first instance.
 - (ii) That this Honourable Court be pleased to grant leave to the ex-parte Applicant to apply for Judicial Review by way of an Order of Certiorari to remove into the High Court for purpose of its being quashed the Decision of the 1st Respondent, as communicated through the 4th Respondent to stop the salary, other emoluments and barring the Claimant from participating in the activities of the 2nd Respondent as communicated vide the letter dated 22nd September, 2022 addressed to the Applicant.



- (iii) That this Honourable Court be pleased to grant leave to the ex-parte Applicant to apply for Judicial Review by way of an Order of Prohibition to prohibit the 2nd Respondent from interfering with her tenure of office, execution of her duties towards the 2nd Respondent and public, her salary, emoluments and other benefits.
 - (iv) That this Honourable court be pleased to grant leave to the ex-parte Applicant to apply for Judicial Review by way of an Order of Mandamus to compel the 4th Respondent to unconditionally reinstate the Applicant to her position as a member of the 2nd Respondent without the alteration, change and or otherwise limiting, the terms of membership in a manner that may impact negatively on the Applicants membership, as a result of the claims leveled against the Applicant in respect to all issues, that led to the stoppage of her benefits and membership of the 2nd Respondent.
 - (v) That upon leave being granted, the same do operate as stay of any decision by the 1st -4th Respondents as communicated through vide the letter dated 22nd September,2022 addressed to the Ex-parte Applicant, to stop her salary, other emoluments and barring, the Claimant from participating in the activities of the 2nd Respondent, or in any manner whatsoever, and to stay any envisaged recruitment of another person to take up her position pending the hearing of this case.
 - (vi) That upon leave being granted, the same do operate as stay of any decision to the 5th Respondents to summon the Applicant, arrest, charge, investigate or in any manner engage the Applicant in relation to any issue leveled against her by the 1st to the 4th Respondent relating to the envisaged cause of action leading to the genesis of the issues raised and/or to be further raised in this case.
 - (vii) That such further orders and reliefs that this Honourable court may deem to just and expedient.
 - (viii) That costs of this application be borne by the Respondents.
2. The Application was accompanied by Verifying affidavit of the Ex-Parte applicant sworn on 13th October 2022 and the Notice of motion with supporting affidavit of the Ex-Parte applicant and the annexures.
 3. The court on the receipt of the Ex-Parte Chamber Summons Application under certificate of urgency, on the 26th October 2022 granted orders 2,3 and 4 being leave of the court to institute suit to seek the judicial review orders of certiorari, prohibition and mandamus as sought.
 4. The court then ordered that the issue of leave granted to operate as stay be canvassed inter-partes as sought under orders 5 and 6.
 5. The 5th Respondent entered appearance and appointed Ms. Ruth Ayunga to represent it and filed ground of opposition dated 9th November 2022 and received in court on even date.
 6. The 1st to 4th Respondent replied to the Chamber Summons Application through the replying affidavit of Emmanuel Mukhebi Situma the Speaker of the Bungoma County Assembly and the Chairman of the Bungoma County Assembly Service Board in opposition to the grant of orders of the leave to operate as stay.



7. The 1st to 4th Respondents through Edward Musumba, Legal Counsel for Bungoma County Assembly, further filed Notice of Preliminary Objection dated 15th November 2022 and received by court one even date raising points of law to wit:-
 - a. The entire petition runs counter to the provisions of section 77(1) and (2) of the County Government Act No. 17 of 2012.
 - b. The entire petition offends the provisions of Article 234(2) (1) of *the Constitution* of Kenya .
 - c. The entire petition runs counter to the provisions of section 85(a)-(g) and section 87(2) of the *Public Service Commission Act*, 2017
 - d. The entire offends the spirit of the provisions of section 8(1) and (2) and section 9 of the Public Service Commission (County Appeals Procedures) Regulations.
 - e. That consequently therefore the court lacks jurisdiction to hear and determine the entire petition.
8. The Ex-Parte Applicant filed her further replying affidavit sworn on the 25th November 2022 in response to the 1st to 4th respondent's replying affidavit and the grounds of opposition.

Hearing directions

9. The Court directed that the Notice of Preliminary Objection dated 15th November 2022 and the application for leave to operate as stay be canvassed together by way of written submissions.
10. The Ex-parte Applicant's written submissions drawn by Ann Were Maloba were dated 21st November 2022 and received in court on the 19th January 2023.
11. The 1st to 4th Respondent's written submissions drawn by Musumba Wakhumba were dated 22nd December 2022 and received in court on the 23rd November 2022.

Determination

Issues for determination

12. The Exparte Applicant in their submissions addressed the following issues:-
 - a. Whether this case is restricted to a mere appeal in its entirety, of the claimant's case in that was(sic) handled by the respondents.
 - b. Whether the Public Service Commission has jurisdiction to handle matters relating to infringement of constitutional rights .
 - c. Whether the application meets threshold set out in law and judicial authorities .
 - d. Whether leave to file judicial review can act as stay of the decision.
 - e. Stay under exceptional circumstances.
13. The 1st to 4th Respondents addressed the following issues in they written submissions:-
 - a. Whether the leave ought to operate as stay
 - b. Whether the court has jurisdiction pursuant to the grounds of law raised under the Notice of Preliminary objection.



14. The court having read the pleadings and the written submissions of parties was of the considered opinion that the issues placed before the court by the parties for consideration in disposition of the application for leave to operate as stay were as follows:-
- a. Whether the court had jurisdiction in the first instance to hear and determine the suit
 - b. Whether the application for leave to operate as stay was merited.

Whether the court had jurisdiction in the first instance to hear and determine the suit

15. This issue emanates from the 1st to 4th Respondents Notice of Preliminary Objection dated 15th November 2022 and received by court one even date raising points of law to wit:-
- a. The entire petition runs counter to the provisions of section 77(1) and (2) of the County Government Act No. 17 of 2012.
 - b. The entire petition offends the provisions of Article 234(2) (1) of *the Constitution* of Kenya .
 - c. The entire petition runs counter to the provisions of section 85(a)-(g) and section 87(2) of the *Public Service Commission Act, 2017*
 - d. The entire offends the spirit of the provisions of section 8(1) and (2) and section 9 of the Public Service Commission (County Appeals Procedures) Regulations.
 - e. That consequently therefore the court lacks jurisdiction to hear and determine the entire petition.
16. The Ex-parte Applicant was a member of the 2nd Respondent appointed under Section 12(3)(d) of the County Government Act and Section 46 of the County Assembly Service Act to serve on part-time basis from 24th October 2018 until the end of term when a new member assumes office. It was not in dispute that the Exparte applicant had proceeded to contest in elections without resigning as a public officer. It was also not in dispute that the Respondent had by letter dated 22nd September 2022 written to the exparte applicant to cease from participating in activities of the Bungoma County Assembly Board and stopped her emoluments allegedly pursuant to advise in writing by the 5th Respondent.
17. Aggrieved by the decision of the Respondents the Ex-parte Applicant approached the court for leave to apply for judicial review orders and further for the leave to operate as stay of the decision.

On the merits of the preliminary objection.

18. The 1st to 4th Respondents submit that the claim runs counter to the provision of section 77(1) and (2) of the County Government Assembly Act. section 77 of the *County Governments Act* reads:-
- “ 1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the “Commission”) against the decision.
 - (2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of— (a) recruitment, selection, appointment and qualifications attached to any office;



- (b) remuneration and terms and conditions of service;
- (c) disciplinary control;
- (d) national values and principles of governance, under Article 10, and values and principles of public service under Article 232 of *the Constitution*;
- (e)) retirement and other removal from service;
- (f) pension benefits, gratuity and any other terminal benefits; or
- (g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.”

19. The 1st to 4th Respondents submit that the suit offends the provisions of article 234(2) of *the Constitution* of Kenya 2010 to wit : ‘Functions and powers of the Public Service Commission article 234(1) the functions and powers of the commission are set out in this article.

(2) the commission shall-

- i. Hear and determine appeals in respect of County Governments Public Service; and

20. The 1st to 4th Respondents submit that Article 234(2)(i) of *the Constitution* clothes the Public Service Commission with jurisdiction to hear and determine appeals in respect of County Governments Public Service. That Article 176(1) of *the Constitution* provides that there shall be a County Government for each county consisting of the County Assembly and County Executive.

21. The 1st to 4th Respondents submit that the Ex-parte applicant runs counter to the provisions of section 85 a-g and section 87(2) of the *Public Service Commission Act* 2017. That the entire petition (sic) offends the spirit of the provisions of section 8(1) and (2) and section 9 of the Public Service Commission (County Appeals Procedures) Regulations.

22. In support of their preliminary objection the 1st to 4th Respondents relied on the decision of the Court of Appeal in Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017] eKLR where the court stated: ‘There is no doubt that the respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by Section 77 of the Act. The section provides not only a forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one, specifically tailored by the legislators to meet needs such as the respondent’s. In our view, the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance.’”

23. The 1st to 4th Respondents submit that the Ex-parte applicant was supposed to appeal to the Public Service Commission. The Respondent further to buttress the need to utilise normal procedures in place of constitutional petitions relied on the decision in Daniel N. Mugendi v Kenyatta University and 3 others (2013)eKLR quoted from the decision as follows:- ‘Citing the case of Alphonse Mwangemi Munga & Others v African Safari Club Ltd [2008] eKLR, the learned judge was persuaded that *the Constitution* had to be read together with other laws made by Parliament. It should not be so construed as to be disruptive of other laws in the administration of justice and that accordingly parties should



make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the constitutional court and making constitutional issues of what is not.”

24. The Respondent further relied on the Court of Appeal decision in Owners of Motor vessel ‘ Lillian S’ v Caltex Oil Kenya Limited [1989] KLR1 to the effect that a question of jurisdiction ought to be raised at the earliest opportunity and determined as a court without jurisdiction ought to down its tools.

The Ex-parte Applicant Response to the Notice of Preliminary Objection .

25. The Ex-parte Applicant’s position was that her reading of the law was that section 77(2) of the County Government Act and the related provisions cited in the notice of preliminary objection was that they related to instances where a party was making an appeal on issues dealt in a decision made before the County Public Service Board. That the ex-parte applicant was never heard at the 1st instance hence denied opportunity to appeal. That the bodies purported to handle the ex-parte applicant’s case only have appellate jurisdiction and do not have original jurisdiction to handle a fresh case. The ex-parte applicant further asserts that the Public Service Commission had no jurisdiction over the 5th and 6th respondents. That the Public Service Commission had no jurisdiction to determine the constitutionality and legality of the procedures by which the allowances were stopped or any action. That the Public Service Commission had no jurisdiction to determine a case on infringement of human rights.

Court’s decision on the Notice of Preliminary Objection dated 15th November 2022

26. The question of jurisdiction is cardinal in the determination of disputes as was held in the landmark decision of Nyarangi JA(as he then was) in the case of the Owners of Motor vessel ‘ Lillian S’ v Caltex Oil Kenya Limited [1989] KLR1 to the extent that jurisdiction is everything and without it the court has no power to make one more step and must down its tools.
27. The court is guided by the Supreme Court in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR where in paragraph 68 it held that jurisdiction flows from either *the Constitution* or legislation or both. The Court further held that the issue of whether the court had jurisdiction to entertain a matter before it is not a matter of procedural technicality but goes to the very heart of the matter and without jurisdiction the court cannot entertain the proceedings.
28. The court is further guided by the landmark decision of the defunct Court of Appeal for East Africa decision of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 676-701 where it was stated that a Preliminary Objection should be in the nature of what used to be demurrer and should be raising a pure point of law in the open eye of the court that can dispose of the suit in limine. The court finds the instant preliminary objection based on points of law on ground of jurisdiction properly raised.
29. The Respondent submits the first port of call for the ex-parte applicant aggrieved with the decision Respondent was the appeal Public Service Commission as per the cited provisions of the law under the Notice and reproduced above. The respondents hinged their submissions on the decision of the Court of Appeal in Secretary County Public Service Board and Another v Hulbhai Gedi Abdille [2017] eKLR (Makhandia, Ouko & M’Inoti JJA)where the court allowed the appeal on basis that the Respondent had failed to utilize the process under Section 77 of the County Government Act as follows:-“ There is no doubt that the Respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by Section 77 of the Act. The section provides not only the forum through which the Respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one specifically tailored by the legislators to meet needs such as the Respondent’s. In our view, the most suitable and appropriate recourse for the Respondent was



to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance.”

30. Article 234 (2) of *the Constitution* states:- “The Commission shall-
- “a. Subject to this Constitution and legislation-
 - b. Hear and determine appeals in respect of County Governments Public Service; and
 - c. Perform any other functions and exercise any other powers conferred by national legislation”.(emphasis given.)
31. Section 77 (1) of the County Government Act reads:- ‘Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission”(emphasis given)
32. Section 87(2) of the *Public Service Commission Act* ousts the jurisdiction of the court in matter of recruitment of any person to county government by providing as follows: “A person shall not file any legal proceedings in any Court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from County Government Public Service unless the procedure provided for under this Part has been exhausted.”(Emphasis given)
33. Applying the Supreme Court decision in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR where at paragraph 68 it held that jurisdiction flows from either *the constitution* or legislation or both then the court finds and determines that neither *the Constitution* or the legislation being the *County Governments Act* and the *Public Service Commission Act* gave the Public Service Commission jurisdiction to handle employment claims emanating from employees of the County Assembly Service Boards.
34. In the upshot the court holds that it has original jurisdiction to hear and determine claims by employees who allege services are terminated unfairly or for other grievance by employees against the County Assembly Service Board as there exists no clear procedure for the redress of such grievance prescribed by *the Constitution* or an Act of Parliament as held in the Speaker of the National Assembly v James Njenga Karume [1992] Eklr. The right of appeal under section 15 of the County Government Act as held in Bungoma ELRC E007 OF 2021 Francis Simiyu Tome and Another v Bungoma County Assembly service Board and others would not qualify as a clear redress procedure for claims on decisions against employees.
35. The Notice of Preliminary Objection is dismissed for lack of merit with costs to the Ex-parte Applicant in cause.

Whether the application for leave to operate as stay was merited

36. The Ex-parte Applicant seeks for the leave granted to institute judicial review suit against the respondents to operate as stay of the decision by the 1st to 4th Respondents as communicated in the letter dated 22nd September 2022 stopping her salary and other emoluments and barring her from participating in the activities of the 2nd respondent and further to stay any envisaged recruitment of another person to take up her position pending the hearing determination of the case.



37. That the leave to operate as stay of any decision of the 5th Respondent to summon, arrest, charge and investigate or in any manner engage the applicant in relation to the issues levelled against her by the 1st to the 4th respondents related to the envisaged cause of action.
38. The Ex-parte Applicant submits that the stay usually halts or suspends proceedings that are challenged by a claim of judicial review and that the purpose of stay is to preserve status quo pending the hearing and determination of the claim for review. That the stay may also be granted where implementation is effected and the court ought to consider the completeness or continuing nature of such implementation as was held in the cited case of Republic v County Government of Embu Ex-parte Peterson Kamau Muto t/a Embu Medical and Dental Clinic and 6 others [2022]e KLR . The Ex-parte applicant further to buttress her case relies on the decision in Solomon Muyeka Alubala v Capital Markets Authority and another [2018]eKLR which court cited with approval decision in R(H) V Ashworth Special Hospital Authority [2003]1 WLR 127 TO WIT: ‘I now turn to the third situation, which occurs where the decision has not only been made, but it has been carried out in full. At first sight, it seems nonsensical to speak of making an order that such a decision should be suspended. How can one say of a decision that has been fully implemented that it should cease to have effect? Once the decision has been implemented, it is a past event, and it is impossible to suspend a piece of history. At first sight, this argument seems irresistible, but I think it is wrong. It overlooks the fact that a successful judicial review challenge does in a very real sense rewrite history. ..It is, therefore, difficult to see why the court should not in principle have jurisdiction to say that the order shall temporarily cease to have effect, with the same result for the time being as will be the permanent outcome if it is ultimately held to be unlawful and is quashed. I would hold that the court has jurisdiction to stay the decision of a tribunal which is subject to a judicial review challenge, even where the decision has been fully implemented But the jurisdiction should be exercised sparingly, and where it is exercised, the court should decide the judicial review application, if at all possible, within days of the order of stay”
39. The Ex-parte Applicant submits that the actions by the respondents are illegal, tainted with procedural unfairness and the 1st to 4th Respondents seeks to ride on the falsified fact that the act has already been fully implemented. The Ex-parte applicant submits that the salary payments were not one off but continuous hence the impugned action is continuous and can be suspended. That the 5th Respondent had not made arrest and there was no evidence of investigations or involvement of the applicant.
40. The Ex-parte applicant submits that her salary had been stopped illegally and unprocedurally on fears that she may not be able to refund the same. The Ex-parte applicant further relied on the decision Republic v County Criminal Investigation Officer Marsabit County and 2 Others Exparte Aboinur Hassan Adan and others (2019)eKLR where the court stated that in consideration of whether leave in judicial review should operate as stay the court takes into account the fact that the application is yet to be determined, consider the mischief, hardship or peril that would affect the exparte applicant during the pendency of the substantive application, what prejudice the exparte applicant would suffer and whether the substantive application would be rendered nugatory.
41. The Ex-parte Applicant further submits there exists exceptional circumstances in her case being that as a public officer on suspension she is entitled to half salary without being required to make refund and secondly that she is the advisor of the board in matters of public interest.
42. The Ex-parte Applicant submits that the courts have held that in certain cases a stay may be granted even where its effects may be temporally reversal of the decision and that this remedy may only be resorted in exceptional cases and that the onus is upon the applicant to prove such exceptional circumstances exist. See Republic v County Assembly Kisii Committee Of Powers And Privileges & Others exparte Karen Nyamoita Magara [2020]e KLR



43. The Ex-parte Applicant to demonstrate existence of exceptional circumstances submits that she was appointed under section 12(3)(d) of the County Assembly Service Act to wit: ‘one person resident in the county appointed by the county assembly from among persons who have knowledge and experience in public affairs but who is not a member of the county assembly.’ That she is the only member representing the Bungoma residents hence they remain unrepresented in the board. That her absence renders the board illegal as it lacks public representation and public interests are not advanced as the rest of the board members are politically inclined. The exparte applicant submits that public interest is a relevant consideration in the instant application as upheld in Republic v National Hospital Insurance Fund Management Board Exparet Patanisho Maternity and Nursing Home [2019]Eklr. That the stoppage of her salary and allowances has exposed her to financial constraints as that is her sole income.
44. With respect to the 5th respondent the exparte applicant submits that the mandate of the 5th respondent was not open minded, that the 5th respondent purported to conduct investigations and advised the 1st to 4th respondents to stop the salary of the exparte applicant without following the requirements of section 69(11) of the *Public Service Commission Act* which requires any disciplinary proceedings against a public officer to uphold the right to fair administrative action as provided for under Article 47 of *the Constitution*. That section 12 of the Ethics And Anti Corruption Commission Act requires the 5th Respondent to observe principle of rules of natural justice in performing its duties.
45. The exparte applicant relied on the decision in Keroche Industries Limited v Kenya Revenue Authority & 5 others [2007] eKLR where the court cited with approval decision in Reg v SECRETARY OF STATE FOR THE ENVIRENMNET EXPARTE Nottingham Shire Country Council (9186) AC where the court stated that , ‘a power which is abused should be treated as a power which has not been properly exercised.’ The exparte applicant cited several other related decisions to ones cited above which the court took note of.

Respondents’ position

46. The 1st to 4th Respondents submit that a stay suspends or stops the proceedings that are challenged by the application for judicial review. That its purpose being to preserve the status quo pending determination of the judicial proceedings. That the stoppage of the exparte applicant’s salary had already occurred upon the 5th Respondent’s advisory and that therefore a stay cannot operate in respect of barring such stoppage. That a stay would be tantamount to granting the substantive orders as the decision sought to be stayed had been fully implemented. That in event that the 5th respondent finds against the exparte applicant there is likely loss of public funds if the stay is granted. That the court should consider the twin overriding principles of proportionality and equality of arms so as not to render nugatory ultimate ends of justice. The 1st to 4th respondents relied on the decision in Republic v National Transport and Safety Authority & 10 others (2014) e KLR where the court held that the threshold of granting leave to institute judicial review proceedings was low compared to that of the leave operating as a stay. In part the court stated: ‘in a situation where the applicant seeks to stop the implementation of a law, he must demonstrate that the implementation of the law will cause irreparable harm. Otherwise the court will be reluctant to suspend the operation of the law.’ And in Taib v Taib where justice Maraga (as he then was) held that a stay is only appropriate to restrain a public body from acting. It is however not appropriate to compel a public body to act.
47. The 5th Respondent vide the grounds of opposition dated 9th November 2022 asserted that pursuant to its statutory mandate it had summoned the exparte applicant for interview and statement recording as a process of granting her hearing opportunity but she did not honour the invitation. That granting



prayer 6 would provide immunity to the applicant from the investigations by the 5th Respondent which would be tantamount to curtailing its constitutional and statutory mandate. That the allegations by the exparte applicant on infringement of her rights was unfounded as no evidence had been availed that the said investigations violate her constitutional rights.

Decision on whether the leave granted to institute judicial review proceedings should be ordered to operate as stay

48. The court considered the positions of the parties as outlined above. The court established that that the Ex-parte applicant was appointed to serve on part time basis with the 2nd respondent. That she was appointed from the public and not elected. That she was a public officer as her letter of employment (RRN1) clearly indicted she was drawing remuneration from public coffers as authorized by the Salaries Remuneration Commission and as per the payslip (EMS1B produced by the 1st to 4th Respondents). That Ex-parte applicant contested for member of National Assembly Webuye West Bungoma nominated by Jubilee political party in election held on the 9th August 2022 without resigning as required under the elections law. That the respondents requested for advisory from the 5th Respondent. That the 5th Respondent in letter dated 8th September 2022 stated it was investigating the exparte applicant and that the 2nd interested party should not clear her or pay gratuity until they conclude the investigation or advice otherwise.
49. The Ex-parte Applicant asserts she had established exceptional circumstances to warrant the court to grant order of leave to operate as stay on basis of her appointment to represent the public. That her salary was continuously implemented and not one off hence the decision could be stopped temporally.
50. The court upholds the decision in *Mrao Limited v First American Bank of Kenya & 2 Others* [2003]e KLR where it was held, “A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.” The court finds that the applicant case on prima facie basis does not meet the threshold under the said authority considering there are valid reasons for the stoppage of the salary having failed to resign from her position before proceeding to contest for elections in the 2022 general elections which accusation she admits to in her supporting affidavit sworn on 13th October 2022. The court further finds on prima facie basis that the 5th Respondent in conducting the investigation process it is in pursuit of its statutory mandate and the court had not found any violation of the rights of the Exparte Applicant.
51. Justice Nyamweya (as she then was) in *Solomon Muyeka Alubala v Capital Markets Authority & another* [2018] eKLR having considered several decisions on application for leave in judicial review to operate as stay stated :- ‘23 From the above decisions, it follows that were the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature then it is still possible to suspend the implementation. However, once implementation is complete then such discretion to stay should be exercised sparingly, and even then when the Court is sure that the judicial review application can be disposed of in the shortest of time possible.’ This court having found on prima facie basis the exparte applicant had violated the law by failing to resign as a public officer to contest for elections in a seat of the national assembly, then it declines to exercise discretion to grant order for the leave to operate as stay sparingly as stated in the foregoing decision, relied on by the exparte applicant the decision having been implemented.



52. The court is further persuaded in the instant case that public interest to uphold the law and protect public funds outweighs the private individual right in this case being the stoppage of the salary and in so holding upholds the decision in R (H). vs Ashworth Special Hospital Authority (supra), where Dyson L.J held that ‘where there is a public interest element involved, the Court strike a balance between the rights of an individual and the public interest, and in striking that balance, the court should usually refuse to grant a stay unless satisfied that there is a strong, and not merely an arguable, case that a tribunal’s decision was unlawful’ Cited in Solomon Muyeka Alubala v Capital Markets Authority & another [2018] eKLR.
53. The court further applying the foregoing authority holds that it would not be in public interest to interfere with the statutory mandate of the 5th respondent without evidence of abuse of its powers.
54. The court considered the impugned letter dated 22nd September 2022(the decision) and noted that it does not amount to termination but to suspension. The Respondents are still bound to comply with employment law and its human resources manual and procedures notwithstanding the court declining to grant stay of its decision on public interest basis. The court was unable to grant further orders without hearing the case on merit to understand the employment terms and conditions of the exparte applicant who was indicated to be serving on part-time basis.

Conclusion and disposition

55. In Conclusion the court declines to exercise its judicial discretion in favour of allowing the leave granted to institute suit for judicial review proceedings to operate as stay as sought under orders 5 and 6 of the exparte chamber summons application dated 13th October 2022. Costs to the respondents in the cause in the application.
56. The Notice of Preliminary Objection dated 15th November 2022 is dismissed for lack of merit with costs to the Exparte Applicant in cause.
57. It is so ordered.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 2ND DAY OF FEBRUARY , 2023.

J. W. KELI,

JUDGE.

In the presence of:-

Court Assistant :- Brenda Wesonga.

For Applicant: Absent.

For Respondents:-Ms Ayunga holding brief for Natome.

