



Republic v County Secretary, Nyamira County & 2 others; Osumu & 3 others (Exparte Applicants) (Miscellaneous Civil Application E001 of 2023) [2023] KEELRC 683 (KLR) (22 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 683 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E001 OF 2023
S RADIDO, J
MARCH 22, 2023

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY SECRETARY, NYAMIRA COUNTY 1ST RESPONDENT
CHIEF OFFICER, FINANCE AND ACCOUNTING SERVICES, NYAMIRA COUNTY 2ND RESPONDENT
CHIEF OFFICER, ECONOMIC PLANNING, RESOURCE MOBILISATION AND ICT, NYAMIRA COUNTY 3RD RESPONDENT

AND

ANDREW OCHIENG OSUMU EXPARTE APPLICANT
BOAZ MOMANYI NYAUMA EXPARTE APPLICANT
HERBERT NYAMWANGE EXPARTE APPLICANT
EVERLYNE MANGAA EXPARTE APPLICANT

RULING

1. The ex-parte applicants sued the Respondents sometime in 2019, alleging breach of contract.
2. The parties reached a consent which the Court adopted on January 18, 2022. The consent was in the following terms:
 - (1) That the Petition herein together with all pending applications herein be deemed compromised in the following terms: -



- (2) That the Petitioners be admitted to the payroll with effect from June 2020.
 - (3) That the Respondents to pay the Claimants (sic) the salary arrears as follows: -
 - (a) April and May together with June salary for the Claimants in the payroll of March 2020.
 - (b) Arrears pending prior to April 2020 be paid via supplementary budget to be presented to the County Assembly in the financial year of 2021 but in any event not later than October 2020.
 - (c) Kennedy Atambo, Imbunge Makori, Godfrey Mokuia Obondi and Andrew Omwenga do present their documents to the Respondents for verification and thereafter they be admitted to the payroll.
 - (4) That there be no victimisation of the Claimants (sic) save for necessary disciplinary action after due process of the law by the relevant county organs.
 - (5) That the Petition be marked as settled with costs to the Petitioners.
3. On January 11, 2023, the ex-parte applicants filed a Chamber Summons seeking orders:
- (1) The applicants be granted leave to apply for an order of mandamus directed to the 1st, 2nd and 3rd Respondents to pay to the applicants and 162 employees in the Petition the sum of Kshs 38,400,000/- being arrears of 10 months in Kisumu ELRC Petition No 23 of 2019 with Kshs 1,762,050/- being certified costs thereon together with interest thereon at 12% per annum from November 2, 2022 until payment in full.
 - (2) The costs of this application be costs in the cause.
4. The acting County Secretary filed a replying affidavit in opposition to the Summons on February 15, 2023, and the Court took arguments on February 16, 2023.
 5. The reasons raised by the ex-parte applicants in support of the Summons were that the Respondents had failed or refused to comply with the terms of the consent and had also failed to pay costs after a Certificate of Costs had been issued.
 6. The Respondents resisted the Summons and contended that the ex-parte applicants had been reinstated to the payroll and paid all salary arrears (copies of P9 tax returns for 2020 were exhibited), the arrears of Kshs 38,400,000/- had not been computed nor supported by a decree, evidence or documentation, and a Certificate of Order against the County government had not been issued.
 7. The Respondents asserted that the Summons was irregular.
 8. The Court has considered the Summons, Statement of Facts, affidavits and submissions, and come to the view that this is not a suitable case to grant leave to commence judicial review for order of mandamus because of the following reasons.
 9. One, the ex-parte applicants have not disclosed the identities of the 162 persons allegedly owed the salary arrears. In Kisumu *Petition No 23 of 2019, Andrew Ochieng Osumo & 3 Ors v County Government*



of Nyamira & 6 Ors, it was pleaded that orders sought would apply to some 634 employees whose names had been removed from the payroll unlawfully.

10. The names and or particulars of the 634 employees were not disclosed in the Petition.
11. In the instant Summons, the ex-parte applicants have purportedly acted on behalf of 162 employees. Again, the names and or particulars of the 162 employees have not been revealed.
12. Two, the ex-parte applicants have not disclosed the source or foundation of the sum of Kshs 38,400,000/- or how it was arrived at. It is not clear whether the amount was decreed or ordered by the Court.
13. Although there is a Certificate of Satisfaction Order given by the Deputy Registrar on February 3, 2023, the order is not supported by the consent dated June 19, 2020, and adopted by the Court on January 18, 2022.
14. The Certificate, on the face of it appears invalid.
15. Three, for the Court to adopt or award the sum of Kshs 38,400,000/-, it must be proved strictly. Judicial review proceedings are not an apt avenue for such a course of action when there is no previous order of the Court finding the amount due or owing.
16. Four, it was irregular for the ex-parte applicants to combine an application for mandamus with one seeking enforcement of payment for taxed costs since there are clear legal provisions to secure payment of costs against the government.

Orders

17. Leave to commence judicial review proceedings is declined. Costs to the Respondents.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 22ND DAY OF MARCH 2023.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For *ex-parte* applicants Ochoki & Co. Advocates

For Respondents Nyachiro Nyagaka & Co. Advocates

Court Assistant Chrispo Aura

