



**Simwah & another v Kakamega County Assembly Service Board; Akosi (Interested Party)
(Judicial Review E005 of 2022) [2023] KEELRC 888 (KLR) (14 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 888 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
JUDICIAL REVIEW E005 OF 2022**

**JW KELI, J
APRIL 14, 2023**

BETWEEN

JOHN SIMWAH APPLICANT

AND

PASCAL MAWANJE EXPARTE APPLICANT

AND

KAKAMEGA COUNTY ASSEMBLY SERVICE BOARD RESPONDENT

AND

HON. BONIFACE SAKWA AKOSI INTERESTED PARTY

RULING

1. The Exparte Applicant vide chamber summons dated 13th December 2022 brought under Orders Rule (1) (2) &(4) of the Civil Procedure Rules 2010 sought the following orders:-
 - a. That this matter be certified urgent
 - b. That this court be pleased to grant leave to Exparte Applicants to apply for the prerogative orders of:-
 - a. Prohibition to restrain further action and or proceedings in respect of the contents of the letter dated the 9th day of December 2022.
 - b. Certiorari to bring before this Honourable court for the purposes of quashing the decision by the Kakamega County Assembly Service Board to indefinitely suspend than/or send the exparte applicants on compulsory leave.



2. That should leave be granted to commence judicial review proceedings as prayed for such leave to operate as stay against such suspension for the Exparte Applicants from office as depicted in the letter dated 9th day of December 2022.
3. The Application was supported by the verifying affidavit of the facts relied on of John Simwa dated 13th December 2022.
4. The Application was opposed by the Respondents who appointed the law firm of Okumu Kubai & Company Advocates. The Respondents filed Notice of Preliminary Objection dated 9th January 2023 which was canvassed and dismissed in determination.
5. The Respondent further filed Replying Affidavit sworn by James Namatsi on the 9th January 2023 in opposition to the Application.
6. One Hon. Boniface Sakwa Akosi applied to be admitted as interested party having been adversely mentioned in the Application and was allowed to filed response which he did vide replying affidavit dated 6th January 2023.
7. The Respondent filed further replying affidavit dated 7th March 2023 sworn by James Namatsi.

Submissions

8. The court directed that the Exparte Application be canvassed by way of written submissions . The parties complied. The Exparte Applicant's written submissions drawn by M/S Amasakha & Company Advocates were dated 13th March 2023 and received in court on the 14th March 2023.
9. The Respondents written submissions drawn by Okumu Kubai & Company advocates were dated 14th March 2023 and received in court on the 15th March 2023. The interested party's written submissions drawn by GS Law LLP were dated 14th March 2023 and received in court on the 15th March 2023.

Decision

Issues For Ddetemination

10. The parties addressed the merit of the application. The court then considers the issues placed before it for determination in the Application were as follows:-
 - a. Whether the Exparte Applicants were entitled to orders sought.

The Exparte Submissions.

11. The Exparte Applicants submit the impugned decision is under letter dated 9th December 2022 which forced the Exparte Applicant to take their annual leave but the contents were of suspense. That during the pendency of this case the Respondents issued interdiction letters dated 8th February 20222 to the Exparte Applicants with similar nature of allegations in letters dated 9th December 2022. That the said 2 letters had effect of suspending the applicants from their duties.
12. That as at 8th February 2023 the Respondents had not complied with last part of letter of 9th December 2022 on the investigations that it was their position that the respondents were acting in furtherance of the issues complained of in the application under consideration. The Exparte Applicant submits that jurisdiction to grant prerogative orders hails form the constitution and statute. The Exparte Applicant relied on decision in Republic -vs- County Council of Kitale & Another Exparte Kondo & 57 Others Mombasa HCMA NO. 384 of 1996 where Waki J stated the purpose of Application for leave to apply



for Judicial review is firstly to eliminate at an early state any application for judicial review which are frivolous or vexatious or scandalous and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case for further consideration...”.

13. The Exparte Applicants submit they were forcibly sent on leave contravening a statutory right to leave by converting their leave to avenue of disciplinary action in violation of section 28 of the Employment Act. That the issues raised in letter of 9th December, 2022 had not been brought to attention of the Exparte Applicants prior contrary to Articles 10, 27,41 and 47 of the Constitution . That no discriminatory action had been initiated prior to the compulsory leave. That without exhausting what was contained in the letter of 9th December 2022 the respondents proceeded to interdict the Exparte applicants vide letters dated 8th February 2023 which they say was continued malice. The Exparte Applicant submit that an employer cannot force an employee to go on annual leave if they do not wish . All what the employer can do is to bar employee from accumulating leave days and relied on decision of Wambati Simiyu Merit -vs- Music Company Right Society of Kenya Petition No 11 of 2018 where court held that compulsory leave is just a form of suspension in the discretion of employer and cannot amount to normal leave which is given on the basis of voluntary request by employer.
14. The Exparte Applicant argue that order of prohibition may be issued to prohibit execution of some decision already taken but ultravires relying on the book on Administrative Law by Sir W Wade & C. Forsyth page 605 which authority was not provided to the court and the court was unable to access.

Respondents' Submissions

15. The Respondents submit that the impugned decision subject of the instant proceedings was letter dated 9th December, 2022 Ref. Annual leave, where it was stated that the County assembly Service Board resolved that the Exparte Applicants proceed on their leave which had accumulated for 45 days with effect from 9th December 2022 and that during the leave the Board would be investigating listed malpractices. That it was factual and admitted by Exparte Applicants the 45 days had since expired having lapsed on the 9th February 2023. That the applicants were no longer on annual leave but on interdiction.
16. The Respondents submit that orders sought in the application are overtaken by events as the annual leave of 45 days ended on the 9th February 2023. That the action contemplated of investigation had also been overtaken by events. That the Exparte Applicants are undergoing disciplinary process having been issued with interdiction letters.
17. That the court's jurisdiction is limited to letter dated 9th December 2022 and not the interdiction letter as held in Republic v Judicial Service commission Exparte Pareno [2004] eKLR “ a court cannot go beyond the relief sought in the statement”. The Respondents on threshold of the judicial review prerogative orders relied on decision in R v County Council Kwale (supra) cited by the Exparte Applicant.
18. The Respondents submit that leave for the order of prohibition cannot issue as the Exparte Applicants proceeded on leave pursuant to the letter dated 9th December 2022 and the period expired. The respondents to buttress this point relied on decision by court of Appeal in Kenya National Examination Council v Republic Exparte Geoffrey /Gathenji Njoroge & 9 Others [1997] eKLR that an order of prohibition can only be issued to prevent the making of a contemplated decision and not to quash a decision already made. It cannot prohibit that has already been made.



19. That on order of certiorari is not officious even if the application was to be meritorious . The order of Certiorari cannot undo leave already taken by the Exparte Applicants. That only Order relevant is of declaration to restore the leave days.
20. That by letter of 9th December 2022 the Exparte Applicants were not suspended and hence orders sought were at variance with the decision in the letter. The Respondents submit the decision Was not arbitrary as alleged and was guided by the provisions of both the Employment Act and the Public Service Human Resource policies and procedure Manual from the Public Service which provide at part E as follows:-

“ Annual leave must be taken within the leave year it falls due”

That there was no irregularity in the decision to warrant judicial review and that the Board was properly constituted. That the interested party was Deputy Clerk while Bungoma ELRC No.E007 of 2023 was by the Clerk.

Interested Party Submission

21. The decision sought to be quashed and prohibited was in the letter dated 9th December 2023 which had already happened hence cannot be prohibited. That there was no alive cause to be quashed as it already happened . That parties are bound by their pleadings. The court cannot stretch its jurisdiction to decision not challenged . That the developments that happened subsequent to the decision full implementation constituted a new cause of action. That as regards decision of 9th December 2022, the only remedy is declaratory orders or damages if the court finds decision unlawful which orders are not available under judicial review.
22. The Applicants are aggrieved by the interdictions . The application was overtaken by events.

Decision

23. It was undisputed fact that the impugned decision sought to be prohibited and quashed was letter of annual leave dated 9th December 2023 issued to the Exparte Applicant. It was not in dispute that the leave was for 45 days which was not disputed had expired. The Exparte Applicant submits that the letter of 9th December 2022 amounted to forced leave as it was not voluntary hence contrary to provision of section 28 of the Employment Act as it also introduced issue of investigation of alleged malpractices to be carried out while they were on leave. To buttress the submission the Exparte Applicants relied on decision in Wambati Simiyu Merit (supra) to effect that compulsory leave was not normal leave as it was not voluntary. The court finds that indeed the decision on the leave was already overtaken by events the 45 days having lapsed on 9th February 2023.
24. The Exparte Applicant submits that the decision was contained in the interdiction letter of 8th February 2023 which was issued before the investigation envisaged under letter of 9th December 2022 hence issue was active to be quashed. The court considered the letter of leave dated 9th December 2022 . It states that the CASB (County Assembly Service Board) had resolved the exparte applicants proceed on leave which had accumulated for 45 days with effect from 9th December 2022. During the leave the Board would be investigating malpractices listed in the letter.

“ Take Notice that during the investigation you may be required upon official invitation and reasonable notice to appear before Board or any other body to give the requisite information”.



25. The Exparte Applicants submit that part of the letter was not effected as they were not invited to appear before the Board before the interdiction letter of 8th February 2023 hence the cause was alive.
26. The court agrees on the threshold of grant of leave to institute suit for prerogative orders as stated in the decision by WAKI J cited by both parties above. The court finds that the letter dated 9th December 2022 was already effected. The court further finds that whereas the Board indicated there would be investigations ongoing, there was no evidence that the letter communicated indefinite suspension as there was a definite period of 45 days.
27. The Exparte Applicant sought for leave to quash the decision on basis that it amounted to indefinite suspension. The court found the time period was defined and had since lapsed. The court finds on prima facie basis that the said leave letter amounted to compulsory leave the Exparte Applicants having not applied for leave and the letter indicating allegation of malpractices to be investigated in the period. However, it was not indefinite suspension and the said period of 45 days had since lapsed.
28. The court agrees with the interested party that parties are bound by their pleadings and further holds its jurisdiction is limited to prayers sought.
29. On prayer for prohibition to restrain further action in respect other contents of letter dated 9th December 2022 the court finds the Court of Appeal in Landmark decision of *Kenya National Examination Council v Republic Exparte Geoffrey Gathenji Njoroge & 9 Others* [1997] eKLR held that order of prohibition be issued to revert the making of contemplated decision and not quash a decision already made. The Exparte Applicants already proceeded on the said leave and the 45 days have already expired. There is nothing to prohibit under the decision of 9th December 2022. The court agrees with the Respondents that the subsequent decision of interdiction is a new cause of action not pleaded in the instant application and the court has no jurisdiction over the said decision. The court finds that the cited book authority is inferior the Court of Appeal decision in Kenya Examination Council case which is binding on this court.
30. On the 2nd order of Certiorari to quash decision of the board to indefinite suspend or and or send the Exparte Applicants on compulsory leave. The court already found the said decision did not indefinitely suspend the exparte applicants. The court found that the said decision was for 45 days which had since expired and further it amounted to compulsory leave.
31. The court finds it is not officious to grant leave to apply for order of Certiorari the Exparte Applicants having already proceeded on leave as stated here the leave and as stated the application is overtaken by events. The Exparte Applicants available remedy could be damages which are not available under judicial review application.
32. The Supreme Court has introduced the doctrine of Judicial restraint on matters of separation of power in the case of *Julius Kariuki Mate & Another v Mattin Nyaga Wambora & Another* 2017 Eklr. The court cautioned against courts rushing to issue conservatory orders that hinder other arms of government from exercising their constitutional and statutory roles. The Supreme Court guided the courts to be restrained in interfering in ongoing process in the National and /county Assemblies and await the assemblies to make their decision then the court have authority to examine and review if seized of the matter.
33. The court finds in the instant case it is called upon to exercise judicial restraint not to restrain the Respondent from carrying out its statutory duty over its employees by grant of stay as guided by the Supreme Court (supra). In the circumstances the court holds that the Exparte Applicants are not entitled to leave to file Judicial Review proceedings in an already implemented decision which if it is



found unlawful the remedy would be damages or declaratory order which are not available in Judicial review proceedings. The application does not meet threshold of grant of leave to seek prerogative orders.

34. The Exparte Chamber summons application dated 13th December 2022 is dismissed.
35. Each Party to bear own costs.
36. It is so ordered

DATED, SIGNED AND DELIVERED IN OPEN COURT ON 14TH APRIL 2023 AT BUNGOMA.

JEMIMAH KELI,

JUDGE.

In the presence of :

Court Assistant : Lucy Macheso

Applicant :-Absent

Respondent: Malenya holding brief for Kubai

