



Republic v Chief Magistrate Court, Migori; John & 10 others (Interested Parties) (Judicial Review Application E001 of 2023) [2023] KEELRC 1065 (KLR) (4 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1065 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW APPLICATION E001 OF 2023**

CN BAARI, J

MAY 4, 2023

BETWEEN

REPUBLIC APPLICANT

AND

CHIEF MAGISTRATE COURT, MIGORI RESPONDENT

AND

MOKORO JARED JOHN INTERESTED PARTY

BEATRICE AOKO OCHIENG INTERESTED PARTY

CLERK COUNTY ASSEMBLY OF MIGORI INTERESTED PARTY

COUNTY ASSEMBLY OF MIGORI INTERESTED PARTY

MIGORI COUNTY PUBLIC SERVICE BOARD INTERESTED PARTY

JARED ODHIAMBO OPIYO INTERESTED PARTY

JEMIMAH ADHIAMBO WERE INTERESTED PARTY

HESBON OTIENO OMWA INTERESTED PARTY

ENOCK ODHIAMBO OCHING INTERESTED PARTY

PHOEBE ADHIAMBO ALOO INTERESTED PARTY

RANGE MWITA MAROA INTERESTED PARTY

RULING

1. Before court is the interested parties’ notice of preliminary objection and a notice of motion application both dated February 14, 2023. Under the preliminary objection, the interested parties/applicants’ seek the striking out *limine litis*, ELRC (Kism)JR E001 of 2023, for reason that it is fatally and irredeemably



defective as it fails to properly invoke the Hon court's lawful jurisdiction in contravention of section 12 (1) (a)-(f) of the [Employment and Labour Relations Court Act](#), and articles 162(2) and 165(6) & (7) of the [Constitution](#).

2. Under the notice of motion, the applicants seek orders that:
 - i. Spent.
 - ii. Spent.
 - iii. The honourable court be pleased to issue an order staying the *ex-parte* orders issued on the February 6, 2023, on account of substantive material non-disclosure of ongoing contemptuous conduct.
 - iv. The honourable court be pleased to bar and/or otherwise deny audience before this honourable court, to Hon Charles Oyugi Owino – Hon Speaker, Migori County Assembly; Hon Vincensia Owino Kionge – Hon Clerk, Migori County Assembly and the Hon County Assembly of Migori, or anyone claiming under or through their authority; in respect of any proceedings herein unless, and until they purge the admitted contempt and comply with the subsisting order issued in CMCC E012 of 2023, Mokoro Jared John & another v Speaker, County Assembly of Migori & 2 others on January 30, 2023.
 - v. The honourable court be pleased to issue an order, directing the *ex-parte* applicant and the 3rd interested party to avail to the applicants immediately nonetheless within three (3) days of the order, true copies of the hansard proceedings of the Migori County Assembly of the January 31, 2023, and February 6, 2023.
 - vi. Costs of the instant application be provided in the disposal of the substantive judicial review motion.
3. The motion is supported by grounds on the face of the application and the affidavit of Hon Jared Odhiambo Opiyo, the 6th applicant/interested party. The crux of the motion is that the interested parties are members of the Migori County Public Service Board, appointed *vide* a competitive recruitment process for a non-renewable term of six years from February 27, 2020, and whose contracts are to run until February 27, 2026.
4. The applicants aver that the 1st and 2nd interested parties commenced proceedings before the Chief Magistrate's court, challenging the action proposed to be taken by the 4th interested party in respect of the composition of the 5th interested party in CMCC E012 of 2023-Mokoro Jared John & another v Speaker County Assembly of Migori & 2 others, and that the court issued interim orders on January 30, 2023, restraining the 4th interested party from considering the report on removal of the members of the Migori County Public Service Board.
5. The applicants further aver that the 3rd and 4th interested parties purported to act contrary to the lawful restraint imposed by the court, and while admitting full knowledge of the order of the court, the *ex parte* applicant commenced judicial review proceedings, seeking to challenge the orders while in contempt of court.
6. The *ex parte* applicant opposed the motion through grounds of opposition filed on February 20, 2023, and a replying affidavit sworn by Hon Charles Oyugi Owino on similar date. The *ex parte* applicant argues that the motion herein, predates joinder of the applicants to the proceedings and is thus bad in law.



7. It is the *ex parte* applicant's position that under judicial review, the only orders that can be granted to an *ex parte* applicant, are those contemplated within the scope of the leave granted and that the orders sought by the interested parties can only be granted upon merit hearing of the motion.
8. The *ex parte* applicant further avers that there is no definite finding of contempt of the orders of January 30, 2023, by it, and that if such orders do exist, the same have not been availed to this court. The *ex parte* applicant further argues that the court that granted the orders said to have been infringed upon, has power and inherent jurisdiction to enforce the orders if indeed they subsist, and further that the applicants herein are not parties to that suit and cannot purport to enforce orders emanating from a suit they are not party to.
9. The *ex parte* applicant further argues that the dispute subject of Migori CMCC No E012 of 2023, is a labour dispute subject to the jurisdictional provisions of the [Employment and Labour Relations Court Act, 2011](#) and article 162(2) of the [Constitution](#), as it seeks to stop the removal of persons then and formerly serving at the County Public Service Board of Migori County.
10. The *ex parte* applicant states that no evidence has been placed before court to show that the applicants herein, earned a salary of Kshs 80,000/- and below, as to place them within the jurisdiction of the magistrate's court as per gazette notice No 6024 of 2018.
11. The *ex parte* applicant avers that Migori CMCC No E012 of 2023 and the instant motion, offends the mandatory provisions of sections 10 and 11 of the [County Assemblies Powers and Privileges Act, No 6 of 2017](#).
12. The 3rd and 4th interested parties also opposed the motion and the preliminary objection *vide* a replying affidavit sworn by Vincentia Awino Kionge. It is the 3rd and 4th interested parties' position that this court has the jurisdiction to determine employment and labour matters, and JR No E001 of 2023, being one seeking to stop removal of persons from of office, falls within the jurisdiction of this court.
13. It is the 3rd and 4th interested parties' argument that this court has power to call and review decisions from a lower court. The 3rd and 4th interested parties' further submit that the application and objection herein, are an abuse of the court process as no grounds have been provided to support their application.
14. Parties canvassed both the motion and the objection by way of written submissions. Submissions were received from the *ex parte* applicant, the 3rd and 4th interested parties and the 6th -11th interested parties. The submissions have been duly considered.

Determination

15. I have considered both the motion and the preliminary objection together with the grounds in support and those in opposition.
16. The 6th-11th applicants/interested parties in a nut shell, seek that the court stays and vacates the orders of February 6, 2023; that the 3rd and 4th interested parties be denied audience for contempt of court and that they be availed copies of the hanzard proceedings for January 31, 2023,
17. Although the applicants/interested parties' reliefs are drawn in a way to suggest that they are spent, having been sought only pending inter parties hearing, the court in the interest of the just determination of the proceedings, and in furtherance of the overriding objective, will address each prayer as if it survived the inter parties stage.



18. Two out of the three prayers sought, are premised on there having been infringement/contempt of the orders issued by the Magistrates Court. The two would thus be conclusively addressed, upon determination of the issue of contempt.
19. The orders said to have been violated/infringed upon arose from Migori CMCC No E012 of 2023- Mokoro Jared John & Another v Speaker County Assembly of Migori & 2 others, where the Principal Magistrate issued an order restraining the 3rd & 4th interested parties from considering a report of an ad hoc committee on the removal of the 6th- 11th interested parties, from the office of chairperson and member of Migori County Public Service Board.
20. The *ex parte* applicant's opposition to the instant application is premised on the fact that no contempt proceedings have been instituted against it or any of the other parties herein, so as to disentitle them to audience on the basis of the contempt.
21. As correctly submitted by the *ex parte* applicant, the motion herein is not a contempt motion/ proceeding. further there are conditions that must be proved for a party to be said to be in contempt of court. In [Samuel M. N Mweru and other v National Land Commission & 2 others](#) [2020] eKLR, it was held that for a party to succeed in an application for contempt the party must satisfy the court on the following four elements:
 - i. That the terms of the order were clear, unambiguous and were binding on the defendant.
 - ii. The defendants had knowledge of or proper notice of the terms of order
 - iii. The defendant has acted in breach of the terms of the orders, and
 - iv. The defendants conduct was deliberate.
22. The grounds herein above listed can only be ascertained through contempt proceedings, and which none has been filed- at least not before this court.
23. Further order 40 rule 3 of the [Civil Procedure Rules](#) states thus: - "In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release."
24. This provision confirms that breach of court orders is enforceable by the court that granted the orders. The orders said to have been violated were not issued by this court, and hence the same can only be effectively enforced through the Magistrates Court, being the court that granted the orders.
25. In the circumstances, I will not determine whether or not the orders issued in Migori CMCC No E012 of 2023- Mokoro Jared John & another v Speaker County Assembly of Migori & 2 others, were violated or not, as the court was not called upon to do so.
26. On whether the court should stay and vacate the orders granted by Justice Radido on February 6, 2023, the applicants/interested parties' argument is that the orders were given on account of substantive material non-disclosure of ongoing contemptuous conduct.
27. The applicants have based this prayer on contempt premised on the alleged violation of the orders of the Magistrates Court, which this court has already addressed in the foregone paragraphs. From the submissions filed by the parties herein, the prayer to "stay and vacate" has been interpreted as one for review of the orders of February 6, 2023.



28. Rule 33 (1) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* states: -
- “A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
- (a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
 - (b) on account of some mistake or error apparent on the face of the record;
 - (c) if the judgment or ruling requires clarification; or
 - (d) for any other sufficient reason.”
29. Other than the allegations of contempt, the applicants/interested parties have not shown that there are new matters, mistakes or errors on the face of the orders granted on February 6, 2023, to meet the threshold for grant of review orders.
30. Further, to stay and/or vacate the orders as prayed, would in my view amount to sitting on appeal on orders granted by a court of concurrent jurisdiction.
31. The applicants’ third and last prayer herein is to be supplied with copies of hazard proceedings for January 31, 2023. Article 35(1)(b) of the *Constitution* guarantees the right to access information in the following words: -
- “Every citizen has the right of access to-
- (b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.”
32. Without a doubt, the applicants/interested purpose for seeking the copies of the hansard, is in relation to the tabling of the report on their removal from office. It is therefore my considered view, that the applicants are within their right to be availed the information they seek.
33. In whole I find and hold that the applicants/interested prayers for stay and vacation of the orders of February 6, 2023, and that seeking that the 3rd and 4th interested parties be denied audience, are devoid of merit and are hereby dismissed.
34. The applicants/interested parties’ prayer to be availed copies of the hansard proceedings of January 31, 2023, is allowed, and the 3rd interested party herein, is hereby ordered to avail the hansard proceedings of January 31, 2023 to the applicants within 14 days of this order.
35. Finally, on the preliminary objection, the applicants seek the striking out of the main judicial review proceedings herein, on the ground that it is fatally and irredeemably defective as it fails to properly invoke the Hon Court’s lawful jurisdiction in contravention of section 12 (1) (a)-(f) of the *Employment and Labour Relations Court Act*, and articles 162(2) and 165(6) & (7) of the *Constitution*.
36. The applicants assertion is that this court does not have jurisdiction to entertain ELRC (Kism) JR E001 of 2023.



37. The court in *Garden Square Limited v Sammy Boit Kogo & another* Nairobi (Milimani) HCCC No 1266 of 2003 [2003] KLR 20, held that a preliminary point is a pure point of law which if successfully taken, would have the effect of entirely disposing the suit or application.
38. A question on the court's jurisdiction is a point of law which if proved, has the effect of disposing of the entire suit for the simple reason that without jurisdiction, a court has to down its tools.
39. In *Samuel Kamau Macharia & another v Kenya Commercial Bank and Another* [2012] eKLR the Supreme Court of Kenya stated thus: "a court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."
40. Section 12 of the Employment and Labour Relations Court Act, sets out the jurisdiction of the court as follows:

" 12. Jurisdiction of the court

- (1) The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including:
 - (a) disputes relating to or arising out of employment between an employer and an employee;
 - (b) disputes between an employer and a trade union;
 - (c) disputes between an employers' organisation and a trade unions organisation;
 - (d) disputes between trade unions;
 - (e) disputes between employer organizations;
 - (f) disputes between an employers' organisation and a trade union;
 - (g) disputes between a trade union and a member thereof;
 - (h) disputes between an employer's organisation or a federation and a member thereof;
 - (i) disputes concerning the registration and election of trade union official; and
 - (j) disputes relating to the registration and enforcement of collective agreements;"
41. From these provisions, it is apparent that the jurisdiction of the E&LRC is limited to matters relating to employment and labour relations. The question for this court is whether the issues subject of ELRC (Kism) JR E001 of 2023, relate to employment and labour.
42. The *ex parte* applicant, is the Speaker of Migori County Assembly, while the interested parties are current and former members of the Migori County Public Service Board. It thus goes



without saying that there exists an employer-employee relationship which places the matter squarely within the jurisdiction of this court.

43. In *Nick Gitbinji Ndichu v Clerk Kiambu County Assembly and another* [2014] eKLR Nduma,J stated thus:

“For one to access the jurisdiction at E&LRC he must demonstrate that there exists an employer – employee relationship; that there is an oral or written contract of service or that the issue is a dispute falls (sic) within the provision of section 12(1) of the E&LRC Act. Though advertisement, shortlisting, interviewing are all steps towards recruitment and steps towards creating an employer – employee relationship (emphasis ours), they are not in my view envisaged in section 12 and which will place this petition under the jurisdiction of the Employment and Labour Relations Court.”

44. I conclude by finding that the issues subject of ELRC (Kism) JR E001 of 2023, are matters within the jurisdiction of this court.
45. The preliminary objection is dismissed with costs.
46. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 4TH DAY OF MAY, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Achieng present for the Ex Parte Applicant

N/A for the Respondent

Mr. Lusi present for 1st-6th Interested Parties

Mr. Otieno Obiero present for the 3rd-4th Interested Parties

Ms. Christine Omollo-C/A

