



**Nekesa v County Assembly of Bungoma & 5 others (Judicial Review  
1 of 2022) [2023] KEELRC 1604 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1604 (KLR)

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

**JW KELI, J  
JUNE 29, 2023**

**BETWEEN**

**RACHEL RAEK NEKESA ..... EXPARTE APPLICANT**

**AND**

**COUNTY ASSEMBLY OF BUNGOMA ..... 1<sup>ST</sup> RESPONDENT**

**ASSEMBLY BOARD ..... 2<sup>ND</sup> RESPONDENT**

**SPEAKER OF THE COUNTY ASSEMBLY OF BUNGOMA .... 3<sup>RD</sup> RESPONDENT**

**THE CLERK COUNTY ASSEMBLY OF BUNGOMA ..... 4<sup>TH</sup> RESPONDENT**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... 5<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The *ex parte* applicant filed Notice of Motion application dated 13<sup>th</sup> October 2022 and received in court on the 18<sup>th</sup> October 2022 under Order 53 Rule 3 of the [Civil Procedure Rules](#) and section 8 and 9 of the [Law Reforms Act](#) seeking the following reliefs:-
  - a. An Order of *certiorari* to remove into the High Court for purposes of it being quashed the decision for the 1<sup>st</sup> respondent as communicated through the 4<sup>th</sup> respondent, to stop the salary and other emoluments and further barring the claimant from participating in the activities of the 2<sup>nd</sup> respondent expressed vide the letter dated 22<sup>nd</sup> September 2022 addressed to the applicant.
  - b. An order of prohibition to prohibit the 2<sup>nd</sup> respondent from interfering with the *ex parte* applicant's tenure of office, execution of her duties towards the 2<sup>nd</sup> Respondent's and public,



to stop her salary, emoluments and other benefits and further to prohibit any declaration of the applicant's position vacant for recruitment of another person,

- c. An Order of mandamus to compel the 1<sup>st</sup> to the 4<sup>th</sup> respondents to unconditionally reinstate the applicant to her position as member of the 2<sup>nd</sup> respondent without the alternation, change and or otherwise limiting the terms of membership in a manner that may impact negatively on the applicant's 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 2<sup>nd</sup> respondent.
  - d. An order of permanent injunction, barring any decision by the 5<sup>th</sup> respondent to summon, arrest, charge, investigate or in any manner engage the applicant in relation to any issue leveled against her by the 1<sup>st</sup> respondent to the 4<sup>th</sup> respondent related to the issues raised and/or to be further raised in this case.
  - e. The costs of this application be borne by the respondent.
  - f. Any other order that is just and equitable
2. The application was based on the grounds set out in the statutory statement filed in support of the application for leave to file the instant application and affidavit sworn by the *ex parte* Applicant on the 13<sup>th</sup> October 2022 together with the annexures.
  3. The grounds under the statutory statement in support of the reliefs were:-
    - a. The *ex parte* applicant was a member of the 2<sup>nd</sup> respondent and her rights to retainer and emoluments and her labour rights have been infringed by the respondents
    - b. The respondents have unprocedurally stopped the *ex parte* applicant's retainer and emoluments on an illegal basis and founded on the unconstitutional approach, an infringement of the applicant's rights under articles 27,28,38,41,27 and 50 of the Constitution among others,
    - c. The applicant has discriminately been barred to conduct her duties towards the 2<sup>nd</sup> respondent contrary to the principles of natural justice and discriminatory referred to the 5<sup>th</sup> respondent by the 1<sup>st</sup> and 3<sup>rd</sup> respondents leaving out other members of the 2<sup>nd</sup> respondent who have similar issues that required non-discriminatory reference to the 5<sup>th</sup> respondent if there was need for such reference.
    - d. There had been unspeakable witch hunt against the applicant which was meant to create excuses and be the mask disguise for her discriminatory treatment and reason for her to be illegally arrested and charged by the 5<sup>th</sup> respondent.
    - e. Unless this matter is urgently heard and determined, the applicant will continue to be subjected to unfettered harassment and with intent to offend the criminal justice system, be subjected to criminal litigation that is intended to punish, inconvenience, prejudice, ridicule, embarrass and frustrate an enthusiastic of good governance and deny her the freedom to execute her duties to the Bungoma County citizens since her appearances in court will inconvenience them.
  4. The *ex parte* application was opposed by the respondents. The 5<sup>th</sup> respondent appointed Ruth Ayunga Advocate to act for it and filed statement of ground of opposition dated 9<sup>th</sup> November 2022 and received in court on the 5<sup>th</sup> November 2022 in which it defended its statutory mandate to investigate the allegations against the *ex parte* applicant.



5. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents entered appearance and filed replying affidavit sworn by Emmanuel Mukhebi Situma sworn on the 14<sup>th</sup> November 2022 and received in court on 16<sup>th</sup> November 2022 together with annexures.
6. The 6<sup>th</sup> respondent did not file response.

### **Written submissions.**

7. The *ex parte* suit was canvassed by way of written submissions. The *ex parte* applicant submissions drawn by Ann Were Maloba Advocates were dated 4<sup>th</sup> March 2023 and received in court on the 16<sup>th</sup> March, 2023.
8. The 1<sup>st</sup> to 4<sup>th</sup> respondents written submissions were drawn by the Legal Counsel Bungoma County Assembly and dated 23<sup>rd</sup> March 2023 and received in court on even date.
9. The 5<sup>th</sup> respondent did not file submissions.

### **Determination**

#### **Issues of determination**

10. The *ex parte* applicant addressed the merits of her suit and whether whether the orders of judicial review were available to her.
11. The 1<sup>st</sup> to 4<sup>th</sup> respondents identified the following as the issues for determination: -
  - i. Whether the applicant was exempt from the provisions of section 43(5) of the *Elections Act*.
  - ii. Whether the 2<sup>nd</sup> respondent's decision stop the payment of the applicant's salary and other emoluments was irrational.
  - iii. Whether the decision to bar the *ex parte* applicant from participating in the activities of the 2<sup>nd</sup> respondent was unreasonable.
  - iv. What are the appropriate orders in the circumstances
12. The court was of the considered opinion all issues addressed by the parties were relevant and for the determination of the *ex parte* Application for the judicial review framed the issues in the suit as follows:-
  - i. Whether the decision by the respondents on the *ex parte* applicant was illegal, ultravires and/or unfair .
  - ii. Whether the orders sought by the *ex parte* applicant of judicial review were available.

#### **Whether the decision by the respondents on the *ex parte* Applicant was illegal, ultravires and/or unfair**

#### **The *ex parte* Applicant's case**

13. The *ex parte* applicant filed supporting affidavit to the suit sworn on the 13<sup>th</sup> October 2022. She also had filed an application with supporting affidavit dated 31st January 2023 and her further affidavit dated 12<sup>th</sup> February 2023. The court perused all the affidavits and summarized her case as follows:-
  - i. The *ex parte* Applicant was an employee of the 2<sup>nd</sup> respondent holding the position of a female member appointed pursuant to section 46(3) of the *County Assembly Services Act*, 2017(RRN



1 was the appointment letter ). That on the 20<sup>th</sup> September 2022 she received a letter stopping her from duty and salary stoppage(RNN2) and that upon receipt of the said letter she filed instant case seeking to quash the said letter dated 20<sup>th</sup> September 2022, prohibition against the interference with her tenure in office and order of mandamus reinstating her to office without her terms being altered negatively, order of permanent injunction barring the 5<sup>th</sup> respondents in the suit from summoning, arresting and charging /investing her on any issue levelled against her by the respondents. That the stoppage of her retainer and emolument and work happened without granting her opportunity to be heard and defend herself. That there was engagement between the 1<sup>st</sup> to 4<sup>th</sup> respondents and the 5<sup>th</sup> respondent without her involvement vide letter dated 7<sup>th</sup> June 2022 and 20<sup>th</sup> September 2022 which engagement she was not involved(RRN3 a,b,c) and which was concluded and a decision communicated to her vide letter of 22<sup>nd</sup> September 2022 which the *exparte* applicant submits infringes on her rights as she was not invited or involved at any time.

- ii. That in any event the contents of the letter dated 7<sup>th</sup> June 2022 by the 1<sup>st</sup> and 2<sup>nd</sup> respondents are true(RRN4), then she was advised by her advocate they were made in bad faith and discriminatory because some members of the 2<sup>nd</sup> respondent contested for various seats in the 9<sup>th</sup> August 2022 General Elections without resignation for membership of the 2<sup>nd</sup> respondent but she was the only one singled out being George Wasike Makari and Joshua Ben Kipkuti gazetted to contest for the seat of member county assembly (RRN5) and further Antony Simiyu Mabele who is an employee of TSC and serving in the Board. That it was discriminatory against her as the foregoing were not barred from continued service (RRN6). That the advice sought was from the wrong body the 5<sup>th</sup> respondent and not the 6<sup>th</sup> respondent. That the 5<sup>th</sup> respondent's advice to the 4<sup>th</sup> respondent to stop her from being cleared or paid gratuity was ill and any action in that regard was premature.
- iii. That she was advised that there was no legal provisions requiring a member of any board of any assembly to resign for an intended engagement in politics because the assembly board membership is unique and the holder of the same are not employees of any public entity required to resign as envisaged by the *Elections Act*.
- iv. That she was not informed as communicated to the 2<sup>nd</sup> to 4<sup>th</sup> respondents by the 5<sup>th</sup> respondent to attend interview as per communication to her of 22<sup>nd</sup> September 2022 to her. (RRN2)
- v. The applicant states that the entire process leading to the purported stoppage of her salary was unconstitutional, illegal and improper and affront to the *Constitution* and *Fair Administrative Action Act* 2015.
- vi. The *exparte* applicant in her further affidavit as relevant to the suit, states that there is no requirement for one to resign as a member of the 2<sup>nd</sup> respondent before applying for another job. On the issue of gratuity the applicant stated that her application for partial gratuity was legally sound. That she never demanded for her full and final terminal benefits as she had not separated from membership of the 2<sup>nd</sup> respondent. That legislature never intended for a 6 member board to have only one female.

### **The 1<sup>st</sup> to 4<sup>th</sup> Respondents' case**

14. The response was vide replying affidavit of Emmanuel Mukhebi Situma dated 9<sup>th</sup> February 2023 and his supplementary affidavit of 8<sup>th</sup> march 2023. It was the 1<sup>st</sup> to 4<sup>th</sup> respondents' case that the claim was a knee jerk reaction calculated to frustrate the operations of the Count Assembly of Bungoma.



That the *ex parte* applicant was first gazetted as a member of the Bungoma County Assembly Service Board in 2013 and having served the first term of 5 years was gazetted to serve another 5 years(ES-1A). That in the past the board had conducted business of recruitment of deputy clerks and the clerk in absence of the *ex parte* applicant as she was also a candidate and at no time did she challenge the composition of the Board(ES-4 and ES-5). That the applicant was duly nominated on jubilee ticket and gazetted as candidate for member of parliament of Webuye West Constituency(ES6a,b and c). That the applicant applied for her gratuity and other dues payable to her at end of term and payment were made(ES-7). That the applicant ought to have resigned on the 8<sup>th</sup> February 2022 as per the law. That the applicant never tendered resignation from public office and campaigned for seat of Member of Parliament until election day and results announcement (E-8). That it was the Ethics and Anti Corruption Commission which wrote a letter following the foregoing advising stoppage of the applicant's salary pending investigations. That the proposed recruitment was occasioned by the applicant's acts of omissions and commissions. That the Clerk is a not a member of the board but its secretary. That by operation of the law the term of office of member appointed lasts only within the life of a term of the County Assembly at end of 5 years and serves upto and until another member is appointed under same procedure. That the suit is meant to prevent another member from being appointed hence prolong the *ex parte* applicant's term.

#### **Decision on issue a.**

15. The court in making the decision on the issue addressed its mind on the following sub issues:- Whether the *ex parte* applicant was required under the law to resign as a member of the Bungoma County Assembly Service Board to contest for elections as Member of Parliament Whether the 1<sup>st</sup> to 4<sup>th</sup> respondents acted in bad faith in stopping the *ex parte* Applicant from sittings and emoluments Whether 5<sup>th</sup> respondent's advice to the 4<sup>th</sup> respondent to stop the *ex parte* applicant from being cleared or paid gratuity was ill and any action in that regard was premature Whether the *ex parte* applicant was discriminated against her colleagues George Wasike Makari and Joshua Ben Kipkuti who had been gazette to contest for the seat of member county assembly (RRN5) and further Antony Simiyu Mabele who is an employee of TSC and serving in the Board. Whether the *ex parte* Applicant was required under the law to resign as a member of the Bungoma County Assembly service board to contest for elections as Member of Parliament
16. In her submissions the *ex parte* applicant submits she had consultations with the 5<sup>th</sup> and 6<sup>th</sup> respondents on whether she needed to resign and they advised she need not. The court finds that this was not a position stated in the pleadings as summarized above where the *ex parte* applicant stated she was advised by her advocate under paragraph 13 that there was no legal provisions requiring a member of any board of any assembly to resign for an intended engagement in politics because the assembly board membership is unique and the holder of the same are not employees of any public entity required to resign as envisaged by the [Elections Act](#). The claimant did not address herself on the law exempting her from resignation.

#### **Response submissions by the 1<sup>st</sup> to 4<sup>th</sup> respondents**

17. The 1<sup>st</sup> to 4<sup>th</sup> respondents relied on the decision of the Supreme Court of Kenya in [Fredrick Otieno Outa v Jared Odeyo Okello & 4 others](#) eKLR on definition of a public officer where the court held:- '[148] Strictly speaking, the proper meaning of "public officer", for purposes of the electoral law, is that embodied in Article 260 of the [Constitution](#) as read together with Section 2 of the [Elections Act](#). The different definitions in other statutory provisions, such as those enumerated earlier on, ought not to take precedence over the said constitutional provision. And thus, the proper meaning of "public officer" currently is: (i) the person concerned is a State officer; or (ii) any other person who holds



“public office” – an office within the national government, county government, or public service; (iii) a person holding such an office, being sustained in terms of remuneration and benefits from the public exchequer. “

18. Further that Section 2 of the *Political Parties Act* (Cap 7B, Laws of Kenya) defines “public officer” in line with the meaning assigned to it under Article 260 of the *Constitution*. Section 12 of that Act subjects “public officers” to certain restrictions, as regards political-party activities. Section 12(1) of the Act provides as follows:

- “(1) A public officer shall not—
- (a) be eligible to be a founding member of a political party;
  - (b) be eligible to hold office in a political party;
  - (c) engage in political activity that may compromise or be seen to compromise the political neutrality of that person’s office; or
  - (d) publicly indicate support for or opposition to any political party or candidate in an election”

19. That Section 16. (1) of the *Public Officer Ethics Act* provides:-

- “1. A public officer shall not, in or in connection with the performance of his duties as such-
- (a) act as an agent for, or so as to further the interest of, a political party; or
  - (b) indicate support for or opposition to any political party or candidate in an election.
- (2) A public officer shall not engage in political activity that may compromise or be seen to compromise the political neutrality of his office.
- (3) This section does not apply to a member of the National Assembly or a councillor of a local authority.”

20. That section 43 of the *Elections Act* on participation of elections by public officer provides:-

- “43.
- (1) A public officer shall not—
    - (a) engage in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election...
  - (5) A public officer who intends to contest an election under this Act shall resign from public office at least six months before the date of election.
  - (6) This section shall not apply to—
    - (a) the President;



- (b) the Prime Minister;
- (c) the Deputy President;
- (d) a member of Parliament;
- (e) a county governor;
- (f) a deputy county governor;
- (g) a member of a county assembly..

### Decision.

21. The *exparte* applicant was appointed as a member of the Bungoma County Assembly Service Board with effective date of 24<sup>th</sup> October 2018 until the end of the term when a new member assumes the office in accordance with section 12(6) of the [County Governments Act](#). (RRN1)
22. The *exparte* applicant was cleared to contest for the seat of Member of Parliament for Webuye West Bungoma under the Jubilee party and was cleared by the 6<sup>th</sup> respondent by issuance of certificate for the seat on the 29<sup>th</sup> may 2022 and subsequently gazetted as a candidate to vie for the said election vide Gazette Notice No 7995 of 1<sup>st</sup> july 2022 by the 6<sup>th</sup> respondent(EMS 2(a),2b and EMS 3).
23. The *exparte* Applicant submits that she made consultations with the 5<sup>th</sup> and 6<sup>th</sup> respondents on whether she needed to resign and they advised she need not. The court finds that this was not a position stated in the pleadings as summarized above where the *exparte* applicant stated she was advised by her advocate under paragraph 13 of her main supporting affidavit. The court holds that such advice by the 5<sup>th</sup> and 6<sup>th</sup> respondent as per the alleged consultations if any by a public entity ought to be sought in writing and issued in writing for it to have any evidential value. That was not the case herein.
24. The Supreme Court decisions are binding on all courts other than itself. The Supreme Court has interpreted who is a public officer and addressed the issue of resignation by public officers to contest for political positions with finality in [Fredrick Otieno Outa v Jared Odeyo Okello & 4 others](#) (2014) eKLR on definition of a public officer where the court held:- “[142] Section 2 of the [Leadership and Integrity Act](#) (Cap. 182 Laws of Kenya) also assigns to “public officer” the meaning given by Article 260 of the [Constitution](#). This Act incorporates the provisions of the [Public Officer Ethics Act](#) into a general code. Section 6 of the Act thus provides:
  - “(1) This Part prescribes a general Leadership and Integrity Code for State officers.
  - (2) The provisions of Chapter Six of the [Constitution](#) shall form part of this Code.
  - (3) Unless otherwise provided in this Act, the provisions of the [Public Officer Ethics Act](#) (No 4 of 2003) shall form part of this Code.
  - (4) If any provision of this Act is in conflict with the [Public Officer Ethics Act](#), 2003 this Act shall prevail” [emphasis supplied].

Section 23 of the Act reinforces the call for political neutrality, specifying as follows:

- “(1) An appointed State officer, other than a Cabinet Secretary or a member of a County executive committee shall not, in the performance of their duties—



- (a) act as an agent for, or further the interests of a political party or candidate in an election; or
  - (b) manifest support for or opposition to any political party or candidate in an election.
- (2) An appointed State officer or public officer shall not engage in any political activity that may compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections.
- (3) Without prejudice to the generality of subsection (2) a public officer shall not —
- (a) engage in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election;
  - (b) publicly indicate support for or opposition against any political party or candidate participating in an election” [emphasis supplied].

The Supreme Court then observed:- ‘[148] Strictly speaking, the proper meaning of “public officer”, for purposes of the electoral law, is that embodied in Article 260 of the Constitution as read together with Section 2 of the Elections Act. The different definitions in other statutory provisions, such as those enumerated earlier on, ought not to take precedence over the said constitutional provision. And thus, the proper meaning of “public officer” currently is: (i) the person concerned is a State officer; or (ii) any other person who holds “public office” – an office within the national government, county government, or public service; (iii) a person holding such an office, being sustained in terms of remuneration and benefits from the public exchequer.’ (emphasis given) The court applying the foregoing decision of the Supreme Court holds that the *exparte* applicant was a public officer appointed as a member of the Bungoma County Public Service Board and enjoying remuneration, car loan and mortgage benefit and medical (RRN1) payable by the exchequer. There was evidence she was paid gratuity too. The court finds that the *exparte* applicant was within the meaning of a public officer and that she was one.

25. Section 43 of the Elections Act on participation of elections by public officer provides:- ‘43. (1) A public officer shall not— (a) engage in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election.. (5) A public officer who intends to contest an election under this Act shall resign from public office at least six months before the date of election. (6) This section shall not apply to— (a) the President; (b) the Prime Minister; (c) the Deputy President; (d) a member of Parliament; (e) a county governor; (f) a deputy county governor; (g) a member of a county assembly..’
26. The court holds that the *exparte* applicant, being a public officer, was required to resign at least six months before the date of election and was thus in violation of the law to continue to be in office once she was cleared to contest under the Jubilee party Ticket being section 23 of the Leadership and Integrity Act (Cap. 182 Laws of Kenya). Section 23 of the Act reinforces the call for political neutrality of public officers, specifying as follows:-

- “(1) An appointed State officer, other than a Cabinet Secretary or a member of a County executive committee shall not, in the performance of their duties—



- (a) act as an agent for, or further the interests of a political party or candidate in an election; or
  - (b) manifest support for or opposition to any political party or candidate in an election.
- (2) An appointed State officer or public officer shall not engage in any political activity that may compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections.”

**Whether the 1<sup>st</sup> to 4<sup>th</sup> respondents acted in bad faith in stopping the *ex parte* Applicant from sittings and emoluments and Whether 5<sup>th</sup> respondent’s advice to the 4<sup>th</sup> respondent to stop her from being cleared or paid gratuity was ill and any action in that regard was premature**

27. On the 7<sup>th</sup> June 2022 the 1<sup>st</sup> respondent vide its speaker wrote to the Manager Ethics and Anti-Corruption Commission Bungoma seeking advice on member of the Bungoma County Assembly Service Board who did not resign for contesting elections being the *ex parte* applicant (RRN3a). The 5<sup>th</sup> respondent vide letter dated 8<sup>th</sup> September 2022 wrote to the 2<sup>nd</sup> respondent stating they had received information about the applicant having contested in the elections of 9<sup>th</sup> August 2022 and sought information inter alia proof of resignation and stoppage of salary and further advised, citing their constitutional and statutory mandate, that the *ex parte* applicant should not be cleared and paid gratuity until they conclude investigations or advice otherwise (RRN3C). The 4<sup>th</sup> respondent on receipt of the letter by 5<sup>th</sup> respondent wrote on the 23<sup>rd</sup> September 2022 to the *ex parte* applicant informing of stoppage of her salary and the emoluments and further participation in the activities of the 2<sup>nd</sup> respondent and stating what the 5<sup>th</sup> respondent had stated in letter of 8<sup>th</sup> September 2022 on non-clearance for gratuity (RNN2).
28. The court finds that the decisions by the respondents were lawful and within their constitutional and statutory mandate following the breach of the law by the *ex parte* applicant as stated above of vying for elections without resignation as provided for under section 43 of the *Elections Act* to wit:- ‘43. (1) A public officer shall not— (a) engage in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election. (5) A public officer who intends to contest an election under this Act shall resign from public office at least six months before the date of election. (6) This section shall not apply to— (a) the President; (b) the Prime Minister; (c) the Deputy President; (d) a member of Parliament; (e) a county governor; (f) a deputy county governor; (g) a member of a county assembly.’ The court holds that the decision by the 1<sup>st</sup> to 4<sup>th</sup> respondents was legal and not premature as it was based on valid reason of violation of the law by the *ex parte* applicant.

**Whether the *ex parte* applicant was discriminated against**

29. The *ex parte* applicant claims she was discriminated against her colleagues George Wasike Makari and Joshua Ben Kipkuti who were gazetted to contest for the seat of member county assembly (RRN5) and further Antony Simiyu Mabele who is an employee of TSC and serving in the Board. The respondent in affidavit of Emmanuel Mukebi Situma dated 14<sup>th</sup> November 2022 paragraph 17 stated that Hon George Makari and Hon. Joshua Ben Kipkuti by virtue of being elected Members of the County Assembly of Bungoma were exempt from section 43 of the *Elections Act* and at the moment were not members of the Board. That Mabele of TSC never pursued any elective post hence had no need to resign.



30. The *Elections Act* specifies the persons required to resign as follows:- ‘section 43. (1) A public officer shall not— (a) engage in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election.. (5) A public officer who intends to contest an election under this Act shall resign from public office at least six months before the date of election. (6) This section shall not apply to— (a) the President; (b) the Prime Minister; (c) the Deputy President; (d) a member of Parliament; (e) a county governor; (f) a deputy county governor; (g) a member of a county assembly.’ The court agreed with 1<sup>st</sup> to 4<sup>th</sup> Respondents that the said two persons Makari and Kipkuti being members so of the Bungoma County Assembly were exempt under section 43(1)(5)g of the Election Act from resignation. The court finds that the requirement of resignation does not apply to Mabele as officer of TSC as that is not an elective post. In the upshot the court holds there was no prove of discrimination by the respondents against the *ex parte* applicant.

### **Whether the orders sought by the *ex parte* applicant of judicial review were available**

31. The *ex parte* applicant submitted that she was entitled to the orders sought and relied on the decision of the Court of Appeal in *Municipal Council of Mombasa v Republic and Umoja Consultants Ltd* (2002)eKLR to wit:- ‘judicial review is concerned with the decision -making process, not with the merits of the decision itself. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.’ The *ex parte* applicant relying on the said decision submitted that the decisions of the respondents were based on illegal, unprocedural and ultravires conduct characterised by impropriety. That the illegality was by the respondents having offended articles 10,40,47 and 50 of the *Constitution* as read with article 236. That article 47 states:- ‘47. Fair administrative action (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall— (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration’’. Article 236 on protection of public officers provides: ‘A public officer shall not be— (a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or (b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.’ That in the event she was a public officer the respondent was bound to comply with the provisions of the *Public Service Commission Act* section 60 which provides that no penalty is to be imposed against a public officer unless they have been given an opportunity to respond to those allegations and the allegations have to be investigated to find the public officer had committed the misconduct.
32. The *ex parte* applicant submits that the advice by the 5<sup>th</sup> respondent was limited to stopping gratuity and not to clear the applicant but the 2<sup>nd</sup> respondent went beyond that to stopping her from her undertaking her duties and advertised her position declaring it vacant denoting letter of 22<sup>nd</sup> September 2022 was communicating termination. That where there is no complete investigations the claimant cannot be terminated from duty, her salary stopped and prevented from undertaking her duties. The



claimant relied on the provisions of section 10 of the County Assemblies Service Act 2017 on the procedure for removal from office stating that the said procedure was not complied with. The said procedure is as follows: ‘10. Removal from office (1) A person who is appointed as a member of the Board under section 12(3) (d) of the County Governments Act (No 17 of 2012) may be removed from office on any of the following grounds— (a) violation of the Constitution; (b) inability to discharge duties for any reason; (c) bankruptcy; or (d) if convicted of any offence with a sentence of more than six months imprisonment. (2) Any person may petition the county assembly for the removal of the member of the Board on the grounds specified under subsection (1). 3) The procedure for the removal of a member of the Board under this section shall be as prescribed in the Standing Orders of the county assembly.’ That applying the said procedure the 2<sup>nd</sup> respondent had no legal capacity to remove her from office but only the 1<sup>st</sup> respondent vide motion tabled in the house, hence the unilateral decision to remove her from office was illegal, unconstitutional and ultravires.

33. To buttress the issue of whether the order of judicial review were available the claimant relied on the decision in Republic v District Land Adjudication and Settlement Officer Maara Sub- County & 3 others; Ex parte Applicant: M’nyiri Ragwa; Njeru Kiririka (Interested Party) [2021] eKLR as follows:-

“Whether the orders of Judicial Review are available?

42. On the issue of Whether the Ex parte Applicant herein is entitled to the orders of *certiorari* and *mandamus*, it should be noted that judicial review orders are discretionary.
43. In Zachariah Wagunza & another v Office of the Registrar, Academic Kenyatta University & 2 others (2013) eKLR the court reiterated the broad grounds on which the court exercises its judicial review jurisdiction as was stated in the Uganda case of Pastoli v Kabale District Local Government council and others (2008) 2 EA 300, and observed among other things that:

“In order to succeed in an application for Judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of law or its principles are instances of illegality...

Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision is usually in defiance of logic and acceptable moral standards.

Procedural Impropriety, is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice act or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or



legislative instrument by which such authority exercises jurisdiction to make a decision.”

44. Similarly, in the case of *Republic v Director of Immigration Services & 2 others exparte Olamilekan Gbenga Fasuyi & 2 others* (2018) eKLR it was held that:

“...It is common ground that the prayers sought are Judicial Review remedies and the rules governing grant of judicial review orders do apply. Judicial Review is about the decision-making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and the court should not attempt to adopt the forbidden appellate approach. Judicial Review is the review by a judge of the High court of a decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction-reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. Judicial Review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the courts is to uphold the fundamental and enduring values that constitute the rule of Law. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the process followed by the decision-maker are proper, and the decision is within the confines of the Law, a Court will not interfere.”

45. According to *Halsbury Law of England* 4<sup>th</sup> EDN.Vol. 1 (1) para 12 page 270:

The remedies of quashing orders (formerly known as orders of *certiorari*) prohibiting orders formerly known as orders of prohibition (mandatory orders formerly known as orders of *mandamus*) ...are all discretionary. The court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief.

46. The objective of Judicial review was observed in *Chief Constable of the North Wales Police v Evans* (1982)1 WLR where 1155 Lord Brightman noted:

Judicial Review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power... Judicial Review, as words imply, is not an appeal from a decision but a review of the manner in which the decision was made.



47. In the instant case the applicant has levelled various allegations that go to the merits of the case. This clearly spells out the issue is the decision and not the process.
48. The court in Commissioner of Lands v Kunste Hotel Limited (1997) eKLR with authority reiterated Lord Bright man’s view and observed:

“...it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision- making process. Its purpose is to ensure that the individuals is given fair treatment by the authority to which he has been subjected.”

34. The *exparte* applicant submitted that the respondents denied her the right to be heard and failed to follow laid down procedures and in response sought to justify the illegal action inviting adjudication on merit of the decision.

### 1<sup>st</sup> to 4<sup>th</sup> Respondent’s submissions

35. The respondents submit that the application was not merited. That the greater public good of compliance with section 43(5) of the *Elections Act* far outweighs the awarding of these orders sought in the instant application. To buttress this position respondent’s relied on the decision in *Halsbury’s laws of England* 4<sup>th</sup> Edn. Vol. 1(1) Para 12 page 270:- ‘The remedies for quashing orders (..orders of *certiorari*), prohibiting orders (..orders of prohibition) and mandatory orders (..orders of *mandamus*) are all discretionary. The court has wide discretion whether to grant relief at all and if so what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying and consider whether or not such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief..... the court has ultimate discretion whether to set aside decisions and may decline to do so in public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account for demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow, ‘contemporary decisions to take their course , considering the complaint and intervening if at all, later and in retrospect by declaratory orders.’”

### Decision on whether Orders of judicial review were available to the *exparte* applicant

36. The court held above that that the *exparte* applicant was a public officer and had breached the provisions of section 43 (5) of the *Elections Act* for failure to resign as required at least 6 months before the contesting for seat of Member of Parliament as she did. It was uncontested fact that she was cleared by a political party namely Jubilee to vie for Member of Parliament Webuye West and indeed was gazetted to contest by the 6<sup>th</sup> respondents (EMS 3) also annexed by the applicant as (RRN6). There were facts admitted by the *exparte* applicant and court finds there was nothing to investigate as the facts spoke for themselves.
37. The court finds that Section10(3) of the *County Assembly Services Act* is applicable on specific grounds being — ‘(a) violation of the *Constitution*; (b) inability to discharge duties for any reason; (c) bankruptcy; or (d) if convicted of any offence with a sentence of more than six months imprisonment.’ There was no evidence before the court that these were grounds raised by the respondents for the provision to be invoked. The Court’s interpretation of the letter of appointment of the *exparte*



Applicant (RRN1) is that termination of the appointment of the applicant was by operation of the law being section 12(6)(d) of the County Governments Act to wit:- ‘Despite subsection (5), when the term of the county assembly ends, a member of the county assembly service board under subsection (3)(d) shall continue in office until a new member has assumed office in the member’s place in the next assembly’ and not by the mechanisms envisaged under section 10 of the County Assemblies Services Act. The court finds that there is in place a new assembly in place following the 2022 general elections hence the applicant’s position was due for replacement as envisaged under section 12(6)(d) of the County Governments Act an issue disclosed in her appointment letter.

38. The court finds that the act of stoppage of salary and payment of gratuity was consistent with the advice by the 5<sup>th</sup> respondent. That further the prohibition from further sitting was a reasonable action consequently. The decision to stop salary and further sitting amounted to suspension from duty which is a power that the 2<sup>nd</sup> respondent as the employer had and for valid reasons of the non- resignation in breach of the law. The court then finds that the orders sought of judicial review were not available to the *exparte* applicant as the process leading to letter of 23<sup>rd</sup> September 2023 was backed by the law and the *exparte* applicant was in violation of statutory provisions requiring public officers not to engage in elective politics as candidates or in a manner that would compromise their neutrality. The court upholds the position of the court of Appeal in Municipal Council of Mombasa v Republic and Umoja Consultants Ltd (2002)eKLR that, ‘judicial review is concerned with the decision -making process, not with the merits of the decision itself. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.’ In the instant case the court found the was *prima facie* evidence and it was not indispute that the *exparte* applicant violated the law by failing to resign. There was nothing to investigate and the power to suspend an officer lies with the employer and as long as there are valid reasons. The court find that the letter of employment of the *exparte* Applicant was clear on the terms and that the processes of advertisement of the position was in compliance with the terms of the letter. That the advertisement was also within the law following the coming in place of a new assembly after the 9<sup>th</sup> august 2022 general being section 12(6)(d) of the County Governments Act to wit:- ‘Despite subsection (5), when the term of the county assembly ends, a member of the county assembly service board under subsection (3)(d) shall continue in office until a new member has assumed office in the member’s place in the next assembly’’. The court found no prove of discrimination the cited persons having been elected members of the assembly hence exempt from resignation under section 43(*supra*) and Antony Mabele having not contested for any seat.
39. The court of Appeal had occasion to determine a case on the requirement of resignation and with finality in Public Service Commission & 4 others v Cheruiyot & 20 others (Civil Appeal 119 & 139 of 2017 (Consolidated)) [2022] KECA 15 (KLR) where it observed :- ‘15. For a person to be eligible for election into public office in a general election, the person that sought to be elected must not have been a state officer or other public officer save for the categories of persons to whom the exclusion applied. By enacting section 43(5) and (6) of the Elections Act, 2011, Parliament sought to give full effect to the provisions of articles 137, 99, 180, and 193 of the Constitution. 16. The provisions of sections 43(5) were not hollow. The impartiality of public servants was a cardinal value enshrined in article 232(1)(a) of the Constitution which provided that the public servant and service had to be responsive,



prompt, impartial and equitable in the provision of services. How could a public servant espouse those principles if he was allowed to remain in office until the election date? Suppose a Judge who intended to run for an elective post was allowed to sit on the bench and preside over election-related cases until the election date, where was his impartiality? Similarly, how could a Commissioner of the Independent Election and Boundaries Commission serving his last year in office and with the ambition to run for elective office, be allowed to remain in office and oversee an election in which he was a candidate? The absurdity of both situations merely served to show the justiciability of the need for public servants to leave public office within a reasonable time before the election in which they would be candidates.

17. The requirements for neutrality and impartiality of public officers were also provided for in other relevant statutes and regulatory frameworks related to the conduct of public officers. In particular section 23(2) and (3) of the [Leadership and Integrity Act](#), 2012 provided that an appointed State officer or public officer was not to engage in any political activity that could compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections....18. It was necessary for public officers desirous of running for elective posts to resign in good time. The provisions of sections 43(5) and (6) of the [Elections Act](#) also sought to promote the principle of good governance and the value of the integrity contemplated under articles 10 (2)(c) of the [Constitution](#). 21. The principle of equality did not mean that every law had to have universal application for all persons who were not by nature, in attainment or circumstances in the same position and the varying needs of different classes of persons required special treatment. The legislature understood and appreciated the need of its own people, that its laws were directed to problems made manifest by experience and that its discriminations were based upon adequate grounds. The rule of classification was not a natural and logical corollary of the rule of equality, but the rule of differentiation was inherent in the concept of equality. Equality meant priority of treatment under parity of conditions. Equality did not connote absolute equality. A classification in order to be constitutional had to rest upon distinctions that were substantial and not merely illusory. The test was whether it had a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into category. 22. Equality had to be seen as the parity of treatment under the parity of conditions. It was not desired that state or public officers intending to join elective politics have one leg in public service and another in elective politics. The fact that section 43(6) of the [Elections Act](#) listed persons to whom the provision of section 43(5) was not applicable did not in any way afford preferential treatment to those officers. Government functions could not be suspended during an election period and hence the exclusion of persons contemplated under section 43(6) of the [Elections Act](#), 2011 from resigning from public office at least six months before a general election. The provisions of sections 43(5) and 6 of were justifiable and reasonable and were not in contravention of any provisions of the [Constitution](#).”

40. The court upholds the above decision of court of Appeal in [Public Service Commission & 4 others](#) (*supra*) to find the decision by the respondents against the *ex parte* applicant had a reasonable basis free from illegality and arbitrariness hence not deriving of orders of Judicial review and in this case upholds the [Halsbury's laws of England](#) 4<sup>th</sup> Edn. Vol. 1(1) Para 12 page 270:- ‘The remedies for quashing orders (..orders of *certiorari*), prohibiting orders (..orders of prohibition) and mandatory orders (..orders of *mandamus*) are all discretionary. The court has wide discretion whether to grant relief at all and if so what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying and consider whether or not such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief..... the court has ultimate discretion whether to set aside decisions and may decline to do so in public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account for demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are



involved the court may allow, ‘contemporary decisions to take their course , considering the complaint and intervening if at all, later and in retrospect by declaratory orders.’”

41. In the upshot the court finds acts against the *ex parte* applicant by the respondents were legal and reasonable based on relevant matters and the law and that the process of stopping her salary and duties was based on undisputed fact of contesting for election without resignation hence no need for investigation. Taking into account the conduct of the *ex parte* applicant I decline to exercise my discretion to grant the orders of judicial review sought.
42. The application for orders of judicial review dated 13<sup>th</sup> October 2022 by way of Notice Motion is dismissed in entirety for lack of merit. I have considered that as at time of hearing the case the parties had not separated. The respondents were represented by internal counsel on salary. Taking these factors into account and to temper mercy with justice I will order each party to bear own costs.
43. It is so ordered.

**DATED, SIGNED & DELIVERED IN OPEN COURT AT COURT AT KAKAMEGA 29<sup>TH</sup> JUNE 2023.**

**JEMIMAH KELI,**

**JUDGE.**

In the presence of:-

Court Assistant : Lucy Macheso

For Claimant :Absent

For 5<sup>th</sup> Respondent:- Ms. Ayunga EACC

1<sup>st</sup> to 4<sup>th</sup> Respondents – Absent

