



**Republic v Clerk, Kisii County Assembly & 3 others; Nyamwange & 4 others
(Ex parte Applicants); Atika (Interested Party) (Judicial Review Miscellaneous
Application E013 of 2023) [2023] KEELRC 1539 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1539 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E013 OF 2023

S RADIDO, J

JUNE 21, 2023

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
FOR ORDERS OF PROHIBITION, CERTIORARI AND MANDAMUS**

AND

**IN THE MATTER OF UNLAWFUL EXERCISE OF ADMINISTRATIVE POWER BY
THE CLERK, SPEAKER AND COUNTY ASSEMBLY OF KISII COUNTY AND IN
THE MATTER OF SECTIONS 3(G), (H), (L) AND (N), 4(3) AND (4) OF THE
PETITION TO COUNTY ASSEMBLIES (PROCEDURE) ACT NO. 15 OF 2020**

AND

**IN THE MATTER OF STANDING ORDERS NOS 195(3),(4) AND (5), 198(E),(F),
(G) AND (M), 202(2) OF THE KISII COUNTY ASSEMBLY STANDING ORDERS**

AND

**IN THE MATTER OF ARTICLES 124(1), 35(1) AND (2), 50(2)(C)
AND (J) AND 23(3) OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

REPUBLIC APPLICANT

AND

CLERK, KISII COUNTY ASSEMBLY 1ST RESPONDENT

SPEAKER, KISII COUNTY ASSEMBLY 2ND RESPONDENT

KISII COUNTY ASSEMBLY 3RD RESPONDENT

GOVERNOR, KISII COUNTY GOVERNMENT 4TH RESPONDENT

AND

NANCY NYANGANYI NYAMWANGE EX PARTE APPLICANT



JACKSON BOGONKO EX PARTE APPLICANT
PATRICK MOGUSU MOMANYI EX PARTE APPLICANT
JOHN MACHUKA NDEGE EX PARTE APPLICANT
JUDY OMARE NYAKERARIO EX PARTE APPLICANT

AND

BENSON MOCHAMA ATIKA INTERESTED PARTY

RULING

1. On 24 April 2023, the ex-parte applicants moved the Court seeking the following orders:
 - (1) ...
 - (2) The Honourable Court be pleased to grant leave to the ex-parte applicants to file a judicial review motion seeking orders of prohibition restraining the 1st, 2nd and 3rd Respondents from further processing the Interested Party's Petition dated 6th March 2023 that is seeking the removal of the 1st to 5th ex-parte applicants from their offices as members of the Kisii County Public Service Board and the said leave do operate as a stay of proceedings of the Interested Party's Petition dated 6th March 2023 by the 3rd Respondent pending the hearing and determination of the main judicial review motion.
 - (3) The Honourable Court be pleased to grant leave to the ex-parte applicants to file a judicial review motion seeking orders of certiorari to remove into the Honourable Court and quash the decision of the 1st, 2nd and 3rd Respondents dated 5th March 2023 committing the Interested Party's Petition dated 6th March 2023 for hearing to the Committee of Labour, Manpower and Social Welfare of the County Assembly of Kisii and the said leave do operate as a stay of proceedings of the Interested Party's Petition dated 6th March 2023 by the 3rd Respondent pending the hearing and determination of the main judicial review motion.
 - (4) The Honourable Court be pleased to grant leave to the ex-parte applicants to file a judicial review motion seeking orders of mandamus compelling the 3rd and 4th Respondents to supply the ex-parte applicants with all reports, documents, letters, Circulars or generally findings of the Institute of Human Resources Management that was contracted by the 4th Respondent to undertake a human resources audit of the Kisii County workforce to enable the ex-parte applicants exercise their constitutional rights under articles 35(1)(b) and 35(2) and to adequately prepare their responses to the Interested Party's Petition or any other Petition or processes that may be commenced against them anchored on the findings of the said reports, documents, letters, circulars or generally findings of the Institute of Human Resources Management and the said leave do operate as a stay of further hearing/proceedings of the Interested Party's Petition dated 6th March 2023 by the 3rd Respondent pending the hearing and determination of the main judicial review motion.
 - (5) The Honourable Court be pleased to grant leave to the ex-parte applicants to file a judicial review motion seeking orders of mandamus compelling the Interested Party to supply the ex-parte applicants with all reports, documents, letters, circulars or generally findings presented to



him by the 4th Respondent which formed a basis for the Petition dated 6th March 2023 pending the hearing and determination of the main judicial review motion.

- (6) That the Honourable Court be pleased to direct that the leave hereinabove do operate as a stay of further proceedings of the Interested Party's Petition dated 6th March 2023 by the 3rd Respondent pending the hearing and determination of the main judicial review Motion.
 - (7) The stay of prayer (6) hereinabove, do include staying the tabling of the Committee's impugned report, debating, voting, adoption of the report and/or making of any resolution with regard to the report and further restraining the Respondents from degazetting the ex-parte applicants and/or in the alternative, if degazetted, an order be issued and further stay be issued suspending the degazettement and further order of stay do prohibit the Respondents from declaring any vacancy in the positions held by the ex-parte applicants and commencing any process that may lead to the recruitment of the ex-parte applicants' positions.
 - (8) Costs of the application be in the cause.
2. When the Chamber Summons was placed before the Court on 25 April 2023, ex-parte, it substantially granted orders (2) to (5).
 3. The Court did not grant proposed orders (6) and (7) as set out in paragraph 1 hereinabove.
 4. The Court further directed that the substantive Motion be filed on or before 5 May 2023.
 5. On 4 May 2023, the ex-parte applicants filed a Motion (the 1st Motion) seeking orders:
 - (1) ...
 - (2) The Honourable Court do grant leave to the applicants to cite the 4th Respondent and his agents; the CECM Administration Mr Daniel Ondabu, the County Secretary, Mr James Okemwa Ntabo, the Chief of Staff Mr Junior Otucho, the C.O. Administration Mr Vincent Nyangwara and the C.O. Executive Mr Edwin Atege, Deputy Directors, Executive Hassan Momanyi and Donald Ongori for being in contempt of court.
 - (3) That upon leave granted as above, summons do issue to the 4th Respondent and his agents; the CECM Administration Mr Daniel Ondabu, the County Secretary, Mr James Okemwa Ntabo, the Chief of Staff Mr Junior Otucho, the C.O. Administration Mr Vincent Nyangwara and the C.O. Executive Mr Edwin Atege, Deputy Directors, Executive Hassan Momanyi and Donald Ongori to personally appear in Court on a day to be appointed by the Court to show cause why they should not be held in contempt of court.
 - (4) That the Honourable Court be pleased to declare that the 4th Respondent and his agents; the CECM Administration Mr Daniel Ondabu, the County Secretary, Mr James Okemwa Ntabo, the Chief of Staff Mr Junior Otucho, the C.O. Administration Mr Vincent Nyangwara and the C.O. Executive Mr Edwin Atege, Deputy Directors, Executive Hassan Momanyi and Donald Ongori are in contempt of court orders issued on 25th April 2023 and proceed to convict and sentence them accordingly.
 - (5) The costs of this application be provided for.
 6. The Court considered the Motion ex-parte on the same day and granted the leave to cite the 4th Respondent and his agents for contempt.
 7. The Court further directed that the parties appear in Court on 22 May 2023 for further directions.



8. However, on 9 May 2023, the ex-parte applicants filed another Motion (the 2nd Motion) seeking orders:
- (1) ...
 - (2) ...
 - (3) ...
 - (4) ...
 - (5) ...
 - (6) ...
 - (7) ...
 - (8) Pending the hearing and determination of the judicial review proceedings herein, the Honourable Court be pleased to forthwith stay implementation of Gazette Notice No. 5841 of 2023 published at the behest of the 4th Respondent on 5th May 2023, purporting to revoke the applicants' appointments as members of the Kisii County Assembly Service Board.
 - (9) Pending the hearing and determination of the judicial review proceedings herein, the Honourable Court be pleased to issue express orders prohibiting the Respondents, directly or through their agents from removing the applicants from the payroll, denying the applicants access to their work premises or otherwise interfering with the applicants discharge of their office duties and operations in line with the spirit of the Courts orders of 25.04.2023.
 - (10) Pending the hearing and determination of the judicial review proceedings herein, the Honourable Court be pleased to forthwith stay any constitution or gazettelement of any Selection Panel by the 4th Respondent to remove or otherwise replace the applicants as members of the Kisii County Public Service Board.
 - (11) Pending the hearing and determination of the judicial review proceedings herein, the Honourable Court be pleased to forthwith stay any steps by any Selection Panel constituted by the 4th Respondent of advertising, interviewing, shortlisting or hiring persons to replace the applicants as members of the Kisii County Public Service Board.
 - (12) Pending the hearing and determination of the judicial review proceedings herein, the Honourable Court be pleased to forthwith prohibit and stay the 1st, 2nd and 3rd Respondents from approving the *constitution* any Selection Panel by the 4th Respondent and approving any purported shortlisted nominations by the 4th Respondent designed to replace the applicants as members of the Kisii County Public Service Board.
 - (13) The Honourable Court be pleased to grant leave to the ex-parte applicants to amend the judicial review motion herein to include a prayer of certiorari to quash the Gazette Notice No 5841 of 2023 (dated 25.04.2023) published at the behest of the 4th Respondent on 5th May 2023, purporting to revoke the applicants' appointments as members of the Kisii County Public Service Board.
 - (14) Costs of this application be borne by the Respondents.
9. The 2nd Motion was placed before the Duty Judge in Nairobi on the same day (both the Judges in Kisumu were away from the station), and the Court directed that the status quo be maintained pending inter- partes hearing on 12 May 2023.



10. The 2nd Motion was served upon the Respondents, and the 1st to 3rd Respondents caused to be filed a replying affidavit sworn by the acting Clerk of the County Assembly in opposition thereto.
11. On his part, the 4th Respondent filed a Notice of Preliminary Objection and replying affidavit in opposition to the 2nd Motion on 12 May 2023.
12. In the Notice of Preliminary Objection, the 4th Respondent contended:
 - i. That the ex-parte Notice of Motion application herein dated 8th May 2023 is res judicata the ex-parte applicants' Chamber Summons application herein dated 25th April 2023.
 - ii. That the present application violates the rule of sub judice as there exists a current JR application being Kisumu ELRC JR E002 of 2023 between the same parties over the same subject matter wherein leave has been granted, and the substantive Motion filed, fixed for mention for directions before the Honourable Justice Radido Kisumu ELRC, on 15th May 2023.
 - iii. The present proceedings are therefore an abuse of the court process and should either be struck out and/or dismissed with costs.
13. When the parties appeared before the Court in Nairobi on 12 May 2023, the Judge issued an array of directions including staying the implementation of Gazette Notice No. 5841 of 25 April 2023. The Judge also enjoined the *Constitution* of a Selection Panel to recruit new members of the Board pending inter-partes hearing before the Court in Kisumu.
14. On 18 May 2023, the ex-parte applicants filed another Motion (the contempt Motion) Referenced: In the Matter of An application for Contempt of Court.
15. In the contempt Motion, the ex-parte applicants sought the following orders:
 - (i) Summons do issue to the 4th Respondent and his agents i.e. the CECM Administration Mr Daniel Ondabu, the County Secretary, Mr James Okemwa Ntabo, the Chief of Staff Mr Junior Otucho, the C.O. Administration Mr Vincent Nyangwara and the C.O. Executive Mr Edwin Atege, Deputy Directors, Executive Hassan Momanyi and Donald Ongori to personally appear in Court on a day to be appointed by the Court to show cause why they should not be held in contempt of court.
 - (ii) This Honourable Court finds the 4th Respondent and his agents i.e. CECM Administration Mr Daniel Ondabu, the County Secretary, Mr James Okemwa Ntabo, the Chief of Staff Mr Junior Otucho, the C.O. Administration Mr Vincent Nyangwara and the C.O. Executive Mr Edwin Atege, Deputy Directors, Executive Hassan Momanyi and Donald Ongori herein in contempt of court for disobeying the Court's orders made on 25th April 2023.
 - (iii) The Honourable Court do order the 4th Respondent and his agents i.e. CECM Administration Mr Daniel Ondabu, the County Secretary, Mr James Okemwa Ntabo, the Chief of Staff Mr Junior Otucho, the C.O. Administration Mr Vincent Nyangwara and the C.O. Executive Mr Edwin Atege, Deputy Directors, Executive Hassan Momanyi and Donald Ongori herein be committed to civil jail for a period to be determined by this Honourable Court until the contempt is purged.
 - (iv) The Honourable Court do order the 4th Respondent and his agents i.e. CECM Administration Mr Daniel Ondabu, the County Secretary, Mr James Okemwa Ntabo, the Chief of Staff Mr Junior Otucho, the C.O. Administration Mr Vincent Nyangwara and the C.O. Executive Mr



Edwin Atege, Deputy Directors, Executive Hassan Momanyi and Donald Ongori pay the ex-parte applicants a sum to be assessed by the Honourable Court being loss incurred by the applicants for the Respondents failure to observe Court orders.

- (v) That the Honourable Court be pleased to otherwise impose such punishment as would be appropriate in the circumstances against the 4th Respondent and his agents.
 - (vi) The costs of this application be provided for.
16. When the parties appeared on 22 May 2023, the Court directed that the Preliminary Objection to the 2nd Motion, and the contempt Motion would be taken simultaneously, and the parties were directed to file and exchange responses and submissions.
17. Consequently, the following was filed:
- (i) Replying affidavit by the County Secretary to the contempt Motion on 26 May 2023.
 - (ii) Replying affidavit by the acting Clerk to the contempt Motion on 26 May 2023.
 - (iii) Submissions by the 1st to 3rd Respondents on the Preliminary Objection on 2 June 2023.
 - (iv) Submissions by the 4th Respondent on the Preliminary Objection on 6 June 2023.
 - (v) Ex-parte applicants' Grounds of Opposition to the Preliminary Objection on 7 June 2023.
 - (vi) Ex-parte applicants' submissions in response to the Preliminary Objection on 7 June 2023.
 - (vii) Ex-parte applicants' supplementary affidavit on the contempt Motion on 7 June 2023.
 - (viii) Ex-parte applicants' submissions on the contempt Motion on 7 June 2023.
18. The Court has considered the Preliminary Objection, the contempt application, affidavits, and submissions.

The Preliminary Objection

Sub judice

19. The 4th Respondent took objection on three fronts, res judicata, sub judice and abuse of court process.
20. In the submissions, the 4th Respondents abandoned the objection on sub judice in anticipation of the Court ruling on the Notice of Withdrawal scheduled for 6 June 2023.
21. On the said date, the Court granted leave to the withdrawal of Judicial Review No. E012 of 2023, and the objection on sub judice, therefore does not lie for the Court's attention.

Res judicata and abuse of court process

22. The 4th Respondent raised the res judicata objection in respect to the 2nd Motion on the ground that the prayers or orders sought therein were essentially similar to the prayers initially sought and declined by the Court on 25 April 2023, when the Court was ruling on the leave application.
23. The 4th Respondent also contended that since the first 10 prayers in the 2nd Motion were similar to prayers (6) and (7) in the Chamber Summons and the Summons having been adjudicated upon and some orders declined, the said Motion was an abuse of the court process.



24. Further, the 4th Respondent, with the backing of the other Respondent took the view that since the Court declined to grant prayers (6) and (7) at the leave stage, it was not open to the ex-parte applicants to purport to seek fresh orders staying the logical sequence of events before the County Assembly.
25. The 4th Respondent urged the Court to apply the principles enunciated in *Gladys Nduku Nthuki v Letshego Kenya Ltd, Mueni Charles Maingi (Intended Plaintiff)* [2022] eKLR, *Accredo AG & 3 Ors v Steffano Uccelli & Ar* [2019] eKLR and *Satya Bhama Gandhi v Director of Public Prosecutions & 3 Ors* [2018] eKLR.
26. The principle of res judicata is a derivative of section 7 of the *Civil Procedure Act*, and it becomes implicated where an issue or subject matter has been directly and substantially in issue in a previous proceeding between the same parties (or their privies), and the suit has been heard and determined by a competent Court.
27. The Court has looked at the Chamber Summons through which the ex-parte applicants sought leave to commence judicial review proceedings and the 2nd Motion, and it can make the following conclusions.
28. First, among the orders which were prayed for during the leave stage were:
 - (6) That the Honourable Court be pleased to direct that the leave hereinabove do operate as a stay of further proceedings of the Interested Party's Petition dated 6th March 2023 by the 3rd Respondent pending the hearing and determination of the main judicial review Motion.
 - (7) The stay of prayer (6) hereinabove, do include staying the tabling of the Committee's impugned report, debating, voting, adoption of the report and/or making of any resolution with regard to the report and further restraining the Respondents from degazetting the ex-parte applicants and/or in the alternative, if degazetted, an order be issued and further stay be issued suspending the degazettement and further order of stay do prohibit the Respondents from declaring any vacancy in the positions held by the ex-parte applicants and commencing any process that may lead to the recruitment of the ex-parte applicants' positions.
29. Two, the ex-parte applicants prayed for orders interdicting any attempt to degazette them as members of the County Public Service Board, the declaration of vacancies in the membership of the Board or the recruitment of new members of the Board.
30. Three, the Court declined to grant or extend the stay orders allowed to include the degazettement, declaration of vacancies or recruitment of new Board members.
31. Four, the orders sought by the ex-parte applicants in the 2nd Motion in regard to post submission of the Committee's report to the plenary of the County Assembly invited the Court to revoke/stay the degazettement of the ex-parte applicants as members of the Board and also the recruitment process of new Board members.
32. Substantially, these were the same prayers which the ex-parte applicants had applied for at the leave stage and were declined by the Court under proposed orders (6) and (7).
33. Five, Judicial review proceedings are a special type of proceedings especially where Order 53 of the *Civil Procedure Rules* are invoked.
34. The Court cannot, therefore, go outside or revisit orders which were sought for and declined at the leave stage, after the grant of leave (see *Cortec Mining Kenya Ltd v Cabinet Secretary, Attorney General & 8 Ors* (2015) eKLR).



35. The Court will, therefore, agree with the Respondents that the ex-parte applicants were attempting to or inviting it to consider a cause which had been presented before it, been considered and declined.

Contempt Motion

36. In asserting contempt, the ex-parte applicants advanced several premises.
37. These were that on 25 April 2023, the Court stayed the proceedings of a Petition dated 6 March 2023 by the Interested Party and lodged with the County Assembly seeking their removal as members of the Board.
38. The ex-parte applicants also asserted that the stay orders were served upon the Respondents on the same day (at 3.03 pm to the 1st Respondent, 3.07 pm to the 2nd Respondent and 3.30 p to the 4th Respondent).
39. According to the ex-parte applicants, despite the service (and knowledge) of the stay orders, the Respondents and or their agents proceeded to take actions or make decisions in contempt of the orders.
40. In this regard, the ex-parte applicants asserted that the CECM Administration Mr Daniel Ondabu, the County Secretary, Mr James Okemwa Ntabo, the Chief of Staff Mr Junior Otucho, the C.O. Administration Mr Vincent Nyangwara and the C.O. Executive Mr Edwin Atege, Deputy Directors, Executive Hassan Momanyi and Donald Ongori invaded the Board's offices carted away files, computers, printers, water dispensers, and other equipment and that in the course of carting away the equipment and records, the officers intimidated and threatened to use violence against the employees who were in the offices at the material time.
41. According to the ex-parte applicants, the said persons closed the Board's offices and have declined to reopen the offices despite a written request from the 1st ex-parte applicant, the chair of the Board.
42. The ex-parte applicants further maintained that advocate for the 1st to 3rd Respondents was present in Court when the stay orders were issued on 25 April 2023.
43. The Respondents resisted the contempt application and contended that they had not been served with the orders alleged to have been disobeyed in good time; that the orders had been overtaken by events as service was effected after the County Assembly had concluded its deliberations and proceedings; that some of the persons sought to be cited were not parties to the proceedings and that reliable information had been received that the ex-parte applicants intended to remove office properties and records after the County Assembly had voted to remove them from office and so there was need to secure the same.
44. Contempt proceedings are in the nature of criminal proceedings and the standard of proof is higher than proof on a balance of probabilities, but not proof beyond a reasonable doubt because of the grave consequences which result from a finding of contempt (see [Duncan Manuel Murigi v Kenya Railways Corporation](#) [2008] eKLR).
45. The proceedings are meant to ensure the rule of law and uphold the dignity of the Court (see [Kenya Tea Growers Association v Francis Atwoli and 5 Ors](#) [2012] eKLR).
46. The test relating to contempt requires the party asserting contempt to demonstrate existence of a court order, service or knowledge of the court order and a deliberate or wilful breach of the order (see [Ochino & Ar v Okombo & 4 Ors](#) [1989] KLR and [Shimmers Plaza Ltd v NBK](#) [2015] eKLR).
47. In the present case, the notes kept by the Judge who dealt with the leave application indicates that the proceedings were in chambers and were ex-parte.



48. It is, therefore, not correct or true, as asserted by the ex-parte applicants, that any of the Respondents or their advocates were privy to or had knowledge of the ex-parte proceedings on 25 April 2023.
49. On the question of service, the Respondents have not denied service of the Court orders of 25 April 2023. The position was that the orders were served after the conclusion of the proceedings which had been stayed.
50. The affidavit of service of Elijah Gekonge Nyangau as to the service of the court orders stated the times of service (from 3.03 pm to 3.30 pm).
51. The assertion by the Respondents that the service was made after the conclusion of the proceedings before the County Assembly were not controverted by the ex-parte applicants.
52. Further, the ex-parte applicants contended that the Respondents or their agents invaded the Boards offices and made the same inaccessible.
53. However, the ex-parte applicants failed to disclose exact time the invasion of the Board's offices took place or at what time the offices were closed.
54. In the same vein, there was no affidavit of fact from any of the employees who were allegedly intimidated and or threatened by the persons sought to be cited for contempt.
55. On the basis of the factual matrix placed before the Court, the ex-parte applicants have failed to meet the legal threshold to prove wilful disobedience of the Court orders issued on 25 April 2023.
56. Before concluding, the Court observes that if the parties continue with the trajectory there have taken of filing myriads of applications and objections, the expeditious and proportionate determination of the proceedings herein will be a task akin to untangling a spider's web.

Conclusion and Orders

57. In light of the above:
 - (i) The Preliminary Objection against the Motion dated 8 May 2023 and filed in Court on 9 May 2023 in respect to the stay and prohibitory orders is upheld.
 - (ii) The Motion dated 8 May 2023 and filed in Court on 9 May 2023 is struck out.
 - (iii) The Court finds no merit in the contempt Motion dated 3 May 2023.
 - (iv) The contempt Motion is dismissed.
58. Costs in the cause.
59. Considering the pivotal role played by a county public service board in the governance and operations of the county public service board, the Court will hereinafter issue directions on the expeditious determination of the outstanding application(s) and the judicial review proceedings.

DELIVERED VIRTUALLY, DATED, AND SIGNED IN KISUMU ON THIS 21ST DAY OF JUNE 2023.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For ex-parte applicants Ochoki & Co. Advocates



For 1st to 3rd Respondents Mr Onserio, Department of Legal and Legislative Services, County Assembly of Kisii

For 4th Respondent County Attorney

For Interested Party Sagana Biriq & Co. Advocates

Court Assistant Chrispo Aura

