



Republic v Clerk, Kisii County Assembly & 3 others; Atika (Interested Party); Nyamwange & 4 others (Exparte Applicants) (Judicial Review E013 of 2023) [2023] KEELRC 2059 (KLR) (30 August 2023) (Ruling)

Neutral citation: [2023] KEELRC 2059 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW E013 OF 2023

S RADIDO, J

AUGUST 30, 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 ETTITION 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) 1 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

BENSON MOCHAMA ATIKA INTERESTED PARTY

AND

NANCY NYANGANYI NYAMWANGE EXPARTE APPLICANT

JACKSON BOGONKO EXPARTE APPLICANT

PATRICK MOGUSU MOMANYI EXPARTE APPLICANT

JOHN MACHUKA NDEGE EXPARTE APPLICANT

JUDY OMARE NYAKERARIO EXPARTE APPLICANT

RULING

1. On 21 June 2023, the Court gave elaborate directions with a view to delivering judgment on the substantive Motion on 10 August 2023.
2. Instead of complying with the directions, the ex-parte applicants filed a Motion under a certificate of urgency dated 13 July 2023 seeking orders:
 - (1) spent.
 - (2) The Honourable S. Radido J be pleased to humble himself and respectfully recuse himself from the hearing and determination of this matter.
 - (3) This matter be allocated to a different judge within the station and/or within the republic of Kenya.
 - (4) Costs of this application be in the cause.
3. The primary grounds in support of the Motion were that by my conduct and the public conduct and utterances by the Governor of Kisii County, I had lost the judicial independence and impartiality required of an arbiter.
4. The particulars were that the directions I had given on 21 June 2023 to deliver the judgment on 10 August 2023 through email during vacation was doubtful and not genuine; that different judges issued orders which I had declined to issue; that my failure to preside over a related matter on 24 May 2023 was suspicious since the Governor had publicly stated he would use all available means to ensure I did not sit; that my failing to sit on 24 May 2023 due to illness was doubtful; that I had vacated orders issued by other judges without a care and it is the Court of Appeal which intervened to restore orders which I had vacated in order to preserve the subject matter of the litigation; that I had directed the parties to file submissions on an unpleaded matter being Nairobi Misc Civil Application No.E001 of 2023 (transferred to Kisumu and numbered Kisumu Judicial Review No. 1 of 2023); that the 5th Respondent had disclosed the contents of a Ruling I delivered on 21 June 2023 in advance; that I had declined to address one of the orders sought in the aforesaid Ruling; that I had misapprehended the principle of res judicata in the Ruling; that credible sources had revealed I was a longtime friend of the advocate for the 5th Respondent and that I had been in constant communication with him since the inception of the proceedings.



5. The 1st Interested Party filed a replying affidavit in opposition to the Motion on 8 August 2023 and submissions on 9 August 2023.
6. In the view of the Interested Party, the instant application was a wild chase to obtain stay orders which had been declined and no grounds warranting recusal had been given by the ex-parte applicants.
7. According to the Interested Party, the application was motivated by the fact that the ex-parte applicants were displeased with the Court's conduct of proceedings and directions.
8. The 1st to 3rd Respondents filed a replying affidavit through the acting Clerk of the County Assembly on 15 August 2023.
9. According to these Respondents the recusal application was made in bad faith as the alleged video featuring utterances by the Governor had not been served on them despite written request and was an abuse of the court process since the parties had agreed a consent before the Court of Appeal to avoid a multiplicity of applications and focus on the substantive judicial review Motion for which a judgment date had been set.
10. On credible intelligence of long term friendship between one of the advocates and the Judge, it was asserted that no affidavit or evidence of such friendship had been placed before the Court.
11. The Governor filed Grounds of Opposition on 9 August 2023 and the County Secretary filed a replying affidavit on behalf of the Governor on 17 August 2023. In the affidavit it was deponed that the application was not only spurious but did not meet the threshold for recusal.
12. It was also averred that the ex-parte applicants had withheld material facts concerning the filing and existence of Kisumu Judicial Review No. E012 of 2023 while filing the application for leave in these particular proceedings and that the proceedings were only withdrawn upon service of a Notice of Preliminary Objection that the proceedings were dead on arrival.
13. The County Secretary also deponed that the ex-parte applicants did not disclose in these proceedings the prior proceedings in Kisumu JR No. E012 of 2023, and that these proceedings were an attempt at forum shopping.
14. In the same vein, the ex-parte applicants were accused of securing orders from Nairobi in Nairobi Misc Civil Application No. E015 of 2023 without disclosing that the orders sought had been declined by the Court sitting in Kisumu.
15. The County Secretary alleged bad faith on the part of the ex-parte applicants by failing to appear before the Deputy Registrar on 24 May 2023 for directions.
16. With reference to the directions issued on 21 June 2023 to deliver the judgment virtually through e-filing portal, it was stated that they were issued in the presence of all the parties and it was a common practice with the advent of virtual Courts due to Covid19 public health pandemic, and were in tandem with the overriding objectives of the Court.
17. Responding to allegations of impartiality with respect to Nairobi Misc Civil Application No. E015 of 2023 which was transferred to Kisumu and renumbered Kisumu Judicial Review No. 1 of 2023, the 4th Respondent asserted that the judge who handled the application made an express order that further directions be given by the Court sitting in Kisumu and that despite undertaking to serve, the ex-parte applicants had failed to serve or disclose the existence of the said proceedings.
18. On the alleged utterances by the Governor, the County Secretary deponed that the ex-parte applicants had declined to serve the video/audio clip despite written request on 11 August 2023.



19. The ex-parte applicants filed a supplementary affidavit and submissions on 28 August 2023.
20. The affidavit and submissions reiterated the assertions made earlier and further argued that the judge was dancing to the tune of the Respondents with a view to sabotaging the ex-parte applicants quest for justice.
21. The 4th Respondent filed submissions on 28 August 2023 while the 1st to 3rd Respondents filed joint submissions on 29 August 2023.
22. The Court has given due consideration to all the material placed before it.

The Law On Recusal

23. The Courts have dealt with and settled the law and principles governing recusal of a judge or judicial officer from a suit.
24. In *Jan Bonde Nielsen v Herman Philipus Steyn & 2 Ors* (2014) eKLR the Court observed that:

The appropriate test to be applied in determining an application for disqualification of a Judge from presiding over a suit was laid down by the Court of Appeal in *R v David Makali & Ors C.A Criminal Application No Nai 4 and 5 of 1995* (Unreported), and reinforced in subsequent cases. See *R v Jackson Mwalulu & Ors C.A. Civil Application No Nai 310 Of 2004* (Unreported) where the Court of Appeal stated that:

...When courts are faced with such proceedings for disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established...

25. In *Jasbir Rai and 3 Ors v Tarlochan Singh Rai and 4 Ors* (2013) eKLR, the Supreme Court observed that:

The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable.

Analysis

26. For purposes of this Ruling, the primary grounds in support of the recusal application can be categorised broadly into two, conduct of the judge and utterances of the Governor.
27. Facts and evidence forming the basis for a recusal application should be pleaded and established by the party asserting impartiality or bias.
28. The test for finding grounds for recusal should be seen from the prism of the fair minded and informed member of the public.

Utterances And Conduct By The Governor

29. The ex-parte applicants first alleged that a copy of the Ruling delivered by the Court on 21 June 2023 was leaked by the Respondents two days before delivery.



30. Regrettably, the ex-parte applicants have not put before the Court any evidence to demonstrate that the Ruling was leaked or that the Court was party to such leakage.
31. The ex-parte applicants also alleged of long held personal friendship between the advocate for the 5th Respondent and the Court. No evidence or foundation of such allegation was placed before the Court.
32. There were also allegations that the Governor had made certain public utterances at a meeting with teachers within the County concerning the proceedings. A video/audio clip was called in aid of the allegation.
33. The Governor is a politician and the notoriety of politicians to make utterances regarding court proceedings cannot be pushed behind the wall. However, the ex-parte applicants did not draw any factual nexus between such utterances, if true and the impartiality or independence of the Court.
34. Common sense would have required the ex-parte applicants to move the Court in such a way that the veracity of such alleged utterances would be interrogated fully and not through a recusal motion.
35. The Court will now examine the record.
36. The record confirms that the ex-parte applicants filed an application seeking leave to commence judicial review proceedings before this Court on 11 April 2023 (Kisumu Judicial Review No. E012 of 2023).
37. The Court granted leave but declined to order the leave to operate as a stay (the same proceedings were withdrawn on 6 June 2023).
38. Two days later, on 13 April 2023, the ex-parte applicants moved to the Court in Nairobi seeking leave to commence judicial review proceedings through Nairobi Misc Civil Application No. E015 of 2023 (Kisumu Judicial Review No. 1 of 2023).
39. The Court in Nairobi granted the leave but declined to order the leave to operate as a stay. The Court directed that the proceedings be transferred to this Court for further directions.
40. This Court only became aware of these transferred proceedings when the file was placed before it on 13 June 2023, for withdrawal.
41. The Respondents were absent. Having secured leave, practice and procedure required the ex-parte applicants to have notified the other parties of the transferred proceedings. The Respondents deny having been notified or served with the proceedings.
42. Would a fair minded and well informed member of the public aware of this fact impugn the decision of the judge to ask the parties to address it on the legal effect of the transferred proceedings on the instant proceedings on the ground that the judge was intruding into matters not pleaded or dancing to the tune of the Respondents? The ex-parte applicants well know the answer to the question.
43. On 24 April 2023, the ex-parte applicants filed a third application on the same grounds before the Court in Kisumu (Kisumu Judicial Review No. E013 of 2023).
44. Yet again, the ex-parte applicants did not disclose the existence of Nairobi Misc Civil Application No. E015 of 2023 or Kisumu Judicial Review No. E012 of 2023) when filing Kisumu Judicial Review No. E013 of 2023 (instant proceedings).
45. Confronted with this record, the Court directed the parties to address the effect of the transferred proceedings in the instant proceedings so that the Court would deal with any legal effect in the judgment (the directive has not been set aside or reviewed and it is the hope of the Court to delve into the question after going through the parties' submissions in the substantive Motion).



46. The unfolding status of the record must have upset the game plan of the ex-parte applicants and prompted the filing of the recusal application.
47. A Court has discretion to issue ex-parte orders during an application for leave to commence judicial review proceedings. Can the mere fact that a Court declines to issue ex-parte stay orders and directs that the application be served as I did in Kisumu Judicial Review No. E012 of 2023 be seen by a fair minded and well informed member of the public as a conduct showing partiality or lack of independence?
48. It is noteworthy that the Court in Nairobi equally declined to issue ex-parte stay orders on 13 April 2023.
49. In the same vein, the ex-parte applicants suggested that my failure to sit on 24 May 2023 due to illness was attributable to the utterances by the 4th Respondent that he would ensure that the ex-parte applicants would not succeed in their search for justice.
50. The Court cannot respond to or address these sorcer(ies) or voodoo-like allegations and leave it to the ex-parte applicants to examine their consciences deeply considering the frailty of the human body.
51. The ex-parte applicants have not placed before the Court any grounds upon which such a conclusion may be drawn.
52. The full facts as gleaned from the record and examined against the prism of the fair minded and informed member of the public does not yield to the request by the ex-parte applicants for my recusal.
53. In the Court's view, the application for recusal was filed for collateral purposes and not in a genuine desire to ensure or achieve the objective purpose of expeditious and proportionate determination of the proceedings. It is no wonder the ex-parte applicants threat to use all arsenal possible to prosecute their grievances in and through other avenues.
54. Before concluding, the Court does not find it necessary or useful to address in this Ruling the ex-parte applicants supposed grievances on the findings it made on the question res judicata and orders issued by other judges save to state that the Court gave a considered Ruling on 21 June 2023 and the ex-parte applicants appealed against the Ruling.
55. Having failed to meet the legal threshold, the application for recusal is found without merit and is dismissed with costs to the Respondents and Interested Party.

DELIVERED VIRTUALLY, DATED, AND SIGNED IN KISUMU ON THIS 30TH DAY OF AUGUST 2023.

RADIDO STEPHEN, MCIARB

JUDGE

