



**Republic v Ag Director, Bandari Maritime Academy & 2 others; Ogogoh (Exparte Applicant);
National Council for persons with Disabilities & another (Interested Parties) (Judicial
Review Application E001 of 2023) [2023] KEELRC 2522 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2522 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E001 OF 2023
M MBARŪ, J
OCTOBER 19, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**AG DIRECTOR, BANDARI MARITIME ACADEMY 1ST RESPONDENT
BOARD OF DIRECTORS, BANDARI MARITIME ACADEMY 2ND
RESPONDENT**

BANDARI MARITIME ACADEMY 3RD RESPONDENT

AND

JULIUS OGOGOH EXPARTE APPLICANT

AND

**NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES INTERESTED
PARTY**

KENYA PORTS AUTHORITY INTERESTED PARTY

RULING

1. The respondents, through the office of the Attorney General filed Notice of Preliminary Objections dated 1st September 2023 on the grounds that;
 - a. The application seeks for an Order of Certiorari well after 6 months after the impugned decision was made contrary to the provisions of Order 53 (3)(1) and Section 9(3) of the Law Reform Act which provides for a time period of 6 months. The impugned decision was made on 2nd September 2023 and the suit was filed on 27 June 2023.



- b. The Service of the Notice of Motion Application offends the provisions of Order 53(3)(1) as the same was filed 21 days of the grant of leave.
 - c. The suit has since been overtaken by events as the prohibition order sought against the 3rd respondent from employing more staff until KPA seconded staff are consulted has since been done and all the seconded staff except 1 opted to leave the academy and who has since been absorbed.
 - d. The suit is frivolous, vexatious, time barred, bad in law and mounts to abuse of court process.
- Therefore, the suit should be struck out at the first instance.
2. The respondents submitted that the ex parte applicant filed a notice of motion dated 15 July 2023 pursuant to leave granted on 27 June 2023 seeking for orders of Certiorari to remove into this court and quash the advertisement of 14 senior management positions of the 3rd respondent and applications received before 7 November 2022. That an order of prohibition be issued prohibiting the 3rd respondent from advertising, recruiting or appointing employees or implementing a new organisational structure and policies.
 3. The objections by the respondent are on the basis that through Legal Notice No.233 of 2018, the 3rd respondent was established as a state corporation with mandate to develop academic and vocational skills and to provide competent maritime human resource for sustainable blue economy. Before, the 3rd respondent was a department of the Kenya Ports Authority (KPA), the 3rd interested party. Being a new institution, the government seconded staff to the 3rd respondent and in this regard, KPA seconded 35 employees to the 3rd respondent for a limited period of 4 years, 2018 to 2022.
 4. In October 2022, the 3rd respondent advertised 14 positions for submission on or before 7 November 2022. The ex parte applicant took issue with the advertisement and filed this application challenging the legality of the recruitment process and on the grounds that the advertisement was done before the KPA seconded employees were sensitised and given priority but the application offends the provisions of order 53 rule 2 and 3(1) of the Civil Procedure Rules, and is overtaken by events hence these objections.
 5. The respondents submitted that Order 53 rule 2 of the *Civil Procedure Rules* required the ex parte applicant to move court for an order of Certiorari within 6 months of the impugned decision as reiterated in Section 9(3) of the *Law Reform Act*. Leave to apply for an order of Certiorari should not be granted unless the application for leave is made inside 6 months after the date of the decision being challenged as held in *Republic v Council of Legal Education & another ex parte Sabiha Kassamia & another [2018]* eKLR. The prescribed period of 6 months within which an application seeking for an order of *Certiorari* may be brought starts running from the date the challenged decision issued.
 6. The ex parte applicant ought to have moved court on or before 2 March 2023 when time lapsed and hence the application before court offended Order 53 rule 2 and section 9(3) of the *Law Reform Act* and further order 53 rule 3(1) which requires that when leave has been granted for an order of mandamus, the application should be made within 21 days by notice of motion and then upon such leave being granted, there should be 8 clear days for service.
 7. The ex parte applicant was granted leave to institute suit on 27 June 2023 and had 21 days to file and serve the substantive motion on or before 17 July 2023. He only filed the application on 20 July 2023, 3 days after time lapsed and hence offends Order 53 rule 3(1). In the case of *Ismail Kibet Hassan v Nakuru Kadhi Court [2010]* eKLR, the court dismissed the suit after the application was served outside the 8 days' period.



8. The respondents further submitted that the application by the ex parte applicant has been overtaken by events as KPA employees were given a choice to decide whether to continue serving the 3rd respondent. All but one opted to remain. This renders the application moot and the court should not issue orders in vain.
9. The 1st interested party, Public Service Commission attended and supported the respondents in their objections to the application and the written submissions.
10. The ex parte applicant did not attend or file any written submissions.

Determination

11. Indeed, the ex parte applicant opted to move the court through the judicial review proceedings. Under such procedures, Rule 7(2) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* requires strict adherence to the provisions of Section 8 and 9 of the *Law Reform Act* and Order 53 of the *Civil Procedure Rules*:
 - (2) A person who wishes to institute judicial review proceedings shall do so in accordance with section 8 and 9 of the *Law Reform Act* and Order 53 of the *Civil Procedure Rules*.
12. The choice of procedure adopted then becomes relevant with regard to the objections raised by the respondents that the ex parte applicant in the application offends the provisions of Order 53 rule 2 and 3(1) of the *Civil Procedure Rules* read together with Section 9(3) of the *Law Reform Act* and more fundamentally that the application is overtaken by events and there is nothing to be secured.
13. The time limitations under Order 53 rule 2 is to allow an applicant move the court instantly to secure the subject matter before it changes, evolves or implemented and the character vicissitudes. Hence, the ex parte applicant is allowed leave to apply for an order of certiorari to remove the decision not later than 6 months after the date it issued.
14. In this case, once leave was granted, the ex parte applicant should have filed the substantive motion and served the respondents and interested parties within the provisions of Order 53 rule 3(1), in 8 clear days before the date of hearing.
15. The ex parte applicant applied for leave herein seeking orders of certiorari and prohibition on 27 June 2023 over matters relating to advertisements closing on 7 November 2022, a period of over 6 months. This is fatal to his application.
16. Upon obtaining leave of 21 days to file the substantive motion, the ex parte applicant did not do so until 20 July 2023 way after the allocated time and without reverting to court for extension of the leave granted. This in itself invalidated the leave granted and to move a step further was without good foundation hence rendering the motion invalid.
17. The respondent's submissions that the substantive issues in the motion have been overtaken by events is not challenged. The ex parte applicant did not attend to offer any explanation, written submissions or any matter that the subject of his application and purpose for moving court is still alive. Court orders should not issue in valid. This is aptly captured by the Court of Appeal in the case of *Eric V.J. Makokha & 4 others v Lawrence Sagini & 2 others [1994]* eKLR;

... an invocation of the equitable jurisdiction of the court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would



not grant its remedy if such order will be in vain. As is said, “Equity, like nature, will do nothing in vain”.

18. Above addressed, in employment and labour relations, where a party is keen to seek judicial review relief, Rule 7(3) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 should suffice. The ex parte applicant chose the route of judicial review proceedings, but failed to abide the procedural requirements therefrom and therefore he should meet the costs due to the other parties.
19. Accordingly, objections herein by the respondents through notice dated 1st September 2023 are found with merit and the application by the ex parte applicant herein found in abuse of court process and is hereby dismissed. Costs of Ksh. 50,000 awarded to the respondents. The 3rd interested party shall bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 19TH DAY OF OCTOBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

