



Republic v Country Government of Turkana & another; Koech (Exparte Applicant); Public Service Commission (Interested Party) (Judicial Review 4A of 2023) [2023] KEELRC 2469 (KLR) (17 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2469 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
JUDICIAL REVIEW 4A OF 2023
HS WASILWA, J
OCTOBER 17, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNTRY GOVERNMENT OF TURKANA 1ST RESPONDENT

THE COUNTY SECRETARY TURKANA COUNTY 2ND RESPONDENT

AND

JOSEPH KIPRONO KOECH EXPARTE APPLICANT

AND

PUBLIC SERVICE COMMISSION INTERESTED PARTY

RULING

1. Before me for determination is the ex parte Applicant’s Amended Chamber Summons dated 2nd May, 2023 and filed on 3rd May, 2023, seeking the following orders: -
 - a. Spent.
 - b. That this Honourable Court be pleased to issue an order granting leave to the ex parte applicant to file an application for grant of judicial review order of mandamus compelling the 1st and 2nd Respondents to comply with the orders of the Court issued in Nairobi ELRC Misc. E101 of 2022: Joseph Kiprono Koech –V- County Government of Turkana & Another and the directive by the Public Service Commission to release all the withheld salary and allowances amounting to Kshs. 9,308, 352 to the ex parte applicant together with interest of 14% p.a accrued thereto from 1st March, 2013 till payment in full.



- c. That this Honourable Court be pleased to make an order as to costs.
 - d. That this honorable court be pleased to make any such or further orders as it may deem necessary to grant in the interest of justice.
2. The application is premised on grounds that: -
- a. The ex-parte Applicant was an employee of the County Government of Turkana, retained as the Chief Finance Officer until his suspension.
 - b. That he filed his case in the Employment and Labour Relations Court at Nakuru serialized as ELRC Cause No. 92 of 2014: Joseph Kiprono Koech –v- County Government Of Turkana & Another, which upon determination, the Court ordered his reinstatement without loss of benefit, as well as payment of all withheld salaries and allowances within 14 days, failure of which the same would accrue interest at 14% pa from 1st March 2013 till payment in full. The decree was extracted on 17th October 2014.
 - c. It is stated that due to the said orders, the ex parte applicant received frequent frustrations and targeted attacks from offices of the County Government of Turkana, forcing him to request the Public Service Commission to direct the 1st and 2nd Respondents to abide by the Judgement and to also transfer him from the County Government of Turkana.
 - d. He was later transferred from the County Government of Turkana to the National Government and the 1st and 2nd Respondent were directed to release all the withheld salary and allowances to the ex-parte Applicant in line with the court's Judgment.
 - e. Due to the Respondents' adamancy, the ex parte applicant filed Nairobi ELRC MISC. E101 of 2022; Joseph Kiprono Koech –V- County Government of Turkana and Another, seeking leave to execute against the County Government of Turkana, which application was allowed.
 - f. Despite several follow ups, demands and requests to have the Respondents release his salary, allowances and accrues interest, the Respondents refused to release them and continues defying the court's Judgment.
 - g. The ex-parte Applicant, states that he is apprehensive that the Respondent defiance will persist if this Honourable Court does not intervene and remedy the situation. This necessitated the filling of this Application seeking leave to file judicial review.
 - h. It is contended that unless the orders sought therein are granted, the ex-parte Applicant will continue suffering loss as he has waited to enjoy the fruits of the Judgment in his favour since 2014, and he has unfortunately been unable to do so, 9 years down the line.
 - i. He states that it is in the interest of justice that the ex-parte Applicant is granted leave to file an Application for grant of judicial review order of mandamus compelling the Respondents to pay the amounts as directed by the court.
 - j. He added that the continued refusal by the Respondents to release the amount as directed by the court to the ex-parte Applicant constitutes unfair administrative action. Moreover, that this Honourable Court has the authority to grant the reliefs sought herein.
3. The application is supported by the affidavit of the ex parte applicant sworn on 2nd May, 2023, in which he reiterates the grounds set out in the application.



4. The application is opposed by the Respondents, who filed a replying affidavit deposed upon on 18th May, 2023 by Peter Eripete, the County Secretary, Turkana County.
5. He stated that the Ex parte applicant obtained judgment in his favour in Nakuru ELRC No. 92 of 2014 for payment of withheld salary and allowances from the date of suspension to the date of judgement. Additionally, that he was tasked with computing the amount owing for the purposes of recording the quantum.
6. Following the said direction, computation was done and recorded in Court on 5th December, 2014 where the ex parte Applicant was to be paid withheld salaries and allowances and all damages of Kshs 4,726, 109. On 10th December, 2014, advocates for the parties calculated the total dues owing to the Ex parte applicant, which was made up of the general damages recorded in court and party & party costs of Kshs 529,000, summing up to Kshs 5,255,109.
7. Upon being served with the said computations, the Respondents paid the said amount in full, through their advocates, Rachier & Amollo Advocate to the ex parte Applicant advocate, M/s Mongeri and Co Advocates via Account number 027202xxxx held in Barclays Bank, Nakuru West Branch and a confirmation letter done to the affiant herein on 20th January, 2025.
8. He states that the ex parte applicant was immediately reinstated to employment following direction received from the County Public Service Board on 19th June, 2015. He was then reinstated to the payroll, posted to the ministry of finance and planning and paid all his salary arrears up to May, 2015.
9. The affiant stated that the ex parte applicant wrote to him severally seeking to be paid facilitative allowances, annual increment, airtime allowances and salary top up when he was not entitled to these allowances because he was suspended and not serving the county.
10. The deponent stated that despite reinstating the ex parte applicant and deploying him to the ministry of finance and, he failed to report to his work station on allegation that he was not provided with a desk to work from. He then re-deployed him to the ministry of pastoral economies and fisheries where he worked from 11th November, 2015 and thereafter after deserted work, forcing the county to stop his December, 2015 salaries.
11. He states that he learnt latter that the ex parte applicant was working for Kenyatta University and then moved to the Council of Governor office. It was until 14th October, 2016, that the county received official communication from the Principal Secretary, Ministry of Devolution that the ex parte applicant had been transferred from Turkana County Government to the National Government.
12. The affiant reiterated that the ex parte applicant was paid the entire decretal sum that included all salaries and allowances up to 30th November, 2014. In any event that the judgement the ex parte applicant is seeking to enforce was issued on 17th October, 2014, more than Eight (8) years ago which is outside the six (6) months limitation period recognized under the law. Therefore, it will not serve any purpose to allow the Application when the proceedings are statutory barred.
13. The affiant stated that the ex parte applicant is using the process herein to unjustly enrich himself when he has already been fully paid. Furthermore, that the ex parte applicant has not satisfied the principles to grant the orders sought.
14. He prayed for the application herein to be dismissed with costs for being abuse of court process.
15. In rebuttal, the ex parte applicant filed a supplementary affidavit sworn on 24th May, 2023. Admitted to receiving the decretal sum of Kshs 4,726,109. But that he is currently claiming underpayments that arose from the registration of CBA between association of local government employers and



- Kenya Local Government workers Union, that took effect from 1st March, 2013. That the said CBA prescribed the basic salary for person in job Group JG”P” at Kshs 72,680 between 1st July, 2013 and 30th June, 2014 and Kshs. 74,130 between 1st July, 2013 and 30th June 2015. Therefore, that he was underpaid for the period between March, 2013 and November, 2014 in that he was paid Kshs 64,795 for the months of April-August 2013 and Kshs 66,245 for the months from September- December 2013. Further that he was paid basic salary of Kshs 30,540 and Kshs 32,715 instead of Kshs 72, 680 and Kshs 74,130 respectively all adding up to Kshs 563, 649.
16. The ex parte applicant stated also that for the period between December, 2015 and December, 2016, the Respondent withheld his salaries totaling to Kshs 8,744,702. Also that when he was deployed to another ministry in the County, he was given a job in a lower rank that affected his salary and allowances, an issue that he appealed to the Public Service Board which board ordered by its decision of 24/8/2016 for the payment of his withheld salaries and allowances and for his transfer to the national government.
 17. It is his case that the Respondent despite receiving express orders from Public Service Board, they withheld his IPPD Data and Last pay certificate until September, and October, 2020 respectively. But that they continue to withhold his salaries despite him computing the salaries arrears owing which stood at Kshs 9,308,352 calculated as per the CBA that took effect from March, 2013.
 18. He stated that armed with the orders by the Public Service Boards made on 24.3.2016 and 24.8.2016, for the release of his withheld allowances and accrued interest, he filed an application in Nairobi ELRC MISC Application No. E101 of 2011; Joseph Kiprono Koech –V- County Government of Turkana and Another agitating for compliance of the decision by PSC and for leave to execute against the County Government of Turkana.
 19. The application filed in Nairobi was undefended and the Court issued Orders dated 23rd September, 2022 adopting the decision of PSC issued on 24.3.2016 and 24.8.2016 to the effect that the ex parte applicant is to be paid accrued salary and allowances of Kshs 9,308,352 together with interest at 14% p.a till payment in full. Therefore, that the Application herein seek to enforce payment of the said Kshs 9,308,352.
 20. He urged this Court to allow the Amended Chamber Summons to file Judicial Review Application for the enforcement of the Orders granted by PSC.
 21. Direction were taken for the Amended Chamber Summons to be canvassed by written submission with the ex parte Applicant filing on 23rd June, 2023 and the Respondents on 25th July, 2023.

Ex parte Applicant’s Submissions.

22. The Applicant submitted on two issues; whether the ex parte Applicant should be granted leave to institute Judicial Review proceedings and who should bear costs of this Application.
23. It was submitted that the ex-parte Applicant should be granted leave to institute Judicial Review proceedings against the actions and/or failure to act by the Respondents. He argued that Judicial Review is concerned with the decision making process and not the merits of the decision itself. Therefore, that leave should ordinarily be granted, if on the material available the court considers that there is an arguable case.



24. The Ex parte Applicant submitted that the reasons for applying for leave to institute judicial review proceedings were explained by Waki J. (as he then was) in *Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others*, Mombasa HCMCA No. 384 of 1996, that
- “...leave is meant to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless; to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration; to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error; and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived...leave may only be granted if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant; the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review.
25. Accordingly, that a court need not delve deeply into the arguments by the parties and conduct a mini-trial, but should only convince itself on a cursory glance of the material presented before it that that the ex-parte Applicant has a prima face case.
26. Based on the foregoing, he submitted that the material presented before this Honourable Court demonstrate that there is a case for grant of judicial review remedy of mandamus to compel the Respondents to pay the ex-parte Applicant Kshs. 9,308,352 in accordance with the Order dated 23rd September 2022, annexure “JKK-5” to the verifying affidavit dated 30th January 2023.
27. Furthermore, that the Respondent were served with the said orders but failed to comply with it. Thus the ex parte applicant intends to have this Honourable Court issue an order of mandamus after hearing the parties in a substantive application for grant of orders of mandamus compelling the respondents to perform this duty as imposed by the court order issued on 23rd September, 2022 in Nairobi ELRC Misc. E101 of 2022.
28. It was submitted that since the Respondents enjoy immunity from execution and attachment of property in satisfaction of a decree, the decree can only be enforced through an order of mandamus compelling the Accounting Officer of the 1st Respondent to pay and satisfy the decree sum contained in the order of 23rd September, 2022 as was held in the case of *Republic v County Government of Kiambu Ex Parte Laban J Macharia Muiruri* [2021] eKLR.
29. In conclusion, the ex parte applicant stated that he has demonstrated a prima facie case for grant of leave to institute proceedings for the judicial review remedy of mandamus compelling the Respondents to perform its public duty.
30. On costs it was submitted that costs follow the event, and as such, the cost of this application be awarded to the Ex-parte Applicant.

Respondents’ Submissions.

31. The Respondents identified three issues for determination; whether the Ex parte applicant has any valid claim against the Respondent capable of being enforced by Judicial review, whether the Court can grant leave for an application of an order of certiorari upon the lapse of the statutory period of six months prescribed under section 9 of the law reforms Act and whether the applicant’s amended



Chamber Summons is within the statutory period of six months prescribed under section 9 of the Law Reform Act.

32. On the first issue, the Respondents submitted that parties are bound by their pleadings and being that the orders sought to be enforced in the Judicial Review proceedings emanates from Judgement of Nairobi ELRC MISC. E101 of 2022 there is no judgement, decree or orders that has been annexed to the verifying affidavit of the Amended Chamber Summons. This, he argued is a confirmation that there is no valid claim in favour of the applicant that remain outstanding.
33. On the second issue, it was submitted that section 9(2) and (3) of the Law Reforms Act stipulates the timelines within which applications seeking leave to commence Judicial Review writs are filed. This Section is mirrored in Order 53 Rule 2 of the Civil Procedure Rules, capping the time to file such applications at 6 months or other shorter period. Conversely, that ex parte applicant herein in his amended Chamber Summons seeks to enforce Orders issued in 2014, which orders cannot be enforced because they are statute barred.
34. To support the argument above, the Respondent cited the case of Republic v Mwangi Nguyai & 3 Others Ex Parte Haru Nguyai [2013]Eklr, where the court held that;-

“Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognized that judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve million and sometimes billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order their affairs in the light of such administrative decisions. The financial public in particular requires decisiveness and finality in such decisions. People should not be left to fear that their investments or expenditure will be wasted by reason of belated challenge to the validity of such decisions. The economy with the current volatile financial markets cannot afford to have such uncertainty. As such judicial review remedies being exceptional in nature should not be made available to indolent who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes.”

35. They also relied on the case of Republic v Council of Legal Education & Another ex parte Sabiha Kssamia & Another [2018] eKLR where the Court relied in the Court of appeal decision in Wilson Osolo v John Ojiambo Ochola & Another [1995] eKLR the Court of Appeal expressed itself thus:-

“It can readily be seen that Order 53 Rule 2 (as it then stood) is derived verbatim from Section 9(3) of the Law Reform Act. Whilst the time limited for doing something under the civil Procedure Rules can be extended by an application under order 49 of the Civil Procedure Rules that procedure cannot be availed of for the extension of time limited by statute, in this case, the Law Reform Act”. There is no provision for extension of time to apply for such leave in the Limitation of Actions Act (cap 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here.”

36. On the third issue, the respondents submitted that amendment of pleadings without leave of court can only be done before pleadings are closed and before the cause of action is statute barred. So that if the court was to accept the Orders issued on 23rd September, 2022 for enforcement, then the amendment



ought to have been done latest on 24th March, 2023. Being that the amendment of the Chamber Summons was effected on 2nd May, 2023, the amendments are still time barred and should be rejected by this Court.

37. In conclusion, it was submitted that the ex parte applicant has not demonstrated a prima facie case. Secondly that even if the court was to accept the decision of 23rd September, 2022, as the one the ex parte applicant is seeking to enforce, the same is time barred and will not serve any purpose for this Court to allow the Application for filling of Judicial Review.
38. The Respondents prayed for the Application to be dismissed for being frivolous and an abuse of Court process.
39. I have examined the averments and submissions of the parties herein.
40. The applicant seeks leave to file JR application against the respondents herein alleging none payment of his withheld salaries and allowances as ordered by the PSC and by this court in a claim filed by the applicant.
41. The respondents content that they paid the applicant the dues sought and they owe the applicant nothing.
42. In determining this application, I note that the purpose of applying for a JR application is to eliminate any frivolous vexatious and hopeless applications and save court valuable judicial time.
43. Having considered the averments of the parties herein, I note there are triable issues which issues can only be considered in a full application being filed with all the relevant documents that would enable the court to resolve the issues to their finality.
44. In my view this application is not frivolous and ought to be filed to enable this court consider it in its finality.
45. I find the application merited and I allow the applicant to file the JR application as sought.
46. The application be filed within 14 days from the date of this ruling.
47. Costs in the application.

RULING DELIVERED VIRTUALLY THIS 17TH DAY OF OCTOBER, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Oira for Exparte Applicant – present

Kisaka for respondent – present

Court Assistant – Fred

