



Nekesa v County Assembly of Bungoma & 3 others (Employment and Labour Relations Cause E001 of 2023) [2023] KEELRC 3154 (KLR) (29 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 3154 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE E001 OF 2023**

**JW KELI, J
NOVEMBER 29, 2023**

BETWEEN

RACHEL RAEL NEKESA CLAIMANT

AND

COUNTY ASSEMBLY OF BUNGOMA 1ST RESPONDENT

BUNGOMA COUNTY ASSEMBLY BOARD 2ND RESPONDENT

SPEAKER OF THE COUNTY ASSEMBLY OF BUNGOMA 3RD RESPONDENT

THE CLERK COUNTY ASSEMBLY OF BUNGOMA 4TH RESPONDENT

JUDGMENT

1. The Claimant aggrieved by the decision of the Respondents restraining her from board sittings of the 2nd Respondent and stopping her emoluments for reason of failure to resign before proceeding to participate in the 2022 general elections as a candidate filed claim dated 31st January 2023 seeking the following reliefs:-
 - a. A declaration that the Respondents decision to make Press advertisement titled Vacancy in the County Assembly service Board of Bungoma and/or Vacancy Title; Member of the County Assembly Service Board, which was published in various media platforms; including Daily News Papers/Prints between 25th January, 2023 to 26th January, 2023 and/or on other dates of publication within the media, inviting applications from eligible candidates to fill the vacancy in the office of the member of the county Assembly Service Board is unprocedural, illegal, unconstitutional and amounts to the infringement of the Claimant’s rights hence null and void.
 - b. This Honourable court be pleased to grant a permanent injunctive order, prohibiting the Respondents, whether by themselves or any of their employees or agents or any person claiming



to act under their authority from proceeding to give effect in any way whatsoever, the press advertisement titled vacancy title: Vacancy in the County Assembly Service Board of Bungoma and or Vacancy Title; Member of the county assembly service board, which was published in various media outlets; including Daily newspapers/prints between 25th January, 2023 to 26th January, 2023 and/or on other dates of publication in media, inviting applications from eligible candidates to fill the vacancy in the office of the member of the county assembly service board.

- c. That this Honourable Court be pleased to declare the composition of the 2nd Respondent, which currently constitutes only members of the male gender unconstitutional and hence the same cannot make any legal binding public duty and therefore the second and that all meetings and resolutions made by the 2nd Respondents when constituted of only members of the male gender; including the press advertisement titled vacancy in the county assembly service board of and the advertisements for the vacancy for the deputy clerk and principle finance officer which were published in the media including Daily newspapers/prints between 25th January, 2023 to 26th January, 2023 and/or on other dates within the media, inviting applications from eligible candidates to fill the said vacancies as null and void hence unconstitutional.
 - d. That this Honourable Court to quash the Respondent's press advertisement titled vacancy in the county assembly Service board of Bungoma and/or Vacancy title, member of the county assembly service board which was published in the media including Daily newspapers/prints between 25th January, 2023 to 26th January, 2023 and/or on other dates within the media, inviting applications from eligible candidates to fill the vacancy in the office of the member of the county assembly service board.
 - e. Costs for the suit.
 - f. Damages for infringement of the claimant's rights.
 - g. That subsequent to the grant of the prayers above the honourable court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders and/or favour the cause of justice.
2. The Claimant in support of the claim filed Claimant's list and bundle of documents dated 31st January 2023. The Court observed that the documents were the same annexures in the Bungoma ELRC JR Case 1 of 2022 filed by the Claimant against the Respondents. The further affidavit dated 24th October 2022 by the Claimant in the JR case was also relied on. The Claimant further filed a witness statement dated 31st January 2022 and received in Court on the 2nd February 2023.
 3. The claim was opposed.
 4. The 3rd Respondent, Emmanuel Mukhebi Situma, the Speaker of the Bungoma County Assembly, filed a replying affidavit dated 9th February 2023 received on court on the 10th February 2023 in opposition to the claim on behalf of all Respondents. The 3rd Respondent further swore and filed a supplementary affidavit dated 8th March 2023 and received in Court on even date.
 5. The Claimant filed affidavit in reply to the replying affidavit filed by the Respondents sworn by herself on the 12th February 2023 and received in court on the 15th February 2023.

The Claimant's Case

6. The Claimant gave particulars of the unconstitutionality of decision of the Respondents stopping her from sitting in the 2nd Respondent board and stoppage of her emoluments without hearing as follows:-



7. The Respondents' conduct is in breach of Articles 27(8), 175(c) and 197(1) of the Constitution.
8. The Claimant never tendered resignation and/or been dismissed, notified and called for any process that would remove her from office or heard on any issue on the conduct of her obligations towards the 2nd Respondent.
9. The Respondent's conduct amounts to constructive dismissal which is in itself illegal and unprocedural and an affront to the principles of public policy and natural justice hence unconstitutional.
10. The Claimant states that upon being served with letter dated 22nd September 2022 whose contents she stated remain ambiguous prompted her to file Bungoma ELRC JR NO. 1 OF 2022.
11. That during the pendency of the JR case the Respondent clarified the letter of 22nd September 2022 was suspension and not dismissal.
12. The court perused all the affidavits including those in the JR case as the Claimant relied on them (Claimant's list and bundle of documents dated 31st January 2023)and summarized the Claimant's case as follows:-
13. The Claimant was an employee of the 2nd Respondent holding the position of a female Board Member appointed pursuant to section 46(3) of the County Assembly Services Act, 2017(RRN 1 was the appointment letter). That on the 20th September 2022 she received a letter stopping her from duty and salary stoppage(RNN2) and that upon receipt of the said letter she filed the Judicial Review case No. 1 of 2022 seeking to quash the said letter dated 20th 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 Ethics and Anti- Corruption Commission (5th Respondent) in the JR CASE 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 1st to 4th Respondents and the 5th Respondent without her involvement vide letter dated 7th June 2022 and 20th 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 22nd September 2022 which the Claimant submits infringes on her rights as she was not invited or involved at any time.
14. The Claimant states that the contents of the letter dated 7th June 2022 by the 1st and 2nd respondents were made in bad faith and was discriminatory because some members of the 2nd Respondent contested for various seats in the 9th August 2022 General Elections without resignation for membership of the 2nd 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 the Claimant as the foregoing were not barred from continued service (RRN6). That the advice sought was from the wrong body the EACC and not the IEBC. That the EACC'S advice to the 4th respondent to stop her from being cleared or paid gratuity was ill advised and any action in that regard was premature.
15. The Claimant in her further affidavit as relevant to the suit, states that there is no requirement for one to resign as a member of the 2nd Respondent before applying for another job.



16. On the issue of gratuity the Claimant 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 2nd respondent. That legislature never intended for the board to have only one female.
17. In the upshot the Claimant states the action of the Respondents amounted to constructive dismissal and were unconstitutional. The Claimant 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.

The 1st to 4th Respondents' Case

18. The response was vide replying affidavit of Emmanuel Mukhebi Situma dated 9th February 2023 and his supplementary affidavit of 8th march 2023.
19. It was the 1st to 4th Respondents' Case that the claim was a knee jerk reaction calculated to frustrate the operations of the County Assembly of Bungoma. That the Claimant 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 Claimant as she was also a candidate and at no time did she challenge the composition of the Board(ES-4 and ES-5).
20. That the Claimant was duly nominated on Jubilee Party ticket and gazetted as a candidate for Member of Parliament of Webuye West Constituency(ES6a,b and c).
21. That the Claimant applied for her gratuity and other dues payable to her at end of term and payment were made(ES-7).
22. That the Claimant ought to have resigned on the 8th February 2022 as per the law. That the Claimant never tendered resignation from public office and campaigned for seat of Member of Parliament until election day and results announcement (E-8).
23. That it was the Ethics and Anti Corruption Commission which wrote a letter following the foregoing advising stoppage of the Claimant's salary pending investigations.
24. That the proposed recruitment was occasioned by the Claimant's acts of omissions and commissions.
25. That the Clerk is a not a member of the board but its secretary.
26. 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 Claimant's term.
27. The 3rd Respondent on behalf of all the Respondents filed a supplementary affidavit in response to the further affidavit by the Claimant of 12th February 2023 where he reiterated that the law with regard to resignation from public bodies prior to seeking elective positions only exempts the elected leaders currently serving terms in elective office from resignation. That the Claimant was not elected hence not exempt as a public officer from the requirement to resign so as to vie for an elective seat.



Hearing

28. The matter was listed for hearing on the 28th September 2023 when the Counsel for the Claimant, Mr. Udoto, informed the Court that the Claimant will rely on her written submissions in the Bungoma JR CASE NO. 1 OF 2022 dated 24th February 2023. The Respondents did not object to that manner of proceeding but sought to file fresh submissions which they did on the 30th October 2023.

Determination.

29. The Claimant relied on the submissions filed in Bungoma ELRC JR No. 1 of 2022 of which I delivered My judgment on 23rd June 2023. I will be highlighting the decision hereunder as it substantially applies to the claim. The Respondents in their fresh submissions in the claim addressed the following issues :-
- a. Whether indeed the 2nd Respondent herein is irregularly constituted.
 - b. Whether time is nigh for advertisement of the position of member of the 2nd Respondent
 - c. Whether the Claimant satisfied the conditions for the award of the Orders sought.
30. I do find that I addressed the three issues addressed by the Respondents in my Judgment in Bungoma JR Case no. 1 of 2022 between the parties and 2 other respondents. The Judgment was relied on by the Respondents in their submissions. I adopt my said Judgment to apply to the three issues. I will in the in judgment highlight the decisions in the said judgment for reference purpose.
31. In the Bungoma ELRC JR case no. 1 of 2022 judgment delivered on the 29th June 2023 I made the following decisions on the issues addressed therein by the parties herein related to same cause of action as in the instant case:-
32. On the issue of whether the decision by the Respondents on the Exparte Applicant was illegal, utravires and/or unfair, I decided as follows:-
33. The *Ex Parte* Applicant was appointed as a member of the Bungoma County Assembly Service Board with effective date of 24th 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)
34. The *Ex Parte* 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 6th respondent by issuance of certificate for the seat on the 29th May 2022 and subsequently gazetted as a candidate to vie for the said election vide Gazette Notice No. 7995 of 1st July 2022 by the 6th Respondent(EMS 2(a),2b and EMS 3).
35. The *Exparte* Applicant submits that she made consultations with the 5th and 6th 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 5th and 6th 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.
36. 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) e KLR 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 *Ex Parte* 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 *Ex Parte* Applicant was within the meaning of a public officer and that she was one.



37. 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..’
38. The court holds that the *Ex Parte* 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.”
39. On the issue whether the 1st to 4th Respondents acted in bad faith in stopping the *Ex parte* Applicant from sittings and emoluments and Whether 5th respondent’s advice to the 4th respondent to stop her from being cleared or paid gratuity was ill and any action in that regard was premature, I decided as follows:-
40. 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 1st to 4th respondents was legal and not premature as it was based on valid reason of violation of the law by the *ex parte* applicant.
41. On the issue whether the *Ex Parte* Applicant was discriminated against, I decided as follows:-
42. The [Elections Act](#) specifies the persons required to resign to participate in elections 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 1st to 4th 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 exparte applicant.
43. On whether Orders of judicial review were available to the exparte applicant, I decided as follows:-
44. The Court held above that that the Ex Parte 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 6th respondents (EMS 3) also annexed by the applicant as (RRN6). There were facts admitted by the Ex Parte Applicant and court finds there was nothing to investigate as the facts spoke for themselves.
45. 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.
46. The court finds that the act of stoppage of salary and payment of gratuity was consistent with the advice by the 5th 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 2nd 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 *Ex Parte* Applicant as the process leading to letter of 23rd September 2023 was backed by the law and the *Ex Parte* 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)e KLR 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 in dispute that the *Ex Parte* 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 finds that the letter of employment of the *Ex parte* 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 9th 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 proof 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.

47. 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 justifiability 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*.”

48. 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* 4th 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.’”
49. 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.

Final Decision On The Claim

50. Having outlined the foregoing My decisions in the Bungoma ELRC JR 1 OF 2022, I DO find the only issue outstanding for me to address in this cause is whether there was constructive dismissal of the Claimant and Whether the Claimant is entitled to reliefs sought.

Whether There Was Constructive Dismissal Of The Claimant

51. The Claimant did not file fresh submissions to address this issue she raised in her claim. The claim was that by stoppage of her sittings in the board and stoppage of emoluments she was constructively dismissed.
52. This Claimant’s position is found in her further affidavit of 12 February 2013. The Claimant did not deny she was duly nominated on the Jubilee political party ticket and gazetted as a candidate for Member of Parliament Webuye West Constituency at the 2022 General Elections. It was the Claimant’s position that there is no requirement for one to resign as the member of the 2nd Respondent before applying for another job (para 6 of the reply to the response). In reply to having applied for gratuity the Claimant stated that her application was for partial payment of gratuity and never demanded for full and final terminal benefits as she had not separated from the membership of the 2nd Respondent.
53. I already held that the Claimant was not elected board member of the 2nd Respondent and that she was obliged to resign before proceeding to be nominated and participate in the election which she did as a



candidate for Member of Parliament Webuye West Constituency at the 2022 General Elections. It was a legal requirement for the Claimant being a public officer to resign to enable her to participate in the elections and since she was cleared without compliance the Court holds the Claimant constructively resigned by her conduct from her job and severed her employee relationship with the Respondents. The *Elections Act* specifies the persons required to resign to participate in elections 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 Claimant as an appointed member who was not a member of a county assembly was not exempt from resignation. It is the finding of the Court the employer having paid the Claimant her gratuity their relationship had ended and no employer employee relationship exists anymore.

54. The Court upholds the decision by the Court of Appeal in *Public Service Commission & 4 others v Cheruiyot & 20 others* (Civil Appeal 119 & 139 of 2017 (Consolidated)) [2022] KECA 15 (KLR) (8 February 2022) where the Court of Appeal considered the status of employees who had left employment to get nominated for elections and sought to stay in service by holding as follows:-“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 the *Elections Act* were justifiable and reasonable and were not in contravention of any provisions of the *Constitution*..”(emphasis given) I do uphold the foregoing Court of Appeal decision to hold that the Claimant was required by law to have resigned and having proceeded to get nominated and be a candidate at the General Elections by that conduct she constructively resigned from office. I do hold the Claimant has no existing employer employee relationship with the Respondents.

Whether The Claimant Is Entitled To Reliefs Sought.

55. The Claimant sought the following reliefs:-
- a. A declaration that the Respondents decision to make Press advertisement titled Vacancy in the County Assembly service Board of Bungoma and/or Vacancy Title; Member of the County Assembly Service Board, which was published in various media platforms; including Daily News Papers/Prints between 25th January, 2023 to 26th January, 2023 and/or on other dates of publication within the media, inviting applications from eligible candidates to fill the vacancy in the office of the member of the county Assembly Service Board is unprocedural, illegal, unconstitutional and amounts to the infringement of the claimant’s rights hence null and void.
 - b. This Honourable court be pleased to grant a permanent injunctive order, prohibiting the Respondents, whether by themselves or any of their employees or agents or any person claiming to act under their authority from proceeding to give effect in any way whatsoever, the press advertisement titled vacancy title: Vacancy in the County Assembly Service Board of Bungoma and or Vacancy Title; Member of the county assembly service board, which was published in various media outlets; including Daily newspapers/prints between 25th January, 2023 to 26th



January, 2023 and/or on other dates of publication in media, inviting applications from eligible candidates to fill the vacancy in the office of the member of the county assembly service board.

- c. That this Honourable Court be pleased to declare the composition of the 2nd Respondent, which currently constitutes only members of the male gender unconstitutional and hence the same cannot make any legal binding public duty and therefore the second and that all meetings and resolutions made by the 2nd Respondents when constituted of only members of the male gender; including the press advertisement titled vacancy in the county assembly service board of and the advertisements for the vacancy for the deputy clerk and principle finance officer which were published in the media including Daily newspapers/prints between 25th January, 2023 to 26th January, 2023 and/or on other dates within the media, inviting applications from eligible candidates to fill the said vacancies as null and void hence unconstitutional.
 - d. That this Honourable Court to quash the Respondent's press advertisement titled vacancy in the county assembly Service board of Bungoma and/or Vacancy title, member of the county assembly service board which was published in the media including Daily newspapers/prints between 25th January, 2023 to 26th January, 2023 and/or on other dates within the media, inviting applications from eligible candidates to fill the vacancy in the office of the member of the county assembly service board.
 - e. Costs for the suit.
 - f. Damages for infringement of the claimant's rights.
 - g. That subsequent to the grant of the prayers above the honourable court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders and/or favour the cause of justice.
56. Having held that the Claimant by her conduct constructively resigned from her appointment as board member of the 2nd Respondent and that there exists no employer employee relationship between the parties then it follows that the Claimant is not entitled to any of the reliefs sought.

Conclusion

57. The Court holds that the Claimant constructively resigned from her employment by conduct and severed the employer employee relationship. The actions of the Respondents were legal.
58. The claim dated 31st January 2023 is dismissed with costs to the Respondents.
59. It is so Ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT COURT AT BUNGOMA 29TH NOVEMBER 2023.

JEMIMAH KELI,

JUDGE.

In The Presence Of:-

For Claimant : - Kipngeno

