



**Republic v County Assembly of Siaya Service Board & 2 others; Olwero (Exparte Applicant) (Judicial Review E037 of 2023) [2023] KEELRC 2932 (KLR) (16 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2932 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
JUDICIAL REVIEW E037 OF 2023  
CN BAARI, J  
NOVEMBER 16, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COUNTY ASSEMBLY OF SIAYA SERVICE BOARD.....1ST RESPONDENT**

**SPEAKER, COUNTY ASSEMBLY OF SIAYA ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY ASSEMBLY OF SIAYA ..... 2<sup>ND</sup> RESPONDENT**

**SPEAKER, COUNTY ASSEMBLY OF SIAYA ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**ISAAC FELIX OLWERO ..... EXPARTE APPLICANT**

**RULING**

1. Before Court is the Applicants/Respondents notice of motion application dated 29<sup>th</sup> September, 2023, brought pursuant to Sections 1A, 1B, 3, and 3A of the *Civil Procedure Act*, Order 45 Rule 1, Order 51 Rule 1 and Order 53 Rule 1(4) of the *Civil Procedure Rules*. The Applicants seek orders that: -
  - i. Spent.
  - ii. Spent.
  - iii. This Honorable Court be pleased to vacate and/or or set aside the proceedings and subsequent order issued on the 27<sup>th</sup> September, 2023, specifically, the order that the leave granted to the *Ex parte* Applicant to apply for Judicial Review orders on 25/9/2023, do operate as a stay of proceedings commenced against the *Ex parte* Applicant until the hearing and determination of the substantive JR motion.



- iv. Upon grant of Order 3 above, the Honorable Court be pleased to reinstate the application dated 21<sup>st</sup> September, 2023, for hearing and determination on merit.
  - v. The costs of the application be provided for.
2. The Motion is supported by grounds on the face thereof and the affidavit of Erick Ogenga sworn on 29<sup>th</sup> September, 2023. The crux of the motion is that the order issued by this Court on 27<sup>th</sup> September, 2023, was issued as a result of non-disclosure of material facts.
  3. The Applicants states that the *Ex parte* Applicant failed to inform the Court that the Court of Appeal at Kisumu in its judgment in Kisumu Civil Appeal No E077 of 2022 between *Siaya County Assembly Service Board & 2 others v Isaac Felix Olwero* delivered on 21<sup>st</sup> July 2023 held at paragraph 31 that;
 

“I would propose that the appeal be allowed, and so as to remove further confusion, a clarification be made that the Judgment of 14<sup>th</sup> April 2021 of the ELRC does not bar the appellants from commencing fresh disciplinary and removal proceedings on the basis of allegations of misconduct made against the respondent in respect to circumstances surrounding the withdrawal of funds from the assembly's bank at Co-operative Bank Siaya Branch on or around 15<sup>th</sup> September 2015 and appropriation of those funds.”
  4. The Applicants/Respondents further aver that if the decision of the Court of Appeal was made known to the Trial Judge before the grant of the impugned order, then the Trial Court would have known that the grant of a stay order would amount to staying the decision of the Court of Appeal, which is irregular and ultra vires.
  5. The Applicants/Respondents aver that the application dated 21<sup>st</sup> September, 2023, was filled on 22<sup>nd</sup> September, 2023, under certificate of urgency, and placed before Justice Radido who gave directions that having previously dealt with a similar dispute between the parties, the matter be placed before Lady Justice Baari on 24<sup>th</sup> September, 2023, and further that the application be served forthwith, but which service was never effected.
  6. The Applicants further aver that on 25<sup>th</sup> September, 2023, the aforesaid application was again placed before Justice Radido who again directed that the same be placed before Lady Justice Baari, and that the *Ex parte* Applicant's Advocate to notify the Respondents accordingly, which again was never done.
  7. The Applicants state that on 25<sup>th</sup> September, 2023, the Trial Court did fix the application dated 21<sup>st</sup> September, 2023, for mention for directions on 27<sup>th</sup> September 2023, and directed that the Respondents be served.
  8. It is their position that the *Ex parte* Applicant's Advocate proceeded to serve the Respondents with the pleadings vide email on 26<sup>th</sup> September, 2023, at 5.04pm and 6.17Pm for a matter coming up on 27<sup>th</sup> September, 2023, at 9.00 am, and thus the said service was not only malicious but also meant to steal a match against the Respondents, and obtain the orders granted.
  9. The Applicants/Respondents further aver that the removal from office of the *Ex parte* Applicant as the Clerk Siaya County Assembly is a process under Section 23 of the *County Assembly Services Act, 2017*, which process is ongoing, and as such, the grant of the impugned order staying the same goes against the laid down principle of law.
  10. Mr. Omondi submitting for the Applicants/Respondents, reiterated the Respondents' pleadings, and further indicated that he is not opposed to the *Ex parte* Applicant's application, save for the order of



stay of proceedings, as the application ought to have been heard and the decision to stay or not, made on merit.

11. It is his prayer that his application be allowed as prayed.
12. The *Ex parte* Applicant/Respondent herein, opposed the motion vide a replying affidavit sworn on 12<sup>th</sup> October, 2023. Counsel for the *Ex parte* Applicant submitted that applications such as the one herein, is only allowed where it is premised on issues that are clear cut and rock solid, such as non-disclosure of a fact which is deemed material. Reliance was had in the holding of Justice Odunga in [\*Republic v Nairobi City Council & another\* \[2014\] eKLR](#)
13. It is submitted for the *Ex parte* Applicant that the decision of the Court of appeal is not a material fact that the court needed to know before granting the stay order.
14. Mr. Onyango further submits that the Judicial review motion does not challenge the Respondents' right to start disciplinary proceedings, but instead, challenges the procedure and jurisdiction of the committee set up to hear the charges against the *Ex parte* Applicant.
15. It is Counsel's further submission that the Court of Appeal decision did not oust this Court's jurisdiction to superintend inferior Courts and tribunals. It is his submission that if in the re-started proceedings, a problem is noted, this Court is not prevented from issuing orders.
16. It is the submission of the *Ex parte* Applicant that indeed, there was an issue with service, but which was a result of a down time of the Court filing system. He finally submits that no proper basis has been given for lifting of the stay orders, and prays that the application be dismissed.

#### **Determination**

17. I have considered the motion by the Respondents, the replying affidavit in opposition and the oral submissions by counsels. The issue for my determination is whether to lift or set aside the stay order granted in this matter.
18. The Court in *Geosurvey International LLC and another v The Town Clerk Malindi Municipal Council* Malindi HCCC No 106 of 2007 [2008] 2 EA 144 had this to say on grant of leave:

“If leave has been granted on *Ex parte* basis the respondent can make an application to set aside the leave. If such application is to be made, it must be made timeously if it is to have any point at all. What is discouraged is the delay in instituting an application to challenge leave.”
19. Further, Odunga J in [\*Republic v Nairobi City Council & another\* \[2014\] eKLR](#) held thus on setting aside of a stay order: -

“.....it is not in doubt that such an order, if granted *Ex parte*, may be set aside at a later stage if the Court finds that the stay ought not to have been issued in the first place or that the change in circumstances no longer warrant the continued existence of the orders of stay. Parties and their counsel are, however, cautioned that the grant of an order of stay ought not to be followed by an application seeking to vacate the same. It is only in cases where the Court is convinced that the conduct of the applicant at the *Ex parte* stage when the stay was granted does not justify the grant either by non-disclosure of material facts or misrepresentation of the same or due to subsequent events that the Court will set aside the stay granted.”



20. The Applicants/Respondents application is premised on alleged material non-disclosure by the *Ex parte* Applicant in respect of a decision of the Court of Appeal rendered earlier on a matter between the parties herein.
21. The Court of Appeal in *Nakumatt Holdings Limited v Commissioner of Value Added Tax* [2011] eKLR expressed itself as follows:

“Although leave granted *Ex parte* can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear-cut cases.....”
22. The only reference by the *Ex parte* Applicant in respect of the Court of Appeal decision subject of this motion, is to the effect that the Court of Appeal agreed with the Trial Court on the initial suit that a formal charge sheet is a pre-requisite before disciplinary proceedings can commence.
23. The decision of the Court of Appeal reads as follows: -

“I would propose that the appeal be allowed, and so as to remove further confusion, a clarification be made that the Judgment of 14<sup>th</sup> April 2021 of the ELRC does not bar the appellants from commencing fresh disciplinary and removal proceedings on the basis of allegations of misconduct made against the respondent in respect to circumstances surrounding the withdrawal of funds from the assembly’s bank at Co-operative Bank Siaya Branch on or around 15<sup>th</sup> September 2015 and appropriation of those funds.”
24. The basis of the initial judicial review proceedings which ended at the Court of Appeal, is the exercise by the Court (ELRC) of its residual jurisdiction to supervise lower Courts and tribunals. The issue then is whether this decision by the Court of Appeal bars this Court from staying a process begun pursuant to the said judgment in exercise of this same residual jurisdiction.
25. In my view, the Court of Appeal in allowing the Respondents to commence disciplinary proceedings against the *Ex parte* Applicant, did not give them a blank check to flaunt procedures. The new disciplinary proceedings are subject to the supervisory jurisdiction vested upon this court by Article 165(6) of the *Constitution*.
26. I thus find and hold that the Applicants/Respondents have not proved a case for setting aside of the stay orders. The motion is dismissed with costs in the cause.
27. I further order that the judicial review motion herein, be set for hearing on priority basis.
28. It is so ordered.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**CHRISTINE N. BAARI**

**JUDGE**

