



**Martine v County Public Service Board, Kajiado County Government & 3 others
(Miscellaneous Cause E003 of 2023) [2023] KEELRC 2733 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2733 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CAUSE E003 OF 2023**

**BOM MANANI, J
NOVEMBER 2, 2023**

BETWEEN

KIRISUA MARTINE APPLICANT

AND

**COUNTY PUBLIC SERVICE BOARD, KAJIADO COUNTY
GOVERNMENT 1ST RESPONDENT
ACTING COUNTY SECRETARY OF THE COUNTY PUBLIC SERVICE BOARD,
KAJIADO COUNTY GOVERNMENT 2ND RESPONDENT
GOVERNOR, KAJIADO COUNTY GOVERNMENT 3RD RESPONDENT
COUNTY ASSEMBLY, KAJIADO COUNTY GOVERNMENT 4TH
RESPONDENT**

RULING

1. By the application dated 12th January 2023, the *Ex-Parte* Applicant moved the court for leave to commence Judicial Review proceedings against the Respondents to:-
 - a. Quash the 2nd Respondent's decision to advertise vacancies of County Chief Officers in local dailies and more specifically in the Standard Newspaper of 30th September 2022.
 - b. Quash the subsequent interview results for the candidates and recommendations in this respect made to the 3rd Respondent.
 - c. Prohibit the 3rd Respondent from nominating shortlisted candidates and forwarding their names to the 4th Respondent for appointment as County Chief Officers.
 - d. Prohibit the 4th Respondent from appointing the candidates shortlisted by the 1st Respondent for the position of County Chief Officers.



2. In addition, the *Ex-Parte* Applicant sought for orders that the leave sought does operate as a stay of the recruitment and appointment process aforesaid. The *Ex-Parte* Applicant also prayed for the court's directions on costs.
3. The application was placed before the court on 16th January 2023 when the following orders were issued: -
 - a. The court granted leave to the *Ex-Parte* Applicant to apply for Judicial Review orders as requested.
 - b. The court directed the *Ex-Parte* Applicant to file and serve the application for Judicial Review within 21 days of the order.
 - c. The court scheduled the matter for mention on 7th February 2023 for directions on the mode of hearing the substantive application for Judicial Review.
4. On 7th February 2023, both the *Ex-Parte* Applicant's and 1st to 3rd Respondents' lawyers attended court. On this date, the *Ex-Parte* Applicant's lawyers intimated that they were yet to file the substantive application for Judicial Review. As a result, the matter was adjourned to 27th February 2023 for further directions.
5. On 27th February 2023, the *Ex-Parte* Applicant's lawyers reiterated the position that they were yet to file the application for Judicial Review. However, they intimated that they had filed an application for enlargement of time to enable them present the motion out of time. It is this application that the court is called upon to determine.
6. It is averred that after the court granted leave to file the Judicial Review application, counsel for the *Ex-Parte* Applicant handed over the file to her colleague for further action. However, the lawyer who was given the file allegedly wrongly diarized the matter. As a result, the file was not acted upon within the timelines that had been set by the court.
7. The *Ex-Parte* Applicant's lawyers aver that the error in diarizing the file was inadvertent. It is their averment that failure to grant their client the orders sought will greatly prejudice not just him but the people of Kajiado County.
8. The 1st to 3rd Respondents have opposed the application. It is their position that the law does not permit the grant of the orders that are sought.
9. The 1st to 3rd Respondents argue that Judicial Review proceedings are sui generis. As such, only sections 8 and 9 of the *Law Reform Act* and Order 53 of the *Civil Procedure Rules* apply to this kind of proceedings.

Analysis

10. Order 53 (3) (1) of the *Civil Procedure Rules* provides as follows:-

“When leave has been granted to apply for an order of mandamus, prohibition or *certiorari*, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.” Emphasis added by underlining.
11. The aforesaid rule was promulgated pursuant to section 9 of the *Law Reform Act*. The rule requires a substantive application for Judicial Review to be lodged within twenty-one (21) days of the order



granting leave to file the proceedings. Neither the Law Reform Act nor Order 53 of the Civil Procedure Rules has provision for enlargement of this time.

12. Prior to the promulgation of the Constitution of Kenya 2010, the fact that Judicial Review proceedings are sui generis was settled. The proceedings were described as neither criminal nor civil in nature. As a result, the regulations that apply to them were understood to be distinct.

13. In the case of Commissioner of Lands v Kunste Hotel Limited [1997] eKLR, the Court of Appeal expressed this position as follows: -

“By virtue of the provisions of S.7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom, which is applicable in this country by reason of S.8 (2) of the Law Reform Act, prerogative writs were changed to be known as "Orders", except for the writ of habeas corpus. So S.8 (1) above denies the High Court the power to issue orders of mandamus, prohibition and *certiorari* while exercising Civil or Criminal jurisdiction. What that then means is that notwithstanding the wording of S.13A, above, which talks of proceedings, in exercising the power to issue or not to issue an order of *certiorari* the Court is neither exercising Civil nor Criminal jurisdiction. It would be exercising special jurisdiction which is outside the ambit of S.136 (1) of the Government Lands Act.....”

14. In view of the foregoing, a string of decisions expressed the position that one cannot invoke provisions of any law outside sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules to litigate Judicial Review matters. For instance, it was indicated that one cannot invoke Order 50 rule 6 of the Civil Procedure Rules to apply to enlarge time for presenting a substantive application for Judicial Review outside the 21 days that are set by Order 53 aforesaid.

15. In Republic v Chairman Amagoro Land Disputes Tribunal & another Ex-Parte Paul Mafwabi Wanyama [2014] eKLR, the Court of Appeal expressed the above view as follows:-

“The judicial review proceedings before the learned judge, which have given rise to this appeal were therefore special in nature and the learned judge erred in importing provisions of the Civil Procedure Act and Rules to proceedings governed by the said provisions of the Law Reform Act and Order 53 Civil Procedure Rules. We agree with learned counsel for the appellant that the learned judge erred in extending time which he had no jurisdiction to do.”

16. In Republic v Kabindi Nyafula & 3 others Ex Parte Kilifi South East Farmers Co-operative [2014] eKLR, the trial court made similar observations as follows: -

“Judicial Review proceedings under Order 53 of the Civil Procedure Rules are a special procedure. A party, other than invoking the provisions of Order 53 cannot invoke the provisions of the Civil Procedure Act and the Rules made there-under. (See *Welamudi v The Chairman Electoral Commission of Kenya* KLR (2002) 285 and *R v Kenya Bureaus of Standards & Others* (2006) EA 345).

The law provides that the substantive Motion seeking for prerogative orders must be filed within 21 days. The Law Reform Act, which is the substantive law dealing with prerogative orders, does not provide for the enlargement of time within which a party should file the Motion.”

17. In Republic v Public Procurement Administrative Review Board & another; Mer Security & Communications System Ltd/Megason Electronics & Control 1978 (JV) & another (Interested Parties); Exparte Magal Security Systems Ltd/Firefox Kenya Limited (JV) [2019] eKLR, the trial judge observed



- that the provisions of Order 53 (3) (1) of the [Civil Procedure Rules](#) were couched in mandatory terms. Therefore, the court did not have discretion to enlarge time for filing an application for Judicial Review outside the timelines that are set in the Order. The learned Judge emphasized that the court could not invoke Order 50 (6) of the [Civil Procedure Rules](#) to enlarge the time.
18. However, in other decisions, the court has suggested that the period for filing substantive Judicial Review motions under Order 53 (3) (1) of the [Civil Procedure Rules](#) can be extended. In [Republic v Kenya Revenue Authority Ex-Parte Stanley Mombo Amuti](#) [2018] eKLR, the court expressed the view that despite the provisions of Order 53 of the Civil Procedure Rules, the court was entitled to enlarge time for filing Judicial Review motions where the *Ex-Parte* Applicant was able to demonstrate that he/she had good reasons to explain the delay in presenting the application. In the learned Judge's view, such power was necessary to protect constitutional values and the rights to fair administrative action and access to justice.
 19. In my view, the twenty-one (21) days granted to file the substantive motion for Judicial Review under Order 53 (3) (1) of the [Civil Procedure Rules](#) do not constitute an unreasonable limitation on article 48 rights to access justice. This limitation strives to ensure that the substantive motion is presented when the circumstances that informed the application for leave are still obtaining.
 20. At the time of applying for leave, the applicant is already aware of the obligation to file the substantive Judicial Review motion within twenty-one (21) days of the order for leave. Therefore, unless there are exceptional circumstances that prevent the filing of the substantive motion within the prescribed time, the *Ex-Parte* Applicant must present the motion within twenty-one (21) days of the order for leave.
 21. In the instant case, counsel for the Applicant avers that her associate wrongly diarized the matter leading to the failure to act on it within the timeframe that had been fixed by the court. Yet, the said associate has not sworn an affidavit to affirm these assertions. Further, no excerpts of the office diary where the matter was allegedly wrongly diarized were exhibited to verify the assertion.
 22. By the time the associate was allegedly diarizing the matter (whether wrongly or otherwise), he/she was alive to the fact that the court had granted the *Ex-Parte* Applicant twenty-one (21) days to file the substantive application and that this time was already running. I do not understand how the alleged wrong diarizing of the file could have clouded this reality. It is difficult to justify the inaction on the matter within the statutory timelines on account of the alleged wrong diarizing of the office file. I dare suggest that the only plausible explanation for the inaction by counsel was some kind of negligence on her part.
 23. It is perhaps necessary to point out that in [Republic v Kenya Revenue Authority Ex-Parte Stanley Mombo Amuti](#) [2018] eKLR, the Judicial Review proceedings were premised on both the [Law Reform Act](#) and the [Fair Administrative Action Act](#). The latter *Act* gives effect to the right to fair administrative action under article 47 of the [Constitution](#) of Kenya 2010 (the [Constitution](#)).
 24. Falling under the Bill of Rights under the [Constitution](#), the article 47 right to fair administrative action benefits from the constitutional remedies prescribed under article 23 of the [Constitution](#) which include the remedy for Judicial Review. Enjoyment of this constitutional remedy is strictly speaking not subject to the need to comply with the provisions of sections 8 and 9 of the [Law Reform Act](#) as read with Order 53 of the [Civil Procedure Rules](#) ([National Social Security Fund v Sokomania Ltd & another](#) [2021] eKLR). Looked at from this perspective, it is arguable that reference by the Applicant in the aforesaid case to Order 53 of the [Civil Procedure Rules](#) was superfluous and of no consequence.
 25. It is equally noteworthy that the decision in [Republic v Public Procurement Administrative Review Board Ex-Parte Syner- Chemie Limited](#) [2016] eKLR which the learned Judge in [Republic v Kenya](#)



Revenue Authority Ex-Parte Stanley Mombo Amuti [2018] eKLR made extensive reference to was also premised on the Fair Administrative Action Act as read with article 47 of the Constitution which essentially benefit from the constitutional remedy of Judicial Review enacted in article 23 of the Constitution. Similarly therefore, reference to Order 53 of the Civil Procedure Rules in those proceedings was of little consequence.

26. The decision in Republic v Clerk of the National Assembly & another Ex parte Bernard Njiinu Njiraini; Cabinet Secretary, Ministry of Industrialization, Trade & Enterprise Development & 4 others (Interested Parties) [2021] eKLR followed the decision in Republic v Public Procurement Administrative Review Board Ex-Parte Syner- Chemie Limited [2016] eKLR. As noted earlier this latter decision was anchored on article 47 of the Constitution as read with the Fair Administrative Action Act which do not require application of sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules to actualize the remedy of Judicial Review under article 23 of the Constitution.
27. In contrast, the proceedings in the instant case are not premised on article 47 of the Constitution as read with the Fair Administrative Action Act. The *Ex-Parte* Applicant makes no reference to these two enactments which anchor the constitutional remedy for Judicial Review provided for under article 23 of the Constitution.
28. Although the *Ex-Parte* Applicant makes reference to the Constitution, this is in the context of articles 10 and 232 thereof. Therefore, it is clear to my mind that the instant Judicial Review proceedings are exclusively anchored on sections 8 and 9 of the Law Reform Act as read with Order 53 of the Civil Procedure Rules. Thus, they are subject to the strictures of leave and the timelines set under the aforesaid Order (National Social Security Fund v Sokomania Ltd & another [2021] eKLR).

Determination

29. In the premises, I find that in the circumstances of this case, this court is not seized of the jurisdiction to extend the timelines for filing the substantive application for Judicial Review.
30. But even if I was wrong on the issue of want of jurisdiction, I find that the reasons that are given by the Applicant to explain the failure to file the substantive application for Judicial Review within the timeframe that was fixed in the order for leave do not justify the grant of the request to extend the time within which to file the application.
31. The upshot is that I find that the application dated 16th February 2023 is without merit.
32. As a result, it is dismissed with costs to the 1st to 3rd Respondents.

DATED, SIGNED AND DELIVERED ON THE 2ND DAY OF NOVEMBER, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Applicant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived



compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

