



**Republic v Clerk, Kisii County Assembly & 2 others; Atika (Interested Party); Nyamwange & 4 others (Exparte Applicants) (Judicial Review E013 of 2023) [2023] KEELRC 2710 (KLR) (1 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2710 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**JUDICIAL REVIEW E013 OF 2023**

**S RADIDO, J**

**NOVEMBER 1, 2023**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF PROHIBITION, CERTIORARI AND MANDAMUS**

**AND**

**IN THE MATTER OF UNLAWFUL EXERCISE OF ADMINISTRATIVE POWER BY THE CLERK, SPEAKER AND COUNTY ASSEMBLY OF KISII COUNTY**

**AND**

**IN THE MATTER OF SECTIONS 3(G), (H), (L) AND (N), 4(3) AND (4) OF THE PETITION TO COUNTY ASSEMBLIES (PROCEDURE) ACT NO. 15 OF 2020**

**AND**

**IN THE MATTER OF STANDING ORDERS NOS 195(3),(4) AND (5), 198(E),(F), (G) AND (M), 202(2) OF THE KISII COUNTY ASSEMBLY STANDING ORDERS**

**AND**

**IN THE MATTER OF ARTICLES 124(1), 35(1) AND (2), 50(2)(C) AND (J) AND 23(3) OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**CLERK, KISII COUNTY ASSEMBLY ..... 1<sup>ST</sup> RESPONDENT**

**SPEAKER, KISII COUNTY ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**

**KISII COUNTY ASSEMBLY ..... 3<sup>RD</sup> RESPONDENT**

**AND**



**BENSON MOCHAMA ATIKA ..... INTERESTED PARTY**

**AND**

**NANCY NYANGANYI NYAMWANGE ..... EXPARTE APPLICANT**

**JACKSON BOGONKO ..... EXPARTE APPLICANT**

**PATRICK MOGUSU MOMANYI ..... EXPARTE APPLICANT**

**JOHN MACHUKA NDEGE ..... EXPARTE APPLICANT**

**JUDY OMARE NYAKERARIO ..... EXPARTE APPLICANT**

### **JUDGMENT**

1. Nancy Nyanganyi Nyamwange, Jackson Bogonko, Patrick Mogusu Momanyi, John Machuka Ndege and Judy Omare Nyakerario (the ex-parte applicants) were nominated and appointed to serve as members of the County Public Service Board, Kisii (the Board) on a date which is not easily discernable from the record.
2. On 6 March 2023, Benson Mochama Atika (the Interested Party) lodged a Petition with the Clerk, County Assembly of Kisii (the Clerk) seeking the removal of the ex-parte applicants from membership of the Board.
3. The Clerk presented the Petition to the Speaker of the County Assembly (the Speaker) and on 8 March 2023, the Speaker placed the Petition before the County Assembly.
4. The Speaker then committed the Petition to the Labour Manpower and Social Welfare Committee of the County Assembly to conduct a hearing as stipulated under the Standing Orders.
5. After the committal of the Petition, the Chairperson of the Committee served summonses upon the ex-parte applicants, inviting them to the hearings to run from 12 April 2023 to 17 April 2023.
6. On 3 April 2023, the ex-parte applicants, through their advocate wrote to the County Assembly and the Governor, County of Kisii (the Governor) requesting to be supplied with certain documents and particulars to enable them respond to and prepare for the hearing of the Petition.
7. Fearing that their rights were threatened with violation, the ex-parte applicants moved the Court in Kisumu Judicial Review No. E012 of 2023 on 11 April 2023, seeking leave to commence judicial review proceedings against the Respondents.
8. The Court directed the ex-parte applicants to serve the application.
9. The ex-parte applicants served the application and the Respondents raised a Notice of Preliminary Objection on 20 April 2023, contending that the application was incurably defective.
10. On 25 April 2023, the ex-parte applicants filed a Notice to Withdraw Kisumu Judicial Review No. E012 of 2023 (the said Notice was only endorsed by the Court on 6 June 2023 because the Court dealing was away).
11. At the same time, the ex-parte applicants also filed a fresh application seeking the grant of leave to commence judicial review proceedings against the Respondents.



12. The Court granted the leave the same day and further directed that the leave operate as a stay of the proceedings before the County Assembly.
13. At the same time, the Court directed the ex-parte applicants to file a substantive Motion together with submissions on or before 5 May 2023. The Respondents and Interested Party were also directed to file and serve responses and submissions by set timelines.
14. The ex-parte applicants purportedly filed the Motion on a date which is not discernable from the Court record (the Motion is not amongst the documents sent via email to the Court). The Motion was dated 4 May 2023. The ex-parte applicants' submissions were filed on the same day.
15. When the Motion came up for further directions on 21 June 2023, the Court directed the Respondents and Interested Party to file and serve responses and submissions within agreed timelines ahead of judgment on 10 August 2023 (however, the ex-parte applicants filed an intervening application seeking recusal of the judge and directions were given on the application on 10 August 2023).
16. The Governor caused to be filed on 2 August 2023, a replying affidavit sworn by the County Secretary on 21 July 2023.
17. In the affidavit, it was averred that the Motion was incompetent and an abuse of the court process because the Statutory Statement and affidavits on record at the leave stage were not part of the Motion; there had been material non-disclosure of the filing and pendency of two related proceedings being Nairobi Judicial Review No. E015 of 2023, wherein leave to commence judicial review had been granted on 14 April 2023 and Kisumu Judicial Review E012 of 2023; the orders sought had been overtaken by events since the orders were served after the County Assembly had concluded proceedings before it; the audit by the Institute of Human Resource Management was incomplete by the time of request for a copy thereof; the Petition lodged by the Interested Party with the Clerk was 2 pages without any affidavits or documents; Kisii High Court Petition No.5 of 2023 and Kisumu Petition No. E010 of 2023 were filed after the Interested Party had filed his Petition with the Clerk; Kisii High Court Petition No. E009 of 2022 had been withdrawn; the Interested Party had signed the Petition he lodged with the Clerk and that the ex-parte applicants had requested the Director of Human Resources to compute their terminal benefits.
18. The Interested Party filed a replying affidavit on 24 July 2023 deponing that the Motion was filed outside the time given while granting leave; filing fees had not been paid; the Petition for removal of the ex-parte applicants had set out the grounds relied on; the Petition was approved by the Clerk on 8 March 2023; the Interested Party was not a party to the Court cases enumerated by the ex-parte applicants and was therefore not aware of them; that the Interested Party personally signed the Petition which was only 2 pages and that no evidentiary material was attached to the Petition; the Petition was not hinged on audit findings by the Institute of Human Resource Management and that the ex-parte applicants were only served with a 45 page Petition during the phase before the Committee on Labour, Manpower and Social Welfare; the ex-parte applicants participated before the Committee in the company of 13 advocates and that they cross-examined Interested Party; the ex-parte applicants were granted a fair hearing upon which 97% of the Assembly voted in favour of removal; the ex-parte applicants approached the Court in Nairobi on 15 April 2023 in Nairobi Judicial Review No. E015 of 2023, and were granted leave to commence judicial review proceedings but abandoned the same and filed Kisumu Judicial Review No. E012 of 2023 seeking leave once again on 20 April 2023 (again abandoned and the instant proceedings filed) without disclosing that leave had been granted by the Court sitting in Nairobi and that the orders sought had been overtaken by events.
19. The Interested Party filed his submissions on the same day.



20. The Interested Party filed further submissions on 8 August 2023.
21. The ex-parte applicants caused further submissions and a supplementary affidavit to be filed on 7 August 2023, to reply to the affidavits by the Governor and Interested Party.
22. When the parties appeared for directions on the intervening recusal application, the Court indicated that it would deliver a Ruling on 30 August 2023.
23. The Ruling was delivered on 30 August 2023, and the Court issued further directions including leave to file further submissions.
24. Pursuant to leave, the ex-parte applicants filed further supplementary submissions on 2 October 2023. The submissions were supposed to be filed and served on or before 8 September 2023. There was no explanation for the late filing in the body of the submissions or through other means.
25. The Court expunges these submissions from the record.

### **Ex-parte applicants' case**

26. The ex-parte applicants challenged the process to remove them from office on several fronts.
27. The first ground of challenge was that the Clerk had not complied with the provisions of sections 3 and 4 of the [Petition to County Assemblies \(Procedure\) Act, 2020](#) as read with Standing Orders numbers 195(3),(4) and (5), 198(e),(f),(g) and (m) and 202(2).
28. According to the ex-parte applicants, the aforesaid provisions required the Clerk to ascertain that the Interested Party had exhausted other alternative dispute resolution mechanisms in place.
29. Similarly, the ex-parte applicants contended that the Clerk ignored the fact that the Petition was sub judice because there were pending Court proceedings on the same allegations set out in the Petition (Kisumu Petition No. 10 of 2023, Kisumu ELRC Petition No. E014 of 2022 and Kisii High Court Petition No. E009 of 2022).
30. The ex-parte applicants, on the same ground, asserted that the Clerk certified the Petition without considering that it contained affidavits and exhibits which were contrary to the legal requirements.
31. Further, the ex-parte applicants contended that the Petition was not signed by the Interested Party.
32. Secondly, the ex-parte applicants asserted that the Clerk had not reviewed the Petition as envisaged by section 4(3) of the [Petition to County Assemblies \(Procedure\) Act, 2020](#) and Standing Order no. 195(3).
33. Thirdly, the ex-parte applicants contested the validity and fairness of the removal process on the basis that the Respondents had declined to supply them with documents they had requested thus breaching their right to access information and fair hearing contrary to Articles 35(1)(b) and (2) and 50(1)(b)(c) and (j) of [the Constitution](#).
34. Fourthly, the ex-parte applicants contended that the Speaker had given the Committee on Labour, Manpower and Social Welfare 14 instead of the 60 days provided by Standing Order No. 202(2) to consider the Petition and that this deprived them of adequate and sufficient time to prepare to defend themselves.

### **The case for the Clerk and County Assembly**

35. The Clerk, Speaker and County Assembly resisted the case advanced by the ex-parte applicants and contended that the Petition lodged by the Interested Party met the legal standard as it was signed by



the Interested Party; the ex-parte applicants were afforded a hearing as contemplated by the Standing Orders and that the County Assembly passed the motion to remove the ex-parte applicants on the morning of 25 April 2023 before service of injunctive court orders.

### **Governor's case**

36. The Governor challenged the competency of the Motion on the twin grounds that the ex-parte applicants had not disclosed the filing of other applications while seeking leave with respect to the subject matter of these proceedings and that the Motion now under consideration was not accompanied by a copy of the Statutory Statement filed while seeking leave as envisaged by Order 53 Rule 4 of the Civil Procedure Rules.
37. The Governor urged the Court to follow the path taken by the Court in *Bespoke Insurance Brokers v Philip Kisia, Town Clerk, City Council of Nairobi & Ar* (2013) eKLR and strike out the supporting affidavit to the Motion sworn by Judy Omare Nyakerario on 5 May 2023, the Statutory Declaration and the Statement of Facts, both dated 4 May 2023.
38. The Governor, citing Civil Appeal No. 210 of 1997, *Bahadurali Ebrahim Shamji v Al Noor Jamal & 2 Ors* also argued that the application was an abuse of the court process because the ex-parte applicants had failed to make material and full disclosure of the fact that they had filed other and similar applications.
39. The Governor further asserted that the prohibitory order sought had been overtaken by events as the Interested Party's Petition had already been processed by the Assembly before Court granted orders while granting leave.
40. With respect to the prayer for an order of mandamus compelling the Interested Party to furnish the ex-parte applicants with certain records and documents, the Governor took the view that the order could not be issued because the Interested Party was not a public body or authority. Reliance was placed on *R v Kenya National Examinations Council ex parte Gathenji & Ors* (1997) eKLR.
41. As regards an order compelling the County Assembly and the Governor to furnish the ex-parte applicants with the report from the Institute of Human Resources and Management, it was contended that the report could not be released as it was an interim report which had not been approved by the County Government.

### **Interested Party's take**

42. The Interested Party took the view that the Motion was caught up by the doctrine of mootness because the decisions or processes sought to be prohibited had been concluded by the time the ex-parte applicants were moving Court or when court orders were served. The case of *Daniel Kaminja & 3 Ors (suing as Westland Environmental Caretaker Group) v County Government of Nairobi* (2019) eKLR was cited.
43. The Interested Party also asserted that the process leading to the removal of the ex-parte applicants was not tainted with illegality since he signed and lodged the 2-page Petition which did not contain evidentiary matter with the Clerk; the Clerk processed the Petition within the parameters set in law; it was the Petition to the Committee which was 45 pages and included evidence; the members walked out of the Assembly after the Speaker had committed the Petition to the relevant Committee and that the ex-parte applicants were provided with evidence and accorded a fair hearing and the same was not unreasonable nor irrational.



44. The Interested Party further averred that the cases pending before the various Courts had nothing to do with the removal of the ex-parte applicants from office.

### **Evaluation**

45. Before delving into an examination of the merits of the Motion, the Court notes that despite referring to a 2<sup>nd</sup> Interested Party, no such party was listed in the part of the application seeking leave nor the Motion.

### **Two Petitions**

46. The ex-parte applicants placed before this Court an extract of a 45-page Petition allegedly submitted by the Interested Party to the Clerk. The Petition had attached thereto evidentiary material through an affidavit. The Petition had the signature of an advocate.
47. The Interested Party however asserted that there were two Petitions, a 2-page Petition which he signed and lodged with the Clerk, and a 45-page Petition with evidence before the Labour, Manpower and Social Welfare Committee. Both Petitions were placed before the Court.
48. The Court had before it purely affidavit evidence. The ex-parte applicants did not categorically deny that the Petition lodged with the Clerk was 2-paged.
49. The Court is therefore, unable to conclude that the Petition lodged with the Clerk was invalid because of failure to comply with the provisions of the law.

### **Material non-disclosure**

50. The ex-parte applicants initially filed an application seeking leave to commence judicial review proceedings before this Court on 11 April 2023 (Kisumu Judicial Review No. E012 of 2023).
51. The Court granted directed that the application be served, but before it could be conclusively dealt with, the ex-parte applicants filed a Notice of Withdrawal was filed on 25 April 2023. The notice was endorsed by the Court on 6 June 2023.
52. Two days later, on 13 April 2023, the ex-parte applicants moved to the Court in Nairobi seeking leave to commence judicial review proceedings through Nairobi Misc Civil Application No. E015 of 2023 (transferred later to Kisumu and renumbered Kisumu Judicial Review No. 1 of 2023).
53. The Court in Nairobi granted the leave but declined to order the leave to operate as a stay. The Court directed that the proceedings be transferred to this Court for further directions.
54. The ex-parte applicants did not disclose to the Court in Nairobi that they had sought similar leave in Kisumu on 11 April 2023.
55. On 24 April 2023, the ex-parte applicants filed a third application before the Court sitting in Kisumu seeking leave to commence judicial review proceedings against the Respondents on the same grounds.
56. The ex-parte applicants did not disclose while filing this third application the existence of Nairobi Misc Civil Application No. E015 of 2023 (transferred to Kisumu and renumbered Kisumu Judicial Review No. 1 of 2023) or Kisumu Judicial Review No. E012 of 2023.
57. The law books are replete with decisions on the applicable principles where a party fails to make full disclosure especially where the exercise of the Court's discretion is sought at an ex-parte stage.



58. In *Hussein Ali & 4 Ors vs. Commissioner of Lands, Lands Registrar & 7 Ors* (2013) eKLR, the Court rendered itself thus:

it is well settled that a person who makes an ex-parte Application to court, that is to say in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage by him. That is perfectly plain and requires no authority to justify it.

59. Similarly, the Court in *R v Kenya National Federation of Co-Operatives Limited ex-parte Communications Commission of Kenya* (2005) 1 KLR 242 observed that:

It is of fundamental importance that applications for judicial review should be made with full disclosure of all material available to the Claimant. This is a case which I can properly use in order to send a message to those who are making applications to this Court reminding them of their duty to make full disclosure; failure to do so will result, in appropriate cases, in the discretion of the Court being exercised against (a Claimant) in relation to the grant of (a remedy).

60. As to what constitutes material disclosure, the Court of Appeal had this to say in *Bahadurali Ebrahim Shamji v Al Noor Jamal & 2 Ors* Civil Appeal No. 210 of 1997:

In considering whether or not there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to include; (i) The duty of the applicant is to make full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries. (v) If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage by that breach of duty. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally, it is not every omission that the injunction will be automatically discharged.

61. In this Court, the ex-parte applicants needed to disclose the existence of the prior applications made while seeking leave to commence judicial review proceedings to both the Court in Nairobi and this Court. It would not have helped the situation that the Judge who dealt with Kisumu Judicial Review No. E012 of 2023 also dealt with the instant proceedings.

62. The ex-parte applicants were represented by a battery of seasoned and experienced advocates. They must have been aware of the duty to make full disclosure. Whether it was by omission or coincidence



that the disclosure was not made, this Court cannot speculate, but the Court is reminded of the adage, too many cooks spoiled the broth.

63. The ex-parte applicants are not only culpable for material non-disclosure but were in abuse of the court process, if not on a trip to forum shop.

### **Competence of the Motion**

64. After the grant of leave, the ex-parte applicants filed a Motion dated 4 May 2023. The Motion does not have a Court stamp acknowledging filing nor are the payment receipts attesting to filing either on 4 May 2023 or thereafter available on record or file. The Motion was not amongst documents sent via email to the Court.
65. When the Court inquired, an advocate for the ex-parte applicants explained that payment for the Motion had been made at the time of seeking leave. The Court will leave it at that.
66. The Motion was accompanied by a verifying affidavit sworn by one of the ex-parte applicants, Judy Omare Nyakerario on 5 May 2023.
67. Order 53 Rule 4 of the Civil Procedure Rules does not contemplate the filing of further affidavits by an ex-parte applicant after the grant of leave without further leave of the Court.
68. The verifying affidavit sworn on 5 May 2023 was thus filed irregularly and it is struck off.
69. While seeking leave, the ex-parte applicants' Summons was accompanied with a Statement of Facts dated 24 April 2023.
70. The instant Motion was accompanied by a Statement of Facts dated 4 May 2023. No leave was sought to introduce the Statement.
71. Apart from the new Statement of Facts, the Motion had exhibited to it a Statutory Declaration dated 4 May 2023. The Statutory Statement was not part of the record when the ex-parte applicants sought leave.
72. The ex-parte applicants did not secure leave to file the Statutory Declaration and it is struck out.
73. There is a reason why the Rules contemplate filing the Statement and Affidavits used during the leave application stage. It is the facts therein which the Court weighs or balances in deciding whether to grant leave and the same are the facts which should be served upon the Respondents otherwise there is a risk of introducing new facts to the prejudice of the Respondents and the dignity of the Court.
74. The Court, therefore, finds that the Notice of Motion was not only incompetent but defective.

### **Processing of the Petition by the Clerk**

75. The ex-parte applicants asserted that the Petition seeking their removal did not conform to the standard set out by sections 3 and 4 of the Petition to County Assemblies Procedures Act because the Clerk committed it to the Speaker the same day he received it while he had 7 days and relied on affidavits and documents contrary to the law and was not signed by the Petitioner (was signed by the advocate).
76. The Clerk had an outer limit of 7 days to scrutinise and process the Petition but he did it in less than the 7 days and that was within the prescribed time. The ex-parte applicants did not show that processing of the Petition by the Clerk within the prescribed time violated any law, was unreasonable or prejudiced any of their rights.



77. It appears from the record that there were two Petitions, a 2-pager and a 45-pager. The two pager was signed by the Interested Party and it did not contain any evidentiary material. The 45-pager was signed by the Interested Party's advocate and it contained matters of evidence.
78. With the material on record through affidavits that were not subjected to cross-examination, the Court is unable to determine or make a conclusion that the Clerk or the Assembly did not comply with the prescriptions of the Petition to County Assemblies Procedures Act or the law on the format of the Petition for removal.

### **Alternative dispute resolution avenues**

79. The ex-parte applicants urged the Court to find that the Petition presented before the County Assembly was premature because the Interested Party, the Clerk and the County Assembly did not consider the ramifications of section 3(g) of the Petition to County Assemblies Procedure Act.
80. The Court has closely examined the provision and notes that it has not mentioned the alternative dispute resolution avenues which the Interested Party and/or the Respondents should have addressed their complaints in the first instance.
81. The removal of members of a county public service board is the legal prerogative of the County Assembly. The ex-parte applicants did not inform the Court how such a mandate could lawfully be channeled through alternative dispute resolution as a precondition before invoking the procedures outlined in the Petition to County Assemblies Procedures Act and the Standing Orders.
82. The ex-parte applicants did not also disclose which fora the allegations should have been channeled through.
83. The Court finds this particular challenge not determinative of the Petition.

### **Sub judice**

84. The Court has looked at the Petitions which were pending before various Courts.
85. Kisii High Court Petition No. E009 of 2022, David Nyarongi Nyakweba & Ar v County Assembly & Ors challenged the validity of a sitting of the Assembly on 16 June 2022 after the Assembly had adjourned sine die on 15 June 2022.
86. Kisii High Court Petition No. 5 of 2023, David Mangondi Senema v the Institute of Human Resources Management & Ors concerned the lawfulness of a human resource audit conducted by the Institute of Human Resource Management.
87. The Petitioner therein asserted that the audit was a usurpation of the mandate of the County Public Service Board and did not seek the removal of the ex-parte applicants from office.
88. Kericho Petition No. E014 of 2022, Thomson Kerongo & Ors v County Public Service Board & Ar challenged the decision to recruit the chair and members of the Board, nurses, doctors and radiographers.
89. Kisumu Petition No. E010 of 2023, Vincent Marita Omas v County Government of Kisii was grounded on the recruitment of ECDE teachers, youth polytechnic instructors and staff in the departments of water, agriculture, livestock and fisheries.



90. These Court cases, in the Court's view, although implicating the decisions of the Board did not call for the removal of the members of the Board and therefore, could not be a hindrance to the processing of the Interested Party's Petition.
91. On the assumption that it is wrong on the conclusions above, the Court will now look at the merits of the judicial review application grounds not already addressed.

### **Failures by the Speaker**

92. While committing the Interested Party's Petition to the Committee on Manpower, Labour and Social Welfare, the Speaker directed the Committee to make inquiries and report back to the Assembly within 14 days.
93. The ex-parte applicants faulted the Speaker for giving the Committee 14 days instead of the 60 days provided for under the Standing Order 202.
94. The ex-parte applicants maintained that this did not afford the Committee and themselves sufficient time to address the allegations raised by the Interested Party and this impinged on their right to a fair hearing.
95. The 60 days allowed by the Standing Order is the maximum time allowed to the Committee to give a response to a Petitioner.
96. The question, therefore, of adequacy or sufficiency of time to make inquiries needs to be determined on a case-by-case basis.
97. The Court says so because the question of the adequacy of time would depend on the complexity of the inquiries to be undertaken by the Committee amongst other factors.
98. The Court is aware and the parties must be aware that even *the Constitution* has provided strict timelines in more complex disputes such as Presidential Election Petitions.
99. In the case at hand, the ex-parte applicants despite alleging insufficient time did not provide any evidence of any handicaps they met in defending themselves before the Committee.

### **Quorum**

100. Upon receipt of the Petition, the Speaker committed it to the Committee on Labour, Manpower and Social Welfare and instructed it to make a report within 14 days.
101. After the Speaker had committed the Petition to the Committee, a member of the County Assembly raised the issue of quorum.
102. The Clerk confirmed that there was no quorum and the division bell was rung. The Chief Whip was ordered to whip up the members but despite his efforts, quorum was not attained and the house was adjourned.
103. The Hansard does not ordinarily capture the movements of members in and out of the plenary of the Assembly or chambers.
104. The question of quorum was raised after the Speaker had made a decision. This Court cannot assume and no evidence was placed before it that at the particular time the Speaker committed the Petition to the Committee, there was no quorum.



105. In the view of this Court, the challenge based on quorum would have been valid had it been raised before the committal and had the Speaker ignored such an issue and gone ahead to commit the Petition after ascertaining that there was no quorum.
106. None of the parties disclosed whether the Assembly revisited the issue of the committal of the Interested Party's Petition when the Assembly next resumed.

### **Access to information**

107. After being served with the Petition, the ex-parte applicants instructed their advocate to request for certain documents from the Respondents. The advocate requested for the documents through a letter dated 3 April 2023.
108. The Respondents did not bother to respond to the request.
109. The Court has considered the request and section 3(1) of the Petition to County Assemblies Procedure Act.
110. In the view of the Court, the request consisted of matters that would have been put to the Interested Party during the inquiries before the Committee on Labour, Manpower and Social Welfare as part of cross-examination.

### **Mootness**

111. The ex-parte applicants secured certain orders at the leave stage. The orders were served after the County Assembly had already voted to remove the ex-parte applicants from office and a purely prohibitive order would not have achieved any practical purpose.

### **Conclusion and Orders**

112. The ex-parte applicants filed at least 3 cases on the same dispute. There was no disclosure of previous proceedings even where leave had been granted. The disclosure was a legal and factual necessity. The failure to disclose the myriad proceedings amounted to abuse of the court process and forum shopping.
113. The Court has already stated that the ex-parte applicants were represented by a battery of experienced and well-seasoned advocates. Some of the orders sought were overtaken by events and became moot.
114. Orders of judicial review can be declined even where a case has been made.
115. The instant case is not one such case. There was a danger in the court making conflicting decisions.
116. The Court makes the following findings:
  - i. The ex-parte applicants failed to make material disclosure of pending or prior proceedings.
  - ii. The ex-parte applicants were in abuse of the court process by filing separate applications on the same issues before different Courts.
  - iii. The Motion dated 4 May 2023 was incompetent and defective for not being accompanied by the affidavits and statutory statement filed with the Chamber Summons while seeking leave to commence judicial review proceedings.
  - iv. The ex-parte applicants have not made a case for grant of judicial review orders.
117. The Court orders the Motion dated 4 May 2023 dismissed with costs to the Respondents and Interested Party.



**DELIVERED VIRTUALLY, DATED, AND SIGNED IN NAROK ON THIS 1<sup>ST</sup> DAY OF NOVEMBER 2023.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

**APPEARANCES**

For ex-parte applicants Mr Nyamweya, Dr Mokuu, Mr Ochoki and Hon Osoro instructed by Ochoki & Co. Advocates

For 1<sup>st</sup> to 3<sup>rd</sup> Respondents Mr Onserio, Department of Legal and Legislative Services, County Assembly of Kisii

For 4<sup>th</sup> Respondent County Attorney

For Interested Party Mr Otieno instructed by Sagana Biriq & Co. Advocates

Court Assistants Chrispo Aura/Everlyne

