



Livingstone & another v County Assembly Service Board of Elgeyo Marakwet & 3 others (Judicial Review Application E014 of 2023) [2023] KEELRC 3269 (KLR) (7 December 2023) (Judgment)

Neutral citation: [2023] KEELRC 3269 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
JUDICIAL REVIEW APPLICATION E014 OF 2023**

**MA ONYANGO, J
DECEMBER 7, 2023**

**IN THE MATTER OF AN APPLICATION BY CHEBOI
LIVINGSTONE AND SALLY TOROITICH FOR JUDICIAL
ORDERS FOR PROHIBITION AND MANDAMUS PURSUANT
TO ORDERS ISSUED ON 4TH APRIL 2023**

AND

**IN THE MATTER OF THE COUNTY GOVERNMENTS ACT NO.
17 OF 2012**

AND

**IN THE MATTER OF THE COUNTY ASSEMBLY SERVICES
ACT NO. 24 OF 2017**

BETWEEN

CHEBOI LIVINGSTONE 1ST APPLICANT

SALLY TOROITICH 2ND APPLICANT

AND

**COUNTY ASSEMBLY SERVICE BOARD OF ELGEYO MARAKWET ... 1ST
RESPONDENT**

COUNTY ASSEMBLY OF ELGEYO MARAKWET 2ND RESPONDENT

**THE SPEAKER, COUNTY ASSEMBLY OF ELGEYO MARAKWET ... 3RD
RESPONDENT**

**THE CLERK, COUNTY ASSEMBLY OF ELGEYO MARAKWET ... 4TH
RESPONDENT**



JUDGMENT

1. Before me for determination is a Notice of Motion dated 25th April 2023 filed by M/s Betty Koech & Company advocates on behalf of the Applicants Cheboi Livingstone and Sally Toroitich. The Notice of Motion was brought under Order 53 Rule 1 of the [Civil Procedure Rules](#) and Section 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law. It was brought pursuant to leave granted on 4th April 2023.
2. The Applicants seek the following orders:
 - a. That this matter be certified urgent and service thereof is dispensed with in the first instance;
 - b. That an order of prohibition against the Respondents jointly and severally, prohibiting the said Respondents whether by themselves, their servants, agents, officers or whatsoever otherwise from in any manner whatsoever unlawfully acting or continuing to impede the Applicants from discharging their functions as members of the 1st Respondent or continuing to enforce or maintaining or continuing with any action for the purposes of removal/impeding of the Applicant from office as members of the County Assembly Service Board of Elgeyo Marakwet.
 - c. That an order be and is hereby issued compelling the 1st ,2nd ,3rd and 4th Respondents to maintain and or reinstate the ex-parte applicants as members of the County Assembly Service Board of Elgeyo/Marakwet
 - d. That the costs of and incidental to this application be borne by the Respondents in any event.
3. The application is supported by the grounds on the face of the Notice of Motion. It is also grounded on the statutory statement filed with the application as well as the verifying affidavits sworn by the Applicants herein.
4. The grounds upon which the application is founded are as follows:
 - a. That the County Assembly Service Board of Elgeyo Marakwet is created under section 12 of the [County Governments Act](#) Laws of Kenya. Section 12(6) of the County Government Act prescribes that the term of office of the members of County Assembly Service Board comes to an end when the new members are sworn into office.
 - b. That following the August 2022 General elections, the County Assembly Service Board of Elgeyo Marakwet is partially constituted by the Speaker of the County Assembly, 2 members of the assembly nominated by political parties pursuant to section 12(3)(c) and the Clerk who is the secretary to the Board. The two representatives representing the public as provided under Section 12(3)(d) of the [County Governments Act](#) have not been appointed nor sworn into office.
 - c. That the [County Governments Act](#) in section 12(6) envisages the continuity of service of the County Assembly Service Board members until such a time that new office holders are sworn into office.
 - d. That section 12 of the [County Governments Act](#) deals with procedure for vacation of office by members of the 1st Respondent. Section 12(6) specifically provides that even 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.



- e. That the aforementioned provision was specifically designed to ensure that the voice of the public was not drowned by ensuring that the board always had two members representing the public.
 - f. That that the 1st and the 2nd Applicants are members of the County Assembly Service Board of Elgeyo Marakwet being the man and woman members appointed to represent the public pursuant to the provisions of section 11(3)(d) of the County Government Act.
 - g. That to date no new members representing the public pursuant to the provisions of section 11(3)(d) of the County Governments Act have been sworn into office.
5. On 2nd June 2023, the Respondents filed a Replying affidavit sworn by Jane Kiptum-Mutai, the 4th Respondent who introduced herself as the Secretary to the 1st Respondent and the Clerk to the 2nd Respondent. The Respondents averred in the affidavit that following the elections of August 2022 and upon convening the first sitting of the new County Assembly, vacancies were declared of the board under section 12(3)(d) of the County Governments Act pursuant to the provisions of section 9(2) of the County Assembly Services Act vide a gazette notice and an advert.
 6. The Respondents maintained that the vacancies were declared to allow qualified members of the public including the Applicants herein to apply for appointments as members of the board. It is further averred that the Applicants indeed applied for the position of board members pursuant to section 12(3) (d) of the County Governments Act and were shortlisted for interviews.
 7. It is contended that the business of the board after the first sitting of the new county assembly was the recruitment of the board members under section 12(3)(d) and that the Applicants would have been conflicted to participate in the process as they were themselves interested in re-appointment.
 8. The Respondents further maintained that the contention by the Applicants that public interest could not be considered in their absence is misleading because even the Act does not indicate that they represent the public and that all board members jointly and severally represent public interest and no board member can claim exclusive obligation to represent the public.
 9. According to the Respondents, section 9(2) of the County Assembly Service Act intended to cure the obvious absurdity of having the two board members participate in the recruitment of members to the positions which they would still be occupying and which they would be directly interested to continue occupying.
 10. The Respondents aver that the orders issued by this court allow the Applicants to participate in the process in which they have direct interest and would result in the Applicants occupying the office of the members of the board through a court order and not by a competitive process as envisaged in law.
 11. The Respondents filed a further affidavit sworn by the 4th Respondent on 23rd October 2023 where she averred that the application is based on legal grounds that have been overtaken by events and that the prayers sought are incapable of being executed. The Respondents aver that the Applicants are still holding the positions of board members via gazette notice no 9276 of 14th July 2023 and that as such, there is nothing left in the application to be determined by this court.
 12. The parties herein filed written submissions. The Applicant's written submissions dated 13th July 2023 were filed on 17th July 2023 whereas the Respondents submissions dated 23rd October 2023 were filed on 24th October 2023.



Determination

13. I have carefully considered the Notice of Motion herein, the opposing affidavits as well as the submissions of parties.
14. I have noted from Gazette Notice no. 9276 of 14th July 2023 annexed to the Respondents' further affidavit filed in court on 25th October 2023 that the name of one of the Applicants herein appears as one of the persons appointed to be members of the Elgeyo Marakwet County Assembly Service Board.
15. In the case of *Daniel Kaminja & 3 others (suing as Westlands Environmental Caretaker Group) v County Government of Nairobi* [2019] eKLR, Mativo J stated as follows;

“A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact.”

And that,

“No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity.”
16. From the evidence available it is manifest that the current application has been overtaken by events.
17. Consequently, I find the application dated 25th April 2023 is not merited and I hereby dismiss it with an order that each party shall bear its costs.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 7TH DAY OF DECEMBER, 2023.

M. ONYANGO

JUDGE

