



REPUBLIC OF KENYA



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Republic v County Assembly of Kiambu Service Board & 2 others; Muriithi (Exparte Applicant); Kiambu County Public Service Board & another (Interested Parties) (Judicial Review Application E014 of 2021) [2022] KEELRC 817 (KLR) (11 February 2022) (Judgment)

Republic v County Assembly of Kiambu Service Board Speaker & 2 others Ex-parte Gabriel Karimi Muriithi; Kiambu County Public Service Board & another (Interested parties) [2022] eKLR

Neutral citation: [2022] KEELRC 817 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

JUDICIAL REVIEW APPLICATION E014 OF 2021

MA ONYANGO, J

FEBRUARY 11, 2022

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE ACT

AND

**IN THE MATTER OF COUNTY GOVERNMENTS ACT,
NO. 4 OF 2017, ARTICLES 10, 22, 23, 41, 47, 73, 232**

AND

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

AND

**IN THE MATTER OF ARTICLES 10, 22, 23,41,47,73,232
AND 236 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF SECTION 5, 10(5) AND 13 OF THE EMPLOYMENT ACT, 2007

AND

**IN THE MATTER OF SECTION 8 & 9 OF THE
LAW REFORM ACT CAP 26 LAWS OF KENYA**

AND



**IN THE MATTER OF SECTIONS 7& 8 OF THE
FAIR ADMINISTRATIVE ACTIONS ACT 2015**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY ASSEMBLY OF KIAMBU SERVICE BOARD 1ST RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF KIAMBU 2ND RESPONDENT

CLERK, COUNTY ASSEMBLY OF KIAMBU 3RD RESPONDENT

AND

GABRIEL KARIMI MURIITHI EXPARTE APPLICANT

AND

KIAMBU COUNTY PUBLIC SERVICE BOARD INTERESTED PARTY

COUNTY GOVERNMENT OF KIAMBU INTERESTED PARTY

JUDGMENT

1. The Ex-parte Applicant (herein after referred to as the Applicant) is the Principal Accountant and employee of the County Assembly of Kiambu from 13th February, 2014.
2. The 1st Respondent is the County Assembly Service Board established under Section 12 of the *County Governments Act, 2012* charged with the general control and management of the Kiambu County Assembly Service.
3. The 2nd Respondent is the speaker of the Kiambu County Assembly and Chairperson of the Kiambu County Assembly Service Board.
4. The 3rd Respondent is the Chief Executive Officer of the County Government of Kiambu, secretary to the 1st Respondent and is in charge of the day to day running of the County Assembly and implementation of the 1st Respondent's decisions.
5. The 1st Interested Party is the board established under Section 57 of the *County Governments Act, 2017* and is responsible for all matters relating County Executive employees including but not limited to recruitment, deployment, secondment among others.
6. The 2nd Interested Party is the Kiambu County Executive of a County Government established under Article 176 of *the Constitution*.

Background

7. The Applicant was employed by the Kiambu County Assembly as the Principal Accountant from 11th April, 2014.



8. He served the Assembly until the 11th April, 2018 when the Respondents seconded him to the interested parties for a period of three (3) years.
9. Upon the expiry of the secondment period the interested parties released the Ex-parte Applicant back to the Kiambu County Assembly and his payroll data was transferred back to the County Assembly.
10. The Applicant reported to the Clerk County Assembly to assume his duties. However, the Respondents through their letters dated 10th May, 2021 and 17th May, 2021 informed him that they had resolved to permanently transfer his services to the Interested Parties.
11. The Applicant contends that his purported transfer is untenable, unlawful and unfair and that the Interested Parties did advise the Respondents against proceeding with the same.
12. It is the Applicant's case that the Respondents' unilateral resolution and/or decision and general conduct, in particular the purported permanent transfer of services to the Interested Parties was unreasonable, in breach of procedure, ultra vires, unlawful, wednesbury unreasonable, unfair unjust and amounts to an abuse of office by the 2nd and 3rd Respondents.
13. In the Motion dated 2nd July, 2021, he seeks the following orders: -
 - a) An order of Certiorari do issue to quash the unilateral decision/resolution of the Respondents to permanently transfer the Ex-parte Applicant from the Kiambu County Assembly to the 2nd Interested Party as his services are no longer needed by the 2nd Interested Party and from removing him from the Kiambu County Assembly payroll and further withholding his salary and other accrued benefits.
 - b) An order of Mandamus do issue compelling the Respondents herein to facilitate the Ex-parte Applicant to resume his duties as the duly appointed Director of Procurement with full pay and without loss of any benefits and seniority, responsibilities or physical office space occupied prior to the forced secondment.
 - c) An order of Prohibition do issue directed against the Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from permanently transferring and/or seconding the Ex-parte Applicant to the 2nd Respondent without his consent and in compliance with the due procedure and the applicable provisions of the law especially *the Constitution*, *Fair Administrative Action Act*, 2015, the *Public Service Commission Act*, 2017, the *County Assembly Services Act*, 2017 and the Public Service guidelines on Norms and Practices.
 - d) An order of prohibition do issue restraining the Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the advertising, interviewing, recruiting, employing, confirming in employment anyone else or replacing the Ex-parte Applicant as the Director of procurement, Kiambu County Assembly.
 - e) An order of prohibition do issue restraining the Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever or otherwise from frustrating and/or taking any action against the Ex-parte Applicant including re-designation, deployment, secondment or any action that affects the Ex-parte Applicant contract of employment and his labour rights contrary to the relevant law and following the due process.
 - f) A declaration that the unilateral resolution, decision and general conduct of the Respondent and in particular the purported permanent transfer of the Ex-parte Applicant from the Kiambu County Assembly to 2nd Interested Party without giving him an opportunity to



be heard, is unreasonable and in breach of procedure, ultra vires, unlawful, wednesbury unreasonable, unfair, manifestly unjust and in blatant disregard to the rules of natural justice and void ab initio.

- g) A declaration that the Ex-parte Applicant's fundamental freedoms and labour rights have been violated.
- h) Compensation to the applicant for the violation of his labour rights, fundamental rights and freedoms.
- i) That any other and further relief that this Court may deem fit and just to grant in the circumstances.
- j) The costs of this Application be provided for.

14. The 1st, 2nd and 3rd Respondents have opposed the motion through a notice of preliminary objection on the following grounds:

- a) That the Application and the entire suit herein as filed is a blatant abuse of the court process as it offends the mandatory provisions of section 9(2) of the Fair Administration Action Act and Article 234 (2) (i) of *the Constitution* of Kenya 2010.
- b) That the same is incompetent, bad in law thus a waste of this courts judicial time hence ' it ought to fail in limine;
- c) That the Petitioner has not exhausted all appeal mechanisms provided by the Law and specifically section 77 of the *County Governments Act* 2012 which provides as follows:
 - (1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the "Commission") against the decision.
 - (2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of—
 - (a) recruitment, selection, appointment and qualifications attached to any office;
 - (b) remuneration and terms and conditions of service;”
 - d) That the application and proceedings hereof are therefore premature.
 - e) That the Application and the entire suit is therefore Null and void ab initio.

15. The Respondents also filed Grounds of Opposition dated 9th July, 2019 raising the following grounds:

- i. That the Application herein as filed is brought in blatant abuse of the court process, its incompetent and bad in law thus a waste of this precious judicial time hence the same ought to fail in limine;
- ii. That the doctrine of exhaustion has not been exercised in this particular matter as upheld in the matter of Anthony Miano & others v Attorney General & others (2021) eKLR and Sonsam (Kenya) Ltd v National Transport and Safety Authority & 2 others (2021) eKLR;
- iii. That the Petitioner has not exhausted all appellate mechanisms as provided by Section 77 of the *County Governments Act*, the application is therefore premature and ought to be struck off;



- iv. That the Application is made of thread bare recitals, incompetent, misconceived and misplaced as the Applicants have not shown what has been breached and how it affects any of their rights and freedoms and since the allegations are very general, interim orders cannot be granted at this stage;
 - v. That whereas the Applicant seeks interim orders against the 1st, 2nd and 3rd Respondents such orders ought not to be granted as any damage (if any) can be well compensated by virtue of the principle of restitutio ad integrum and damages with costs.
 - vi. That the Exparte applicant's allegations are unsubstantiated and this Honorable Court in applying stringent measures designed to filter out claims which are groundless or hopeless at an early stage and to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative error ought to dismiss this application so as to remove the uncertainty in which the Respondents being public bodies might be left;
 - vii. That the orders sought cannot be granted as such orders prayer or orders same shall prejudice the Respondents and interfere with their statutory duties.
16. The 1st and 2nd Interested Parties jointly filed the Replying Affidavit of Daniel Kirathe, the County Solicitor of the 2nd Interested Party in which he avers that the 1st and 2nd Interested Parties absorbed the Ex-parte Applicant on secondment terms for a period of 3 years, which period was non-renewable.
 17. They aver that upon the lapse of the 3 year period the Applicant's engagement reverted back to the County Assembly.
 18. The Affiant further states that the 1st and 2nd Interested Parties did not in any way take part in the decision making and secondment process at the County Assembly but only received the Applicant upon request by the 1st Respondent.
 19. The Affiant further stated that on the basis of the above the Interested Parties are not privy to whether due procedure was followed by the Respondents and whether his consent was sought prior to the secondment.
 20. The Affiant deposed that upon completion of the secondment period, the Applicant was released back to his employer and as a result his last salary to be paid by the 1st Interested Party was due in March, 2021.
 21. That all subsequent salaries and remuneration were then to be handled by the 1st, 2nd and 3rd Respondents in accordance with the Applicant's terms of service.
 22. The Interested Parties maintained that there was no joint resolution to permanently transfer the Applicant to the County Executive and that any such deliberations were taken solely by the 1st Respondent.
 23. The 1st and 2nd Interested Parties maintained that they did not at any point engage in any violations of the Applicant's rights and therefore ought not to have any adverse orders made against them or be condemned to pay any costs.
 24. The motion was disposed of by way of written submissions.
 25. This Court has considered the submissions filed by all the parties herein and the authorities cited therein.



26. The Applicant, through his Counsel on record drew this Court's attention to Judicial Review Application No. E017 of 2021 – James Mbugua Kamau v County Assembly of Kiambu Service Board & Others, whose judgment was delivered by My Brother, Nderi Nduma J. on 16th December, 2021.
27. This Court takes judicial notice that the facts and evidence in this matter are similar to the aforementioned matter and that the two matters arose from the same cause of action.
28. The Ex-parte Applicant in Judicial Review Application No. E017 of 2021 – James Mbugua Kamau v County Assembly of Kiambu Service Board & Others sought the following orders:
- a) An order of Certiorari do issue to quash the unilateral decision/resolution of the Respondents to permanently transfer the Ex-parte Applicant from the Kiambu County Assembly to the 2nd Interested Party as his services are no longer needed by the 2nd Interested Party and from removing him from the Kiambu County Assembly payroll and further withholding his salary and other accrued benefits.
 - b) An order of Mandamus do issue compelling the Respondents herein to facilitate the Ex-parte Applicant to resume his duties as the duly appointed Director of Procurement with full pay and without loss of any benefits and seniority, responsibilities or physical office space occupied prior to the forced secondment.
 - c) An order of Prohibition do issue directed against the Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from permanently transferring and/or seconding the Ex-parte Applicant to the 2nd Respondent without his consent and in compliance with the due procedure and the applicable provisions of the law especially *the Constitution*, *Fair Administrative Action Act*, 2015, the *Public Service Commission Act*, 2017, the *County Assembly Services Act*, 2017 and the Public Service guidelines on Norms and Practices.
 - d) An order of prohibition do issue restraining the Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the advertising, interviewing, recruiting, employing, confirming in employment anyone else or replacing the Ex-parte Applicant as the Director of procurement, Kiambu County Assembly.
 - e) An order of prohibition do issue restraining the Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever or otherwise from frustrating and/or taking any action against the Ex-parte Applicant including re-designation, deployment, secondment or any action that affects the Ex-parte Applicant contract of employment and his labour rights contrary to the relevant law and following the due process.
 - f) A declaration that the unilateral resolution, decision and general conduct of the Respondent and in particular the purported permanent transfer of the Ex-parte Applicant from the Kiambu County Assembly to 2nd Interested Party without giving him an opportunity to be heard, is unreasonable and in breach of procedure, ultra vires, unlawful, wednesbury unreasonable, unfair, manifestly unjust and in blatant disregard to the rules of natural justice and void ab initio.
 - g) A declaration that the Ex-parte Applicant's fundamental freedoms and labour rights have been violated.
 - h) Compensation to the applicant for the violation of his labour rights, fundamental rights and freedoms.



- i) That any other and further relief that this Court may deem fit and just to grant in the circumstances.

29. The Court in the above matter made the following pronouncements:

“In the final analysis, the Court finds the application has merit and is allowed.

- (1) The Court grants the Exparte Applicant the following orders against the Respondents jointly and severally: -
- (a) An order of Certiorari is issued to quash the unilateral decision/ resolution of the Respondents to permanently transfer the Ex-parte Applicant from the Kiambu County Assembly to the 2nd Interested Party as his services are no longer needed by the 2nd Interested Party and from removing him from the Kiambu County Assembly payroll and further withholding his salary and other accrued benefits.
 - (b) An order of Mandamus is issued compelling the Respondents herein to facilitate the Ex-parte Applicant to resume his duties as the duly appointed Director of Procurement with full pay and without loss of any benefits and seniority, responsibilities or physical office space occupied prior to the forced secondment.
 - (c) An order of Prohibition is issued directed against the Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from permanently transferring and/or seconding the Ex-parte Applicant to the 2nd Interested Party without his consent and in compliance with the due procedure and the applicable provisions of the law especially *the Constitution*, *Fair Administrative Action Act*, 2015, the *Public Service Commission Act*, 2017, the *County Assembly Services Act*, 2017 and the Public Service guidelines on Norms and Practices.
 - (d) An order of prohibition is issued restraining the Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the advertising, interviewing, recruiting, employing, confirming in employment anyone else or replacing the Ex-parte Applicant as the Director of procurement, Kiambu County Assembly.
 - (e) An order of prohibition is issued restraining the Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever or otherwise from frustrating and/or taking any action against the Ex-parte Applicant including re-designation, deployment, secondment or any action that affects the Ex-parte Applicant contract of employment and his labour rights contrary to the relevant law and following the due process.



- (f) A declaration that the unilateral resolution, decision and general conduct of the Respondent and in particular the purported permanent transfer of the Ex-parte Applicant from the Kiambu County Assembly to 2nd Interested Party without giving him an opportunity to be heard, is unreasonable and in breach of procedure, ultra vires, unlawful, wednesbury unreasonable, unfair, manifestly unjust and in blatant disregard to the rules of natural justice and void ab initio.
 - (g) A declaration that the Ex-parte Applicant's fundamental freedoms and labour rights have been violated.
- (2) The Respondents to pay to the Exparte Applicant all arrear remuneration due to the Exparte Applicant from the date the same was stopped and to continue to pay the Exparte Applicant in terms of his terms and conditions of service in the position of Director of Procurement County Assembly of Kiambu.
 - (3) Costs of the suit.”
30. The two suits seek similar orders of Certiorari and Prohibition to quash the decision and/or resolutions of the Respondents to permanently transfer the Ex-parte Applicant to the Interested Parties.
 31. The orders sought in the two suits are identical. They arise from the same set of facts and circumstances. This is evident from their respective pleadings which are set out hereinabove.
 32. I find that the two matters ought to have been brought to the Court's attention for purposes of consolidation. The principles of consolidation of suits were explained in *Stumberg and another v Potgeiter* (1970) E.A. 323 as follows: -

“Where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered.”
 33. Further, in the *Law Society of Kenya v The Centre for Human Rights and Democracy*, (Supreme Court of Kenya, Petition No. 14 of 2013) it was held that:

“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it.”
 34. I find that this matter ought to have been consolidated with Judicial Review Application No. E017 of 2021 and determined together.
 35. Now that consolidation was not ordered and since both suits challenge the same decision, the prayers sought in both suits are the same and they both cite similar issues, the decision of the first suit should be binding on those issues and to the said parties and need not be tried again.
 36. This Court therefore adopts the judgment in Judicial Review Application No. E017 of 2021.
 37. The Court grants the Exparte Applicant the following orders against the Respondents jointly and severally: -



- (i) An order of Certiorari be and is hereby issued to quash the unilateral decision/resolution of the Respondents to permanently transfer the Ex-parte Applicant from the Kiambu County Assembly to the 2nd Interested Party as his services are no longer needed by the 2nd Interested Party and from removing him from the Kiambu County Assembly payroll and further withholding his salary and other accrued benefits.
- (ii) An order of Mandamus be and is hereby issued compelling the Respondents herein to facilitate the Ex-parte Applicant to resume his duties as the duly appointed Director of Procurement with full pay and without loss of any benefits and seniority, responsibilities or physical office space occupied prior to the forced secondment.
- (iii) An order of Prohibition is issued directed against the Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from permanently transferring and/or seconding the Ex-parte Applicant to the 2nd Interested Party without his consent and in compliance with the due procedure and the applicable provisions of the law especially *the Constitution*, *Fair Administrative Action Act*, 2015, the *Public Service Commission Act*, 2017, the *County Assembly Services Act*, 2017 and the Public Service guidelines on Norms and Practices.
- (iv) An order of prohibition be and is hereby issued restraining the Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the advertising, interviewing, recruiting, employing, confirming in employment anyone else or replacing the Ex-parte Applicant as the Director of procurement, Kiambu County Assembly.
- (v) An order of prohibition be and is hereby issued restraining the Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever or otherwise from frustrating and/or taking any action against the Ex-parte Applicant including re-designation, deployment, secondment or any action that affects the Ex-parte Applicant contract of employment and his labour rights contrary to the relevant law and following the due process.
- (vi) The Court declares that the unilateral resolution, decision and general conduct of the Respondent and in particular the purported permanent transfer of the Ex-parte Applicant from the Kiambu County Assembly to 2nd Interested Party without giving him an opportunity to be heard, is unreasonable and in breach of procedure, ultra vires, unlawful, wednesbury unreasonable, unfair, manifestly unjust and in blatant disregard to the rules of natural justice and void ab initio.
- (vii) The Court declares that the Ex-parte Applicant's fundamental freedoms and labour rights have been violated.
- (viii) The Respondents are directed to pay to the Exparte Applicant all arrears of remuneration due to the Exparte Applicant from the date the same was stopped and to continue to pay the Exparte Applicant in terms of his terms and conditions of service in the position of Director of Procurement County Assembly of Kiambu.
- (ix) The Respondents shall pay the Ex-parte Applicant's costs of the suit.

38. It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 11TH DAY OF FEBRUARY 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

