



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
JUDICIAL REVIEW APPLICATION NO. E039 OF 2021

(Before Hon. Justice Dr. Jacob Gakeri)

REPUBLIC.....APPLICANT

VERSUS

THE NAIROBI CITY COUNTY ASSEMBLY SERVICE BOARD.....1ST RESPONDENT

GAVIN CASTRO.....2ND RESPONDENT

PAULINE SARAH AKUKU.....EXPARTE APPLICANT

RULING

1. On 22nd December 2021, the *Ex Parte Applicant* herein moved this court through chamber summons seeking the following orders that:

a) Spent

b) Spent

c) *The Ex Parte Applicant be granted leave to apply for a Judicial Review order of CERTIORARI to bring into this Court and quash the 1st Respondent's decision to unilaterally and illegally appoint the 2nd Respondent as*

the Acting Clerk, Nairobi City County Assembly.

d) *The Ex-Parte Applicant be granted leave to apply for a Judicial Review order of MANDAMUS to compel the 1st Respondent to appoint the Ex-parte Applicant herein to the position of Acting Clerk, Nairobi City County Assembly.*

e) *The Ex-Parte Applicant be granted leave to apply for a Judicial Review order of PROHIBITION to prohibit the Respondents from appointing any other officer to the position of Acting Clerk, Nairobi City County Assembly.*

f) *The leave so granted to operate as a stay of the appointment of the 2nd Respondent as the Acting Clerk, Nairobi City County Assembly by the 1st Respondent done on 21st December, 2021 pending hearing and determination of the Judicial Review Application.*

g) *Such further orders and reliefs that this Honourable Court may deem to be just and expedient.*

h) *Costs of this application be borne by the Respondents.*

2. The *Ex Parte* chamber summons is expressed under Order 53 of the Civil Procedure Rules, Rule 3(1) of the High Court (Practice and Procedure) Rules of the Judicature Act and all other enabling provisions of the law.

3. The 2nd Respondent, vide a supporting affidavit and further affidavit sworn on his and the 1st Respondent's behalf on 30th December 2021 and 21st January 2022 respectively, urges the court not to grant the orders sought on grounds that the same issues are under adjudication in Petition E201 of 2021 filed on 20th December 2021.

4. The 2nd Respondent avers that the above petition was filed by Okiya Omtatah who he alleges is a proxy of the *Ex-Parte Applicant*, seeking to terminate the acting appointment of Adah Onyango and replacing her with the *Ex-Parte Applicant*.

5. He avows that on 20th December 2021, the Court considered the application and granted the orders sought barring Ms. Adah Onyango from acting as the clerk to the 1st Respondent and set down the matter for *inter partes* hearing on 18th January 2021, where the prayer for appointment of the *Ex Parte Applicant* would be considered *inter partes* and on merit.

6. That therefore, there is pending before court, another matter on the question of the appointment of the Deputy Clerk and as such, he avows that this court ought not to grant any orders in the interim to avoid conflicting decisions and abuse of court processes.

7. The affiant also avers that the instant suit is intended to frustrate the hearing of the application and the petition as the *Ex Parte Applicant* is aware that the orders sought in the petition are similar to those sought in the present application.

8. He states that in the event that the application is allowed, it would render the proceedings before the court on 18th January 2022 merely academic and would cause confusion in the management of the Board and the Assembly in particular.

9. That it would be in the interests of justice to stay this matter or in the alternative, order that the same be considered alongside **Nairobi ELRC Petition No. E201 of 2021** on the 18th January 2021 as ordered by the court.

10. He also avows that it is in the interests of the public for the courts to refrain from interfering or being seen to be micromanaging the affairs of competent institutions set up under the law to manage the affairs of its employees unless in clear and obvious cases of breach of law and regulation.

11. That the instant suit seeks to micromanage the affairs of the 1st Respondent including suggesting to the board who to be appointed in an acting capacity; decisions he avers are wholly within the exclusive functions and powers of the Board.

12. The affiant also avers that the *exparte* applicant has not come to court with clean hands as she holds the position of Deputy Clerk, in violation of a Court Order issued on 25th November 2019 in **ELRC Petition No. 194 of 2019**.

13. He states that the *Ex Parte Applicant* has continued to act as a second Deputy Clerk, a position not contemplated by law and that she is therefore seeking to sanitise her position through the instant suit.

14. The matter came up before this court on 07th February 2022 and the court directed that the same be dispensed with through submissions.

Submissions

15. At the time of retiring to write this ruling, the *Ex Parte Applicant* had not filed her submissions.

1st Respondent Submissions

16. The 1st Respondent in its submissions reiterated that the application was an abuse of court process and submitted that the court ought not to enable a litigant who is willing to waste judicial time and resources to get favourable outcomes.

17. Additionally, it submitted that the fundamental objective of the *sub judice* rule is to prevent courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon parallel litigations in respect of the same action, subject matter and relief.

18. It is argued that when two or more cases are filed seeking similar reliefs, the matter filed later ought to be stayed in order to await the determination of the former suit to avoid abuse of the court processes and diminish the chances of courts with competent jurisdictions rendering conflicting decisions over the same subject matter. Reliance is made on the decision in **Republic v Paul Kihara Kariuki, Attorney General & 2 others Exparte Law Society of Kenya [2020] eKLR**.

19. Regarding the application of leave being granted to operate as stay of the appointment of the 2nd Respondent as the Acting Clerk, it submitted that the Applicant had not met the threshold of granting stay of a decision which has already been implemented.

20. Reliance was placed on the holding in **Republic v National Transport & Safety Authority & 10 others [2014] eKLR** where the Court expressed itself as follows:

"In judicial review, the threshold for obtaining leave to commence is low and obtaining leave is not in itself evidence of a strong case for issuance of stay orders. In order to obtain leave to commence judicial review proceedings, an applicant only needs to show that he has an arguable case. The standard for the grant of an order of stay is however a high one. In a situation where an Applicant seeks to stop the implementation of a law, he must demonstrate that the implementation of the law will cause irreparable harm. Otherwise, the Court will be reluctant to suspend the operation of a law."

21. It is further argued that where a decision sought to be quashed has been implemented, leave ought not to operate as a stay since the stay is no longer efficacious as there may be nothing remaining to be stayed unless there exist exceptional cases to warrant the court to reverse a decision which has been implemented. The onus is upon the applicant to prove that such exceptional circumstances exist. The decision in

James Opiyo Wandayi v Kenya National Assembly & 2 others [2016] eKLR is relied upon to reinforce the submission.

22. On the basis of the foregoing, the 1st Respondent concludes that the *Ex parte* Applicant had not made out a *prima facie* case to warrant the grant of an order for stay and as such, the prayer ought not to be granted considering that the 1st Respondent's decision to appoint the 2nd Respondent as the Acting Clerk was within its mandate under the law.

2nd Respondent's Submissions

23. The 2nd Respondent submits that the *Ex-Parte Applicant* has no arguable case neither has she satisfied the grounds to be considered before leave is granted provided in the book **Judicial Review: Principles and Procedure by Jonathan Auburn** at paragraph 26. It is submitted that the Ex Parte Applicant has not met the threshold for a grant of leave for judicial review.

24. It is the 2nd Respondent's submission that the *Ex Parte Applicant* had not shown an illegality in the appointment of the 2nd Respondent as Acting Clerk given that the same was conducted in compliance with Section 21 of the County Assembly Services Act and the Justice and Legal Affairs Committee (JLAC) Report adopted by the Assembly on 26th October 2021. The decision in **Pastoli v Kabale District Local Government Council & Others (2008) 2EA 300** is relied upon to buttress the submission.

25. The 2nd Respondent also submits that the issue of the position of acting clerk is *sub-judice* and that *Ex Parte Applicant* was clearly forum shopping for a court to sanitize her position.

26. It is argued that the *Ex parte* Applicant has no arguable case as her alleged expectation of being appointed Acting Clerk has no backing in law. Reference is made to the decision in **Aga Khan Education Service v Republic & Others (2004) 1EA**.

27. On whether such leave, if granted, should act as stay, the 2nd Respondent opposes the same and argues that it would cripple all functions of the County Assembly and cause confusion in the management of the Board.

28. Finally, reliance is made on the twin principle of proportionality and equality of arms. The 2nd Respondent prays that the court considers public interest, whether or not the decision has been implemented and equality of arms in declining such stay and leave altogether. Decisions in **Beatrice Kwamboka v Leader of Majority Party of the Nairobi County Assembly (2016) eKLR** and **Taib A. Taib v Minister for Local Government & 3 Others (2006) eKLR** are relied upon to buttress the submission.

Analysis and Determination

29. After careful consideration of the *Ex parte* chamber summons dated 22nd December 2021 statutory statement, verifying affidavit, supporting and further affidavits of the 2nd Respondent and submissions of the 1st and 2nd Respondents, the only issue for determination is whether the *Ex parte Applicant* has met the threshold for a grant of the leave sought to commence judicial review proceedings and whether such leave should operate as a stay of the appointment of the 2nd Respondent.

30. As to whether the *Ex Parte Applicant* has established grounds to warrant the leave sought, the starting point is a recapitulation of the essence of obtaining such leave as eloquently captured by Waki J. (as he then as) in **Republic v County Council of Kwale & another Ex parte Kondo & 57 others, Mombasa HC Misc. Application No. 384 of 1996** as follows:

"... is to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the application is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the Court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public offices and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived." (See also IRC v National Federation of Self-Employed and Small Businesses Ltd (1982) 617, (1981) 2 ALL ER 93)

31. The requirements were elucidated by Mativo J. in **Republic v Kenya Revenue Authority Commissioner Ex Parte Keycorp Reals Advisory Limited [2019] eKLR** where he cited with approval the decision in **Meixner & another v A.G [2005] KLR 189**. At the leave stage the Applicant must show that: -

(i) *Sufficient interest in the matter otherwise known as locus standi.*

(ii) *He/she is affected in some way by the decision being challenged.*

(iii) *He/she has an arguable case and that the case has a reasonable chance of success.*

(iv) *The application must be concerned with a public law matter that is the action must be based on some rule of public law.*

(v) *The decision complained of must have been taken by public body, that is a body established by statute or otherwise exercising a public function."*

32. Similarly, in the words of Mativo J. in **Ex Parte Keycorp Reals Advisory Limited (supra)**:

“At the leave stage, the Applicant has the burden of demonstrating that the decision is illegal, unfair and irrational. The Applicant must persuade the Court that the application raises a serious issue. This is a low threshold. A serious issue is demonstrated if the Judge believes that the Applicant has raised an arguable issue that can only be resolved by a full hearing of the judicial review application. If the Court is not persuaded as aforesaid, leave will be denied and the matter proceeds no further.”

33. The Court is in agreement with the foregoing sentiments.

34. Applying the foregoing principles to the facts of the instant case, it is clear that the Applicant has satisfied the criteria set out herein above and the application was not intended to waste scarce judicial time. More importantly, the application herein is arguable.

35. The foregoing finding notwithstanding, it is noteworthy that the issue of the position of Acting Clerk is already before the Court under **Petition No. E201 of 2021 Okoiti Okiya Omtatah v Nairobi City Council Assembly Service Board & Adah Onyango** dated 14th December 2021, a fact the *Exparte Applicant* is aware of.

36. Having two suits running parallel to each other in the same Court seeking similar reliefs would not augur well with the administration of justice. In addition, it violates the **res sub judice rule**.

37. The petition, on the basis of which certain interim orders were granted on 20th December 2021, is live and pending determination and the reliefs sought are identical to the reliefs in the instant case.

38. Relatedly, sight must not be lost of the fact that the Applicant instituted Petition No. 170 of 2021 seeking a stay of the JLAC Report but withdrew the same subsequently as alleged by the 2nd Respondent. These allegations have not been controverted by the Applicant who for unexplained reasons opted not to file submissions in support of the *Exparte* chamber summons.

39. As to whether the leave, if granted should operate as a stay of the appointment of the 2nd Respondent as the Acting Clerk, Nairobi City County Assembly, it is submitted that the *Exparte Applicant* has not attained the threshold for the grant of stay of a decision implemented more than three months ago.

40. **Order 53 Rule 1(4)** of the **Civil Procedure Rules** provides that:

(4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:

41. A stay suspends or stops the proceedings that are challenged by the application for judicial review. Its purpose being to preserve the *status quo* pending determination of the judicial review proceedings.

42. In **Republic v National Transport & Safety Authority & 10 others (supra)** the Court expressed itself as follows:

“...The standard for the grant of an order of stay is however a high one. In a situation where an Applicant seeks to stop the implementation of a law, he must demonstrate that the implementation of the law will cause irreparable harm. Otherwise, the Court will be reluctant to suspend the operation of a law.”

43. As observed by P. Nyamweya J. in **Sauti Communications Limited v Communications authority of Kenya [2020] eKLR:**

“The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decisions and in various decisions by Kenyan Courts.”

44. According to the Judge in important consideration is whether the decision sought to be stayed has been fully implemented. This aspect was considered in **Jared Benson Kangwana v Attorney General HCCC No. 446 of 1995, Taib Ali Taib v Minister for Local Government & Others HC Misc. No. 158 of 2006, Republic v Cabinet Secretary for Transport and Infrastructure & 4 others, Exparte Kenya Country Bus Owners Association & 8 others [2014] eKLR** and **James Opiyo Wandayi v Kenya National Assembly and 2 others (supra)** where Judges held that where the decision sought to be stayed is complete, the Court cannot stay the same unless it is a continuing process in which the case the Court considers the completeness or continuing nature of the implementation.

45. In determining whether or not leave should act as a stay, the Court is guided by the sentiments of Odunga J. in **Beatrice Kwamboka v Leader of Majority Party of the Nairobi County Assembly [2016] eKLR** where the Learned Judge

put it thus:

“Apart from the foregoing the Court must also look at the likely effect of granting the stay to the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales so justice lie considering the fact that it is the business of the Court, so far as possible to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court in

exercising discretion, should therefore always opt for the lower rather than the higher risk of injustice.”

46. Finally, in the words of Maraga J. (as he then was) in **Taib A. Jaib v Minister of Local Government & 3 others (supra)**

“The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. It is not limited to judicial or quasi-judicial proceedings as some think. It also encompasses the administrative decision making process (if it has not yet been completed) being undertaken by a public body such as a local authority or minister, and the implementation of the decision of such body if it has been taken. A stay is only appropriate to restrain a public body from acting. It is however, not appropriate to compel a public body to act.”

47. The Court is in agreement with these sentiments.

48. In light of the foregoing legal position, I now turn to the facts of the instant case to determine whether the *Ex Parte Applicant* deserves a stay order.

49. It is not in dispute that the decision sought to be stayed was taken on 21st December 2021, more than three months ago and continuing.

50. Based on the judicial authorities cited above, the Court is of the view that a stay at this stage would be tantamount to granting the substantive orders sought by the *Ex Parte Applicant* and would be inappropriate, inefficacious and is likely to occasion confusion and disruption.

51. For the foregoing reasons, the Court is satisfied that the *Ex Parte Applicant* has not placed sufficient material before the Court to warrant the direction that leave should operate as a stay in the instant case.

Conclusion

52. Having found that the *Ex Parte Applicant* has demonstrated that the application is arguable, leave is hereby granted for the *Ex Parte Applicant* to commence judicial review proceedings against the 1st Respondent subject to the following conditions.

(1) Proceedings in the instant case shall be stayed until ELRC Petition No. E201 of 2021; Okoiti Okiya Omtatah v Nairobi City Council Assembly Service Board & M/s Adah Onyango is heard and determined.

(2) Leave shall not operate as a stay.

(3) There shall be no order as to costs.

53. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF APRIL 2022

DR. JACOB GAKERI

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.

DR. JACOB GAKERI

JUDGE