



**Republic v County Government of Kericho & another; Oduori & another (Exparte)  
(Judicial Review E002 of 2021) [2022] KEELRC 1370 (KLR) (14 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1370 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO  
JUDICIAL REVIEW E002 OF 2021**

**ON MAKAU, J**

**JULY 14, 2022**

**IN THE MATTER OF AN APPLICATION BY BRIDGIT ODUORI  
AND LILAH CHERUTICH FOR THE JUDICIAL REVIEW  
ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26**

**AND**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF ARTICLES 22,23,29,41,47,  
162 AND 236 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF EMPLOYMENT ACT, NO 11 OF 2007**

**AND**

**IN THE MATTER OF SECTIONS 7,8 AND 9 OF THE  
FAIR ADMINSTRATIVE ACTIONS ACT NO 4 OF 2015**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COUNTY GOVERNMENT OF KERICHO ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE MEMBER, HEALTH**

**SERVICES ..... 2<sup>ND</sup> RESPONDENT**

**AND**



**BRIDGET ODUORI ..... EXPARTE**  
**LILAH CHERUTICH ..... EXPARTE**

## **JUDGMENT**

1. On November 26, 2021, this Court granted the applicants leave to apply for orders of certiorari, and prohibition as sought in their chamber summons dated November 25, 2021. The Court also directed the leave granted to operate as stay pending the hearing and determination of the intended motion.
2. The Applicant then filed the substantive motion dated December 1, 2021 on the December 14, 2021, which sought the following Orders;
  1. An order of Certiorari to remove into employment and labour Relations Court for quashing and to quash the decision of the Respondents and or servants, agents and or employees dated 14<sup>th</sup> October, 2014 to evict the ex parte applicants from the staff houses located within the premises of Londiani Sub-County Hospital and all consequential actions based on the said action.
  2. An order of Prohibition to prohibit and restrain the Respondent and or servants, agents and /or employees from evicting the Exparte Applicants from the staff houses located within the premises of Londiani Sub-County Hospital or doing any act detrimental to the ex parte Applicants in the furtherance of the impugned decision.
  3. An order for costs of the proceedings.

### **Summary of Facts**

3. The applicants are public officer employed as Health records information officers at Londiani Sub-County Hospital. By virtue of their positions the applicants were allocated staff houses within the staff quarters of Londiani Sub-County Hospital where they have resided from the day of employment.
4. On or about the October 18, 2021, the applicants were issued with eviction notices by the Superintendent of Londiani Sub-County Hospital which notices directed the Applicants to vacate the said House before the Mid night of October 31, 2021, giving them 13 days to relocate. This Notice was copied to among others, the agents of the Respondents and the Officer Commanding Station Londiani Police station.
5. It is averred that the decision to evict them from the staff houses was made without them being heard, neither were they given alternative Houses or pay in lieu.
6. When the applicants failed to vacate the said houses, the Superintendent of Londiani Sub-County Hospital summoned them to the office threatening them with dire consequences including transfer and/or termination of their employment.
7. The applicants contend that they ought to have been heard before the said notices were issued or the decision to evict them, in favour of other staff members, was made.
8. It is their averments that the Respondent intends to evict them to create room for other staff members and not for the purpose indicated in the eviction Notice. In their view, the eviction will cause them loss and damage and they will be exposed to threats and harassment by the Respondent's agents. Further,



- since they are not paid House allowance by the Respondent, they will face more financial hardship if they are evicted from the staff houses without alternative accommodation or payment in lieu.
9. The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the Application herein and filed replying affidavit sworn on May 27, 2022 by their County Attorney, Mr. Gideon Mutai. He deposes that the application is frivolous, mischievous, misleading and an abuse of Court process as such it ought to be dismissed forthwith.
  10. He avers that the eviction notices were communicated with sufficient Notice as the first eviction notice was issued on the September 16, 2020, another reminder on the November 6, 2020 and another on May 13, 2021 all of which fell on deaf ears. He added that the purpose of issuing the eviction notice was for the houses to be renovated and be used as call rooms for theatre Nurses and other staff, a right which is reserved for the Hospital.
  11. The affiant avers that, it is not a term of employment that the employees of the Hospital are to be hosted in the Hospital premises and the refusal by the applicants to heed to the request to create room for theatre nurse was in total disobedience of direction from their superiors.
  12. He concluded that he who seeks equity must do Equity a maxim which the Applicant abused when they failed to heed lawful authority and instead rushed to this Court seeking for justice when they themselves failed to obey orders of their employer.
  13. Directions were taken to file submission in this matter and the applicants filed their submission on the May 26, 2022, however the Respondent sought to rely on their replying affidavit only.

#### **Applicants' Submissions.**

14. The Ex parte Applicant submitted only on issue whether the Orders sought should issues contending that their application was unopposed. To support the prayers sought, they relied on the case of *Republic v Secretary of the firearms Licensing Board and 2 others Ex parte; Senator Johnson Muthama* [2018] eKLR where the Court discussed the elements which an applicant for judicial review must establish to the court to warrant review administrative decisions including illegality, irrationality and procedural impropriety.
15. It was submitted that Section 31(1) of the *Employment Act*, mandates employer to provide accommodation for their employees and in the alternative make payment for rent (House allowance). To support this argument, the Ex parte Applicants relied on the case of *Richard Were and 11 others v Permanent Secretary Ministry of Health & 3 others* [2013] eKLR where the Court held that employer's obligation to provide housing or provide housing allowance to his employee under section 31 of the *Employment Act* is consistent with the state obligation to provide access to housing under Article 43(1) of *the Constitution*.
16. In the instant case, the Applicant submitted that, the Respondent send them eviction notices without giving them alternative accommodation or paying them house allowance and as such the decision to evict them is in breach of section 31 of the *Employment Act* as read with Article 43(1)(b) of *the Constitution*.
17. It was also argued that the eviction Notices were merely served on them without being heard contrary to the provisions of Article 47 of *the Constitution*. In this they relied on the case of *James Opiyo Wandayi v Kenya National Assembly & 2 others* [2016] eKLR.
18. On the reliefs sought, the ex parte applicant relied on the case of *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR where the Court discussed the nature and the application of judicial review orders.



19. Accordingly, it was argued that the Application herein is merited and the same ought to be granted as prayed.

### **Analysis and Determination.**

20. Upon careful analysis of the above facts as set out in the affidavits and submissions, I find the applicants' contention that the application is unopposed to be incorrect considering that the respondents filed a Replying Affidavit sworn on May 27, 2022 which denies accusations made against them in the application. Consequently, the following issues fall for determination, namely: -
- a. Whether the impugned decision warrants judicial review.
  - b. Whether the reliefs sought should be issued.

### **Whether the decision warrants judicial review.**

21. Courts have discussed the instances when judicial review should be sought and granted. In the case of *Republic v Secretary of the firearms Licensing Board and 2 others Ex parte; Senator Johnson Muthama* [2018] eKLR the Court held that;

“Before embarking on the remaining issues for determination, it is necessary to reiterate the grounds for judicial review as stated in the Ugandan case of *Pastoli vs Kabale District Local Government Council & others*, (2008) 2 EA 300 at pages 303 to 304 thus:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR). Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality..... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”. Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. *Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876.”

22. It is undisputed fact that the applicants are employees of Kericho County Government, having been employed as Record management officer and deployed to Londiani sub-County Hospital. They were offered Housing in the said Hospital quarters and occupied the said houses from the time of employment to date.
23. The Hospital Management through several letters allegedly communicated to the Applicants it's decision to have them vacate their staff House for the purposes of renovation and use as call rooms for operating Theatre Nurses and other staff. The said letters were not brought before the Court. What is



before this Court is the eviction Notice dated October 14, 2021 giving the Applicants up to October 31, 2021 to vacate the said houses or risk losing their jobs for insubordination.

24. The applicants have argued before this Court that the said Notices did not provide them with alternative housing, considering that they are not paid House allowance by their employer. The non-payment of house allowance, informed the Respondent's decision to house the applicants in the staff Quarters located within the Hospital. The Respondents did not challenge that fact.

25. Section 31 of the *Employment Act* provides that;

(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service—(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or (b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a). (2) The Minister may, on the recommendation of the Board by notice in the Gazette, exclude the application of this section to a category of employees and such category of employee shall be dealt with as shall be specified in the Notice.”

26. From the above provisions it is clear that every employee is entitled to either housing provided by the employer or in the alternative a reasonable house allowance. The provision is consistent with Article 43 of *the Constitution* of Kenya provides that;

“Every person has the right—

- a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
- b) to accessible and adequate housing, and to reasonable standards of sanitation;
- c) to be free from hunger, and to have adequate food of acceptable quality;
- d) to clean and safe water in adequate quantities;
- e) to social security; and
- f) to education.”

27. The decision by the Respondent communicated through the notice of October 14, 2021 was evicting the Applicants without providing an alternative housing or house allowance. The said decision was essentially made to disadvantage the applicants and favour their colleagues in the same hospital. In a similar case, *Richard Were and 11 other v Permanent Secretary Ministry of Health & 3 others* [2013] eKLR Majanja J held that: -

“In order achieve the objective of ensuring that a class of employed person access housing, the State has through the *Employment Act* imposed a mandate on the employer to provide housing or an allowance to the employee to obtain housing in the market. The mandate imposed on every employer is consistent with the State obligations under Article 43(1) (b)



to provide access to housing. The government, as employer, has provision for either housing or payment of house allowance...”

28. Having considered the material presented to the court, I am satisfied that the applicants have established that the decision to evict them from staff quarters in order to create room for their colleagues was illegal, irrational and tainted with procedural impropriety.
29. The decision was illegal because it was contrary to express provisions of Section 31 of the *Employment Act* which requires that the employer should provide housing to his employee or in the alternative pay him housing allowance at the market value. The eviction notice purports to evict them without offering to pay any housing allowance to them. Whichever way one looks at is a threat to the applicants’ right to housing promised under Article 43(1) (b) of *the Constitution* and provided under section 31 of the *Employment Act*.
30. It was irrational because the notice period given was less than one month and therefore too short for any reasonable person, especially with a family to relocate. Besides, the employer did not provide any alternative housing or offer to pay any housing allowance commensurate with the market rates. There was no indication that there were alternative market residential houses near the workplace where they could relocate without disrupting their families.
31. The decision lacks procedural propriety because the employer did not act fairly. The applicants were never accorded any hearing before the decision to evict them was made and therefore the court finds that they were condemned unheard contrary to the rules of natural justice. Although the Respondent has a prerogative in allocating resources to its staff, such power must be exercised fairly and lawfully.

#### **Whether the reliefs sought are merited**

32. The Applicants have urged the court to grant them the order of prohibition and certiorari against the employer. In the case of *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR the Court held that; -

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision... What does an Order of Prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. Only an order of Certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the appeal before us, the respondents did not apply for an order of certiorari and that is all we want to say on that aspect of the matter.”



33. Having found that the applicants have established that the decision to evict them is tainted with illegality, irrationality and procedural impropriety, I find that the orders sought are merited. Consequently I allow the Notice of Motion dated December 1, 2021 by making the following orders:
- a. Certiorari is hereby issued bringing into this Honourable court and quashing the Respondent's decision contained in the eviction Notice dated October 14, 2021 and any other consequential orders emanating therefrom.
  - b. Prohibitory is hereby issued against the Respondents and or their servant and agents prohibiting them from evicting the Applicants from the employer's staff quarters located within the precincts of Londiani Sub County Hospital or doing any other act in furtherance of the impugned decisions.
  - c. For avoidance of any doubt, the respondents are at liberty to remove the applicants from the staff quarter provided that the same is done within the four corners of the law by ensuring that there is valid reason for the removal, by serving a reasonable notice and then paying them a housing allowance. The respondents shall indicate in writing the allowance payable to the applicants before they are served them with the notice to vacate.
  - d. The applicants are awarded costs of this suit.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 14<sup>TH</sup> DAY OF JULY, 2022.**

**ONESMUS N MAKAU**

**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 15<sup>th</sup> April 2020, this Judgment 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.

**ONESMUS N. MAKAU**

**JUDGE**

