



Republic v Nairobi County Governor & 2 others; Speaker Nairobi County Assembly & another (Interested Parties); Gufu (Exparte Applicant) (Judicial Review Miscellaneous Application E004 of 2022) [2022] KEELRC 4082 (KLR) (30 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 4082 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E004 OF 2022
SC RUTTO, J
SEPTEMBER 30, 2022

IN THE MATTER OF: ENFORCEMENT OF THE RESOLUTION OF NAIROBI CITY COUNTY ASSEMBLY MADE ON 27TH JULY, 2021 FOR THE REMOVAL FROM OFFICE OF MS LYDIA KWAMBOKA, THE NAIROBI CITY COUNTY ATTORNEY AND IN THE MATTER OF: SECTION 40 (2), (3), (4), (5) AND (6) OF THE COUNTY GOVERNMENT AND IN THE MATTER OF: SECTION 13 AND 16 OF THE OFFICE OF THE COUNTY ATTORNEY ACT NO 14 OF 2020 AND IN THE MATTER OF: SECTION 11 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, NO. 4 OF 2015 AND IN THE MATTER OF: ARTICLE 10 OF THE CONSTITUTION OF KENYA, 2010 ON THE VALUES OF TRANSPARENCY AND ACCOUNTABILITY AND IN THE MATTER OF: ARTICLE 10 OF THE CONSTITUTION ON THE VALUES OF RULE OF LAW AND INTEGRITY AND IN THE MATTER OF:

BETWEEN

REPUBLIC APPLICANT

AND

HON. ANN KANANU MWENDA 1ST RESPONDENT

COUNTY GOVERNMENT OF NAIROBI 2ND RESPONDENT

LYDIAH OGWOKA KWAMBOKA 3RD RESPONDENT

AND

SPEAKER OF NAIROBI COUNTY ASSEMBLY INTERESTED PARTY

ETHICS AND ANTI CORRUPTION COMMISSION INTERESTED PARTY

AND

MOHAMED GUFU EXPARTE APPLICANT



RULING

1. The *Ex parte* Applicant, approached the Court through a Chamber Summons Application seeking leave to apply for an order of mandamus against the 1st Respondent, an order of certiorari against the 1st and 3rd Respondent and an order of prohibition against the 3rd Respondent.
2. The Court granted the prayer for leave and also directed that the Applicant serves the substantive motion on all the parties within 21 days.
3. Upon being served with the Application, the 1st and 2nd Respondent filed a Replying Affidavit as well as a preliminary objection.
4. Similarly, the 3rd Respondent filed a Replying Affidavit and a preliminary objection.
5. It is those two preliminary objections by the Respondents, that now come up for determination. The 1st and 2nd Respondents' preliminary objection is premised on the following grounds: -
 - i. The suit is *res judicata* the ruling and orders of Honourable Justice Monica Mbaru dated February 16, 2022 in ELRC JR Misc Application No E037 of 2021 Victor Otieno Odhiambo vs Hon Anne Kananu, County Government of Nairobi, Lydia Kwamboka and Speaker of the National Assembly, Ethics and Anti-Corruption Commission.
 - ii. The suit is fatally defective as it seeks an order of mandamus against the 1st respondent to compel her enforce a duty that she has not performed or undertaken under the provisions of sections 30(2) (a) and 31(d) of the County Government Act No 17 of 2012, sections 5(1) and 13 of the Office of the County Attorney Act No 14 of 2020 as read together with sections 43 and 51 of the Interpretations and General Provisions Act No 39 of 1956.
 - iii. The Honourable Court lacks jurisdiction to grant any orders sought in the Chamber Summons dated March 4, 2022 are (sic) incapable of being granted.
 - iv. The Applicant herein has not exhausted the statutory remedies available under section 13 of the office of the County Attorney Act No 14 of 2020 as read together with Section 51 of the Interpretations and General Provisions Act No 39 of 1956 before approaching the Court for the removal of the 3rd respondent as the County Attorney of the 2nd respondent.
 - v. The County Assembly of Nairobi City County in passing the resolution dated July 27, 2021 to compel the 1st respondent to terminate the services of the 3rd respondent as County Attorney did not exhaust the statutory remedies available under section 13 of the office of the County Attorney Act No 14 of 2020 as read together with section 51 of the Interpretations and General Provisions Act No 39 of 1956.
 - vi. The suit herein is fatally defective as the resolutions of the Nairobi city county assembly passed on July 27, 2021 are ultra vires the provisions of section 13 of the office of the County Attorney Act No 14 of 2020 as read together with section 51 of the Interpretations and General Provisions Act No 39 of 1956.
6. Turning to the preliminary objection by the 3rd Respondent, the same is couched as follows: -

Take notice that the 3rd Respondent shall at the hearing of the Notice of Motion dated March 24, 2022



- i. Object to the Affidavit of Mohammed Gufu sworn on March 24, 2022 as it contravenes provisions of order 53 Rule 4 of the [Civil Procedure Rules](#).
- ii. Object to the hearing of the said Judicial Review and Motion as it offends provisions of order 53 Rule 1 (2) (b).

7. It was agreed by the parties that both preliminary objections be canvassed by written submissions.

Submissions

8. Placing reliance on the case of [Charles Onchari Ogoti vs Safaricom Limited & another](#) (2020) eKLR and [Mukisa Biscuit Manufacturing Co Ltd vs West end Distributors Ltd](#) (1969) EA 696, the 1st and 2nd Respondents submitted that the preliminary objection is clearly within the definition set out by the courts hence should be upheld. That the preliminary objection conflates issues of law to the effect that whether the 1st Respondent is duty bound by the resolutions of the Nairobi County Assembly to remove the 3rd Respondent.
9. In further submission, the 1st and 2nd Respondents urged that the duty and responsibility of dismissing the holder of the office of the county attorney is solely bestowed on the 1st Respondent and thus cannot be compelled by this Honourable Court to enforce the same. That the reasons for exercising the said power ought to be valid and compelling and will depend on the circumstances of each case.
10. It was further submitted that an internal remedy must be exhausted prior to commencement of the instant judicial review unless the Applicant can demonstrate exceptional circumstances to exempt it from this requirement. That the decision to remove the 3rd Respondent was arrived at prior to exhausting available remedies which requires any aggrieved party to move the 1st Respondent to exercise her discretion and remove the 3rd Respondent from office under section 13 of the County Attorney Act. That the doctrine of exhaustion was completely ignored by the Ex Parte Applicant who by passed the statutory remedies and the procedure provided under the Act before approaching this Court.
11. On its part, the 3rd Respondent submitted that the *Ex parte* Applicant did not disclose to the Court that there were previous proceedings before this Court by the same parties over the same subject matter in ELRC JR No E036/2021 and ELRC JR No E237/2021 before Hon Justice Monica Mbaru in which the *Ex parte* Applicant was granted leave to apply for judicial review but did not file the substantive Notice of Motion within the stipulated time, hence the same was dismissed by the Court.
12. In further submission, the 3rd Respondent urged that the Application is on all four a replica of the said previous proceedings. Citing the provisions of Order 53 Rule 4, the 3rd Respondent submitted that the Affidavit of Mohammed Gufu has been filed after grant of leave to apply for judicial review and no leave of the Court was ever sought to file the said affidavit. That further, and despite demand, the *Ex parte* Applicant had failed to serve the Affidavit in support of the Application for leave, upon the 3rd Respondent.
13. On the part of the *Ex parte* Applicant, it was submitted that the preliminary objection by the 1st and 2nd Respondents is defective and improper as it conflates issues of law and fact. That it is not based on pure points of law. That the preliminary objection is largely based on issues of fact that require evidentiary proof.
14. The *Ex parte* Applicant further urged that ELRC JR E036/2021 as consolidated with ELRC JR/ E037/2021 were merely struck out and not dismissed. That as such, the same was not determined on its merits hence the principle of res judicata does not apply. On this score, the *Ex parte* Applicant placed



reliance on the cases of *Enock Muhanji vs Hamid Abdalla Mbarak* (2013) eKLR and *Moses Mbatia vs Joseph Wamburu Kihara* (2021) eKLR.

15. Gathering support from the case of *Kenya Commercial Bank Ltd vs Benjob Amalgamated Ltd* (2017), the *Ex parte* Applicant urged that the 1st and 2nd Respondent had failed to prove conjunctively all the requisite elements of *res judicata*. That further, the 1st Respondent's obligation once the assembly passes a resolution on the removal of a member of the executive committee, is imperative and mandatory. That the Respondents had not proved that the 3rd Respondent is not a member of the county executive committee. That contrary to the Respondent's assertions, there is no statutory remedy available to the *Ex parte* Applicant under section 13 of the County Attorney Act as read together with section 52 of the office of the County Attorney Act No 14 of 2020 and section 51 of the Interpretations and General Provisions Act.
16. With regard to the preliminary objection by the 3rd Respondent, the *Ex parte* Applicant argued that despite the Verifying Affidavit not containing the averment to the effect that there are no previous proceedings between the parties over the same course of action, the same was not deliberate. The case of *Edney Adaka Ismial vs Equity Bank Limited* (2014) eKLR was cited to support the *Ex parte* Applicant's argument that the mistakes of an advocate should not be visited on the client when the situation can be remedied by costs. That the same was regrettable and that it could be cured by the provisions of Order 19 Rule 7 of the *Civil Procedure Rules, 2010*.
17. The *Ex Parte* Applicant further submitted that there is no requirement for an Applicant to seek leave to file an affidavit in support of its motion. That further, it served the 3rd Respondent with the substantive motion containing the statutory statement.

Analysis and determination

18. I have considered the two preliminary objections as well as the opposing submissions and in my view, the issues falling for determination by the Court are: -
 - i. Whether the Respondents' Preliminary Objection meets the fundamental threshold of a preliminary objection
 - ii. Whether the Judicial Review Application is fatally defective: -
 - a. For offending the provisions of Order 53 Rule 1(2) (b) and Order 53 Rule 4 of the Civil Procedure Rules, 2010;
 - b. In light of the provisions of Sections 30 (2) (a) and 31 (d) of the County Government Act, section 5(1) and 13 of the Office of the county Attorney Act as read together with sections 43 and 51 of the Interpretation and General Provisions Act.
 - iii. Whether the doctrine of exhaustion of remedies apply, and if so, to what extent?

Whether the Respondents' Preliminary Objection meets the fundamental threshold of a preliminary objection

19. The *Ex Parte* Applicant has submitted that the Respondents' preliminary objections do not raise pure issues of law. As expected, the Respondents hold differently.
20. The test that must be satisfied before a preliminary objection can be argued, was established in the celebrated case of *Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors Ltd* [1969] E A 696



where it was held that a proper preliminary objection constitutes a pure point of law. It was further held that: -

“A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

21. This position was amplified by the Supreme Court in the case of *Independent Electoral and Boundaries Commission vs Jane Cheperenger & 2 Others* [2015] eKLR as follows: -

“(16) It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (see *Hassan Nyanje Charo v Khatib Mwashetani & 3 Others*, Civil Application No 14 of 2014, [2014] eKLR).

(17) On that basis, two questions emerge for this Court’s consideration: what pure point of law has the 1st respondent raised in her preliminary objection? Are the facts in issue, settled?

22. In the present case, the preliminary objection by the 1st and 2nd Respondents is on *res judicata*, the principle of exhaustion of remedies and whether the order of mandamus as sought against the 1st Respondent can issue in light of the relevant legal provisions. The issue of *res judicat* is no doubt an issue of law. On the other hand, the 3rd Respondent’s preliminary objection is in respect of the requirements under Order 53 of the Civil Procedure Rules. Again, these are express issues of law.

23. The crux of the Application is that it seeks to compel the 1st Respondent to implement a resolution by the Nairobi County Assembly on July 27, 2021 for the removal of the 3rd Respondent from the office of the County Attorney Nairobi County and to quash every decision made by the said 3rd Respondent following the resolution. The Application further seeks to restrain the 3rd Respondent from performing and/or discharging the duties of the office of the County Attorney. Indeed, the existence of these facts are not in dispute and it is on the basis of the same remaining constant and being uncontested, that the Application has legs to stand on.

24. The issues raised in the 1st and 2nd Respondent’s preliminary objection touch on the mandate of the 1st Respondent vis a vis the office of the 3rd Respondent. These are issues of law as they revolve around sections 30(2) (a) and 31 of the County Government Act and section 13 of the Office of the County Attorney Act No14 of 2020.

25. To this end, the Respondents’ argument has been advanced on the basis and concurrence that the facts as pleaded by the *Ex parte* Applicant are correct. The issues raised in the preliminary objection can be ascertained by merely looking at the orders sought in the Application vis a vis the relevant law. This is a case where the law speaks for itself. This is an issue which does not require the ascertainment of any facts or exercise of any judicial discretion, as it is one that can only be determined by the application of the relevant legal provisions.

26. In light of the foregoing, I am of the view that the preliminary objections are proper in form and valid, hence I am enjoined to consider the same.



Whether the Application is fatally defective in light of Order 53 Rule 1(2) (b) and 53 (4) of the Civil Procedure Rules

27. The 3rd Respondent contends that the Application offends the provisions of Order 53 Rule 1(2) (b) of the Civil Procedure Rules. The said provision is in the following manner: -

“(2) An application for such leave shall be made *ex parte* to a judge in chambers, and shall be accompanied by —

.....

(b) affidavits verifying the facts and averment that there is no other cause pending, and that there have been no previous proceedings in any court between the applicant and the respondent, over the same subject matter and that the cause of action relates to the applicants named in the application.” Underlined for emphasis

28. In regard to the foregoing provision, the 3rd Respondent urged that the *Ex parte* Applicant did not disclose to the Court that there were previous proceedings before this Court by the same parties over the same subject matter in ELRC JR No E036/2021 and ELRC JR No E37/2021, in which the Applicant was granted leave to apply for judicial review but did not file the substantive Notice of Motion within the stipulated timeline.

29. The *Ex parte* Applicant admitted the existence of the previous proceedings and the fact that the same was not disclosed in his Verifying Affidavit. His only contention was that the same was inadvertent and is curable under Order 19 Rule 7 of the Civil Procedure Rules.

30. The Judicial Review Application dated March 15, 2022 is accompanied by a Verifying Affidavit sworn by Mr Mohammed Gufu. Notably, he does not aver in the said Affidavit that there are previous proceedings over the same subject matter.

31. The question now is whether the said omission is fundamental and whether the same renders the Application fatally defective? The *Ex parte* Applicant’s position is that the omission is not fatal and is curable under Order 19 Rule 7 of the Civil Procedure Rules. I am of a different view.

32. My position is fortified by the determination in the case of *Commissioner of Lands vs Kunste Hotel Ltd* [1995]-1998]1 EA 1, where the Court of Appeal held that Judicial Review jurisdiction is a special jurisdiction which is neither civil or criminal and the *Civil Procedure Act* does not apply since it is governed by Section 8 and 9 of the *Law Reform Act* being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law.

33. Similarly, Ringera J (as he then was) in the case *Wellamondi vs The Chairman, Electoral Commission of Kenya*, (2002)1 KLR 286, reaffirmed this legal position as follows: -

“I agree that Judicial Review Proceedings under Order 53 of the Civil Procedure Rules are a special procedure. The provisions of the order are invoked whenever orders of *certiorari*, *mandamus*, or *prohibition* are sought. That may be so in either civil or criminal proceedings. So in the exercise of its power under the order, the court is exercising neither a civil nor a criminal jurisdiction in the strict sense of the word. It is exercising a jurisdiction *sui generis*. It follows therefore that it is incompetent to invoke the provisions of section 3A and order 1 rule 8 of the *Civil Procedure rules*. It is equally incompetent to invoke section 42.” Underlined for Emphasis



34. Accordingly, and contrary to the *Ex parte* Applicant's argument, the defects in the Application cannot be cured by Order 19 Rule 7 of the Civil Procedure Rules.
35. In the instant case, the *Ex parte* Applicant has made an admission to the existence of two previous suits which were consolidated, that is, ELRC JR E036/2021 and ELRC JR No E37/2021. Upon perusing the Order issued by the Court on 15th February, 2022, it is evident that upon consolidation, ELRC JR No37/2021 which had been identified as the lead file, was struck out as the *Ex parte* Applicant did not utilize the leave granted by the Court, to file the substantive motion.
36. The Application before me is the very same Notice of Motion dated February 2, 2022 which was struck out by the Court. The orders being sought are similar and the same goes for the grounds in support thereof. As a matter of fact, the Supporting Affidavit to the Notice of Motion dated February 2, 2022 and sworn by Mr. Victor Otieno is similar in form and substance, to the one sworn by Mr. Mohamed Gufu on March 24, 2022, in support of the instant Application. Indeed, the erstwhile Application dated February 2, 2022 and the Supporting Affidavit thereto, has been lifted word for word and placed into the instant Application.
37. The Applicant's failure to bring to the attention of the Court the existence of the previous suits, was a fundamental error noting that the provision under Order 53 Rule 1(2) (b), is couched in mandatory terms. Furthermore, and seeing that there were indeed previous proceedings, it was incumbent upon the Applicant to aver the same in compliance with the aforesaid legal provision. To my mind, the requirement under Order 53 Rule 1(2) (b) is not an idle one, as it allows the Court exercise discretion appropriately, prior to granting leave.
38. For the foregoing reason, it is my finding that the omission in the *Ex parte* Applicant's Verifying Affidavit is grave and incurable, as to render the Application fatally defective.
39. As has been held in numerous court decisions, the principle of *res judicata* is not applicable in judicial review proceedings. See Re:National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47. Nonetheless, re-litigation over the same issue and over the same subject matter ought to be put to an end as it amounts to abuse of court process.
40. In this case, the fact that leave was granted by the Court in ELRC JR No. E37/2021 but was not utilized and now the same issues are being re-introduced through the instant Application, no doubt amounts to abuse of court process.
41. On this issue, I will follow the determination in [Republic vs National Transport & Safety Authority & 10 others Ex parte James Maina Mugo](#) [2015] eKLR, where it was held that: -

“58. This, however, does not mean that the Court is powerless where it is clear that by bringing proceedings a party is clearly abusing the court process. Whereas *res judicata* may not be invoked in judicial review the Court retains an inherent jurisdiction to terminate proceedings where the same amount to an abuse of its process. One of cardinal principles of law is that litigation must come to an end and where a court of competent jurisdiction has pronounced a final decision on a matter to bring fresh proceedings whether as judicial review proceedings or otherwise would amount to an abuse of the process of the court and would therefore not be entertained. The Court in terminating the same would be invoking its inherent jurisdiction which is not a jurisdiction conferred by section 3A of the [Civil Procedure Act](#) as such but merely reserved thereunder.”



42. What presents before me is utter abuse of court process. The Ex parte Applicant in the instant case merely took the place of the former Ex parte Applicant and presented before Court the very same Application in ELRC JR No. E037/2021, that was struck out on February 15, 2022. The Ex parte Applicant in that case, had leave to prosecute the Application but squandered the opportunity to do so. He is now seeking a second bite of the cherry through the instant Application. This is a practice that cannot be sanctioned by the Court.
43. I have also noted that the Ex parte Applicant filed a Supporting Affidavit together with the substantive motion. This was another error. On this issue, I gather support from the determination in the case of *John Ria Fakkii vs Attorney General* [2012] eKLR, where it was held that: -
- “It is trite law that once an Applicant obtains leave to file judicial review proceedings he is required to only file a Notice of Motion without any affidavit introducing evidentiary material. Once leave is granted, the principal pleadings in the Statutory Statement is the evidence in the Verifying Affidavit accompanying the Chamber Summons for leave to file the judicial review applications. The Provisions of Order 53, Civil Procedure Rules are clear on this. In fact, the court itself has no jurisdiction to grant leave to the Applicant to file any further or other affidavit to the Notice of Motion which is merely a vessel to present the Verifying Affidavit before the court and which itself contains the facts in support of the statement. The statement cannot have any exhibits or other evidence annexed to it. It therefore follows that the purported “Supporting Affidavit” to the Notice of Motion dated 11th April 2006 is inadmissible and unnecessary appendage. The court must cleanse its record, and I hereby strike out the said Affidavit to leave the Notice of Motion bare as required by Law.
44. Against this background, I do not find it necessary to consider the other issues for determination as it is obvious that the instant proceedings cannot be sustained.

Order

45. In the final analysis, the preliminary objection by the 3rd Respondent is hereby upheld and the Application dated March 4, 2022 is hereby struck out on grounds that the same is fatally defective and the proceedings are a total abuse of the court process.
46. The Respondents shall have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Ex parte Applicant Mr Oginga

For the 1st and 2nd Respondents Mr Kago

For the 3rd Respondent Mr Mogeni

For the Interested Parties No appearance

Court assistant Abdimalik Hussein



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 had 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.

STELLA RUTTO

JUDGE

