



**Republic v County Assembly of Kiambu Service Board & 2 others; Kiambu County Public Service Board & another (Interested Parties); Ngure (Exparte) (Judicial Review Application E012 of 2021) [2022] KEELRC 12739 (KLR) (26 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12739 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**JUDICIAL REVIEW APPLICATION E012 OF 2021**

**MA ONYANGO, J**

**SEPTEMBER 26, 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 AND 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 AND 9 OF THE  
LAW REFORM ACT CAP 26 LAWS OF KENYA**

**AND**

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

**BETWEEN**



REPUBLIC ..... APPLICANT

AND

COUNTY ASSEMBLY OF KIAMBU SERVICE BOARD ..... 1<sup>ST</sup> RESPONDENT

SPEAKER COUNTY ASSEMBLY OF KIAMBU ..... 2<sup>ND</sup> RESPONDENT

CLERK, COUNTY ASSEMBLY OF KIAMBU ..... 3<sup>RD</sup> RESPONDENT

AND

KIAMBU COUNTY PUBLIC SERVICE BOARD ..... INTERESTED PARTY

COUNTY GOVERNMENT OF KIAMBU ..... INTERESTED PARTY

AND

DAVID KIRIGI NGURE ..... EXPARTE

*(Nderi Nduma J. vide his judgment delivered on December 16, 2021)*

### JUDGMENT

1. What is before this court is substantive motion dated July 2, 2021 in which the *exparte* applicant seeks *inter alia* the following orders;
  - a) An order of *certiorari* to issue to quash the unilateral decision/resolution of the respondents to permanently transfer the *exparte* applicant from the Kiambu County Assembly to the 2<sup>nd</sup> interested party as his services are no longer needed by 2<sup>nd</sup> 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* to issue compelling the respondents herein to facilitate the *exparte* applicant to resume his duties as the duly appointed Deputy Clerk 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 to 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 *exparte* applicant to the 2<sup>nd</sup> 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 to issue restraining the Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from advertising, interviewing, recruiting, employing, confirming in employment anyone else or replacing the *exparte* applicant as the Deputy Clerk, Kiambu County Assembly and director of legislative, procedural service.
  - e) An order of prohibition to 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 *exparte* applicant including re-designation, deployment, secondment or any action that affects the *exparte* 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 respondents and in particular the purported permanent transfer of the *exparte* applicant from the Kiambu County Assembly to the 2<sup>nd</sup> 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 *exparte* 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) Any other and further relief that this honourable court may deem fit and just to grant in the circumstances.
- j) The cost of the suit.

## Background

2. The *exparte* applicant has been the Deputy Clerk, director legislative and procedural services and employee of the County Assembly of Kiambu since October 9, 2013.
3. Vide the letter dated March 16, 2018 the *exparte* applicant avers that he was arbitrarily, illegally and irregularly, ordered to proceed on forced leave by the respondents until April 16, 2018 ostensibly owing to some allegations which were termed as recent happenings in the assembly and whose clear particulars were never revealed to him nor was the *exparte* applicant accorded an opportunity to respond. He avers that he was threatened against any resistance and/or failure to proceed on the said forced leave.
4. The *exparte* applicant avers that before the forced leave period came to effluxion and *vide* letters dated April 3, 2018 and May 5, 2018 from the respondents and letter dated April 11, 2018 from the interested parties, he was involuntary and without his consent transferred to the interested parties under the guise of secondment for a period of three (3) years as Director – Department of Administration and Public Service under the legal section.
5. The interested parties, upon the expiry of the forced secondment period released the applicant back to the 1<sup>st</sup> respondent *vide* a letters dated April 30, 2021 referenced as KCG/ST/2/9/VOL IV/169 and KCG/ST/2/9/VOL IV/170 and more specifically directed the *exparte* applicant to report back to the 1<sup>st</sup> respondent. In addition the *exparte* applicant's payroll was transferred back to the county assembly.
6. The *exparte* applicant reported to the 2<sup>nd</sup> respondent on May 10, 2021 at around 10.00 hours *vide* letter dated the same day and referenced DK/DC/1/2021 for purpose of resuming duties as per the status immediately prior to the said secondment.
7. The *exparte* applicant avers that instead of facilitating him to resume his duties, the respondents with malice and with the sole intention of frustrating him and constructively dismissing the *exparte* applicant, mischievously in a letter dated May 7, 2021, received by the *exparte* applicant at around 1140 hours on May 10, 2021, informed him that the 20<sup>9</sup><sup>th</sup> sitting that brought together the 1<sup>st</sup> respondent



and 1<sup>st</sup> interested party had resolved to permanently transfer the *ex parte* applicant to the 2<sup>nd</sup> interested party which fact the respondents knew was erroneous and not true because:

- i. The 1<sup>st</sup> interested party *vide* memo dated April 19, 2021 addressed to the 2<sup>nd</sup> interested parties and copied to respondents, in response to respondents letters on the permanent transfer, disowned the alleged resolution;
  - ii. Letters dated April 30, 2021 by the 2<sup>nd</sup> interested party had officially released the *ex parte* applicant to the 3<sup>rd</sup> respondent;
  - iii. *Vide* the letters dated April 30, 2021 the interested parties had transferred the *ex parte* applicant's pay roll to the 2<sup>nd</sup> respondent and their last payment was on March 31, 2021.
8. The *ex parte* applicant upon receipt of the letter from the 2<sup>nd</sup> respondent, wrote to the respondents *vide* a letter dated May 10, 2021 setting the record straight and further informing them that he had already been released by the 1<sup>st</sup> interested party and officially reported and further requested for a certified copy of the resolution of the purported joint resolution which letter has never been replied and/or responded to nor the requested information supplied.
  9. The *ex parte* applicant avers that the respondents never took any action to facilitate him to resume his office and duties but have completely denied and obstructed him from accessing his office and to resume duties since his reporting on May 10, 2021.
  10. The *ex parte* applicant *vide* a letter dated May 17, 2021 submitted his duly filled medical insurance application form, complained about the persistent denial and obstruction from accessing his office and resuming duties and further pleaded that the denial and obstruction to resume office and duties thereof be addressed.
  11. The 3<sup>rd</sup> respondent *vide* a letter dated May 17, 2021 received by the *ex parte* applicant on May 19, 2021, clarified the respondents resolution to permanently transfer the *ex parte* applicant to the 2<sup>nd</sup> interested party despite the interested parties protest and officially informing the respondents *vide* the letter dated April 30, 2021 that the same was untenable since the *ex parte* applicant's terms of appointment are permanent and pensionable which could not be varied midstream.
  12. The *ex parte* applicant later learned that all County Assembly employees except him had received their salary for the month of May 2021. In addition, from enquiry through the Government Human Resource Information System popularly known as GHRIS, he learned that he did not have a pay slip for the said month meaning that his salary for the said month was not processed and further that the respondents had disabled his GHRIS credentials.
  13. The *ex parte* applicant avers that the respondents stopped his salary without notifying him and he only learnt of the same when he visited his bank in a bid to withdraw money to meet his personal and family bills.
  14. The *ex parte* applicant avers that his purported permanent transfer and wilful and unlawful withholding of his salary is erroneous and had been arrived at arbitrarily, irrationally, unreasonably and without hearing the applicant and or according him opportunity to state his case.
  15. The *ex parte* applicant avers that his family is undergoing grave suffering as he is the sole bread winner and his family livelihood is threatened. That his family risks going without basic needs especially food, school fees and medical treatment.
  16. The *ex parte* applicant avers that he has suffered and will continue suffering substantial irreparable loss unless the respondent's decision is quashed, the respondent compelled to reinstate him in the



- payroll and to continue paying his monthly salary and all other lawful benefits, and is prohibited from permanently transferring him and withholding his salary without due procedure and lawful cause.
17. When this matter came up for mention on the February 17, 2022, the advocate for the *ex parte* applicant requested this court to consider adopting as the judgment in this matter, the judgment in judicial review application No E017 of 2021 [James Mbugua Kamau v County Assembly of Kiambu Service Board & others](#), which judgment was delivered by my brother Nderi Nduma J on December 16, 2021.
  18. This aforesaid judgment was also adopted by myself in a similar and related case being, Nairobi ELRC JR/E014 of 2021 [Gabriel Karimi Muriithi v County Assembly of Kiambu Service Board and others](#).
  19. The grounds for adopting the said judgment delivered in JR No E017 of 2021 were:-
    - i. The subject matter in these two cases arises out of the same act or transaction or series of acts or transactions. Grounds relied on both application are similar and only variant and or different is the post occupied by the *ex parte* applicants
    - ii. That the documents provided in support of the *ex parte* applicants' cases are same documents and all evidence therein are generally similar.
    - iii. Both applications arose from the similar questions of law and facts namely; the *ex parte* applicants being permanently transferred and/or seconded to the 2<sup>nd</sup> interested party without their 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 coupled with failure to seek their consent.
    - iv. All orders sought were similarly the same and the only the different is the names and post of the ex-parte applicants.
  20. The respondents opposed the said application *vide* the notice of preliminary objection and grounds of opposition dated July 9, 2021.
  21. The interested parties responded to both the application and the preliminary objection *vide* the replying affidavit sworn by Daniel Kirathe on August 23, 2021.
  22. The *ex parte* applicant avers that it is in the best interest of justice, time and costs that this court analyses the pleadings and evidence on record and find that the cause of action arose from the same transactions, the facts are similar and the evidence adduced in the files are the same.
  23. The *ex parte* applicant relied on the case of Court of Appeal civil application No 299 [John Gakure & 148 others v Dawa Pharmaceuticals Company Limited & 7 others](#) civil application No 299 of 2007, where the court expressed itself as follows:

“Jurisdiction of the court has been enhanced and its latitude expanded in order for the court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective and its principle aims. In the court's view, dealing with a case justly includes inter-alia, reducing delay, and costs, expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective calls for a new thinking and innovation and actively including the granting of appropriate interim relief in deserving cases.”



24. That by adopting the aforesaid judgment the court will not only be saving precious judicial time but also protecting the dignity of the court by avoiding arriving at a conflicting judgment on same facts arising from the transaction.
25. The *ex parte* applicant further also on the case of Nairobi ELC suit No 1000 of 2012 *Joseph Okoyo v Edwin Dickson Wasunna* (2014) eKLR, which cited with approval the case in Mombasa HCCC No 992 of 1994 *Nyati Security Guards and Services v Municipal Council of Mombasa* where the court stated:-
- “The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where:-
- (a) Some common question of law or fact arises in both or all of them; or
  - (b) The rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or
  - (c) For some other reason it is desirable to make an order for consolidating them.”
26. The *ex parte* applicant further relied on the case of Kerugoya HC ELC 258 of 2013 *Benson G Mutahi v Raphael Gichovi Munene Kabutu & 4 others* (2014) eKLR which cited with approval a rendition of the Indian case of; *Brij Kishore v Bir Singh & others Harana* L.R 5922 of 2013 wherein Justice Paramjeat Singh quoted the following from the Indian Supreme Court case of *Prem Lala Nabata & another v Chandi Prasad Sikaria*, (2007) 2, Supreme Court cases 551 at paragraph 18 and stated as follows;-
- “It cannot be disputed that the court has power to consolidate suits in appropriate cases. Consolidation is a process by which two or more causes or matters are by order of the court combined or united and treated as one cause or matter. The main purpose of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or cause pending in the court and it appears to the court that some common questions of law or fact arises in both or all the suits or that the rights to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions; or that for some other reason, it is desirable to make an order consolidating the suits.”
27. The *ex parte* applicant also relied on petition No 14 of 2013 *Law Society of Kenya v Center for Human Rights and Democracy and 12 others* (2014) eKLR, where Supreme Court observed follows:-
- “The essence of consolidation of suits 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.”
28. The *ex parte* applicant submits that this court should adopt the judgment delivered on Nairobi ELRC JR No E017 of 2021 on the following grounds:-
- i. The two suits arise from the same facts especially from the same letters;
  - ii. The same question of law and fact are raised;



- iii. The rights and/or reliefs claimed in the both cases arise out of the same transaction or series of transaction and letters;
- iv. The application are more and or less the same in wording and body and orders sought are the same;
- v. The notice and preliminary objection and ground of opposition filed by respondents is the same, word per word, sentence per sentence, paragraph per paragraph and page per page;
- vi. All questions raised therein have been fully determined by Nderi Nduma J. *vide* his judgment delivered on December 16, 2021 and nothing left for this court to determine;
- vii. No party will be disadvantaged or prejudiced in any way if this court adopt the said judgment or confer undue advantage to the other party as all parties had opportunity to urge, present and ventilate their case, fact in aforesaid case and their filed their submissions on all questions raised by facts and law.

29. I have considered the submissions of the parties. I have also perused the decision in the suits filed by James Mbugua Kamau in JR E017 of 2021 and Gabriel Karimi Muriithi in JR E014 of 2021. It is not in doubt that the circumstances giving rise to the instant suit are the same as those from which the two previous suits arose.

30. As I held in JR E014 of 2021 filed by Gabriel Karimi Muriithi, the facts of this case are the same as those in JR E017 of 2021. The *ex parte* applicants in the two suits were both transferred in similar manner as the *ex parte* applicant herein. Upon the lapse of their transfer of three years, the respondents declined to receive them back. The 1<sup>st</sup> interested party to whom they had been seconded for three years also declined to take them back leaving them without an employer.

31. I have ascertained that the facts of this case and the reliefs sought are similar to those in JR E014 of 2021 and JR E017 of 2021.

32. For the foregoing reasons I agree with the applicant that this suit is on all fours with JR E014 of 2021 and JR E017 of 2021. I accordingly adopt the decisions in the two cases and make the following orders:

- (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 2<sup>nd</sup> interested party as his services are no longer needed by the 2<sup>nd</sup> 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 be and is hereby 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 2<sup>nd</sup> 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 *exparte* 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 *exparte* applicant including re-designation, deployment, secondment or any action that affects the *exparte* 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 *exparte* applicant from the Kiambu County Assembly to 2<sup>nd</sup> 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 *exparte* 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 *exparte* applicant's costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF SEPTEMBER 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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, the 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 the 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.

**MAUREEN ONYANGO**

**JUDGE**

