



**Republic v Migori County Secretary & another; Ngwala & 8 others (Exparte);
Migori County Public Service Board (Interested Party) (Judicial Review Application
E013 of 2022) [2022] KEELRC 3939 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3939 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW APPLICATION E013 OF 2022**

**S RADIDO, J
SEPTEMBER 23, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

MIGORI COUNTY SECRETARY 1ST RESPONDENT

GOVERNOR, MIGORI COUNTY 2ND RESPONDENT

AND

JOSHUA OTIENO NGWALA EXPARTE

DALMAS OYUGI OYUGI EXPARTE

MARY ATIENO MIDIDA EXPARTE

PAULINE AMOLLO MUGA EXPARTE

SAMUEL OTIENO OCHIENG EXPARTE

MARTINE OGOLLA DIMA EXPARTE

ELIJAH MWITA GAMBERE EXPARTE

LAZARUS JUMA SCOTCH EXPARTE

FREDRICK MAROA MOHERAI EXPARTE

AND

MIGORI COUNTY PUBLIC SERVICE BOARD INTERESTED PARTY



RULING

1. On September 6, 2022, the County Secretary & Head of County Public Service sent 1-month notices of termination of appointment to the 9 *ex-parte* applicants who were serving as County Chief Officers.
2. The notices informed the *ex-parte* applicants that their contracts would stand terminated within the expiry of the 1-month notice respectively.
3. The *ex-parte* applicants were alarmed, and on September 14, 2022, they jointly moved the court under the vacation rules through a Summons supported by a certificate of urgency seeking leave to commence judicial review proceedings.
4. The Summons was placed before the duty judge, and she granted orders:
 - i. That leave is granted to the *ex-parte* applicants to apply for an order for judicial review in the nature of *certiorari* to remove into the Employment and Labour Relations Court and quash the decision of the respondents contained in their Notice of Termination letters dated September 6, 2022.
 - ii. That leave is granted to the *ex-parte* applicants to apply for an order in the nature of prohibition to restrain the respondents from terminating the services of the *ex-parte* applicants, withholding their full salaries and/or allowances, redeploying them to other positions upon stay (sic) other than as Chief Officers performing their functions to which they are employed.
 - iii. That temporary order of injunction on letter of termination (sic) dated September 6, 2022 pending the hearing *inter-partes* of the application on the issue of leave operating as a stay.
 - iv. That application be served on the respondents within 1 day of order.
 - v. That the respondents to file a response within 7 days.
 - vi. That hearing of the application for leave to operate as stay on the September 21, 2022 *inter-partes*.
5. The respondents filed Grounds of Opposition and 2 replying affidavits on September 20, 2022.
6. When the summons was called out for *inter-partes* hearing on the morning of September 21, 2022, the court took brief oral submissions from the parties. It then directed them to file and exchange short written submissions before highlighting on September 22, 2022.
7. The parties filed the submissions, and the court took oral highlights as scheduled.
8. The court has considered the summons, affidavits, and submissions by the parties, including the case law, cited.
9. The *ex-parte* applicants already secured leave to commence judicial review proceedings, and nothing turns on the issue.
10. The issues outstanding for the adjudication of this court are, therefore, whether the temporary injunctive order staying the notices of termination (as set out in paragraph 4(iii) above) should be confirmed or extended and whether the leave which was granted on September 12, 2022 should operate as a stay of the Notices of Termination dated September 6, 2022 and the advertisements of September 8, 2022..



11. The orders under consideration in this Ruling and which were sought by the *ex-parte* applicants were:
 4. If leave is granted, the same do operate as a stay of:
 - (i) The termination of the *ex-parte* applicants' services from taking effect and,
 - (ii) The advertisement and recruitment of new Chief Officers that was advertised by the interested party in the Standard and Daily Nation newspapers of September 8, 2022.

Leave to operate as a stay of the advertisement of 8 September 2022

12. The second limb of stay order the *ex-parte* applicants sought was made against the County Public Service Board, Migori.
13. The Board was named as an interested party by the *ex-parte* applicants.
14. The question, therefore, begs whether such an order can issue against such a party in judicial review proceedings.
15. The parties did not place before the court any precedent providing or suggesting an answer to the question.
16. The court will, therefore, in an endeavour to find an answer to the question, examine the very basic nature of a respondent (defendant) and that of an interested party.
17. In the court's view, a respondent (or defendant) is a person or entity whom one party asserts before a court of law or tribunal to have occasioned it a legal injury (wrong) and from whom a remedy is sought.
18. An interested party, however, is one who is likely to be affected directly by the determination of a legal dispute between a respondent (or defendant) and the person alleging legal injury or wrong, ordinarily called plaintiff or claimant in our jurisdiction.
19. The *ex-parte* applicants have not pleaded the County Public Service Board as a respondent within the extrapolation in paragraph 18 above. Yet, it wants an order staying the decision of the Board, but as an interested party.
20. Judicial review proceedings are a special type of proceedings, and a court may exercise discretion to decline to issue judicial review orders even where a case has been made.
21. In the circumstances, the court is not convinced that this is an appropriate case to grant the order sought by the *ex-parte* applicants against the interested party.
22. It is even doubtful whether the court can order an interested party in a judicial review proceeding to do or refrain from doing something with the attendant contempt implications.

Stay of the Notices of termination

23. The first limb of the stay the *ex-parte* applicants implored the court to grant was with respect to the Notices of Termination dated September 6, 2022.
24. The Notices did not emanate from the County Public Service Board. It is not clear at this stage whether the respondents considered the applicability of the protections assured public officers against removal from office by article 236 of the [Constitution](#) as well as the provisions of section 59(1)(c) of the [County Governments Act](#) on the functions of the interested party.
25. The court will therefore confirm the injunctive orders issued by the duty judge on September 12, 2022.



Conclusion and orders

26. From the foregoing, and considering that the affairs of the county government should not be hindered from operating smoothly as soon as possible, the court orders:
- i. Leave granted on September 12, 2022 will not operate as a stay.
 - ii. The temporary order(s) of injunction issued on September 12, 2022 restraining the respondent(s) from implementing the Notices of Termination dated September 6, 2022 are extended pending the hearing and determination of the substantive motion.
 - iii. The *ex-parte* applicants to file and serve a substantive Motion together with submissions of not more than 6 pages on or before September 30, 2022.
 - iv. The respondents and interested party to file and serve responses and submissions of not more than 6 pages within 10 days of service.
 - v. The *ex-parte* applicants to file rejoinder submissions of not more than 3 pages within 3 days of service.
27. The court will deliver judgment on November 16, 2022.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 23RD DAY OF SEPTEMBER 2022.

Radido Stephen, MCI Arb

Judge

Appearances

For *ex-parte* applicants Mr Odeny instructed by Bruce Odeny & Co Advocates

For respondents Mr Okongo instructed by Okongo Wandago & Co Advocates

For interested party Mr Okongo instructed by Okongo Wandago & Co Advocates

Court Assistant Chrispo Aura

