



**Republic v Nyandarua County Assembly Service Board & another; Mundia (Exparte Applicant)
(Judicial Review E005 of 2022) [2022] KEELRC 4868 (KLR) (20 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4868 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
JUDICIAL REVIEW E005 OF 2022
HS WASILWA, J
SEPTEMBER 20, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

NYANDARUA COUNTY ASSEMBLY SERVICE BOARD 1ST RESPONDENT

NYANDARUA COUNTY ASSEMBLY 2ND RESPONDENT

AND

PETER GITHINGO MUNDIA EXPARTE APPLICANT

RULING

1. This ruling is in respect to the chamber summons by the ex parte applicant dated July 20, 2022, brought pursuant to order 53, rule 1 (1), (2), (4) of the [Civil Procedure Rules](#) sections 1A and 1B, 3 and 3A of the [Civil Procedure Act](#) Cap 21, Laws of Kenya, the [Law Reform Act](#), the [Constitution](#) of Kenya and all other enabling powers and provisions of law, seeking the following orders:-
 - a) That this application be certified as urgent and the same be heard ex parte on priority basis.
 - b) That this honourable court be pleased to grant leave to the ex- parte applicant to commence judicial review proceedings in the nature of an order of certiorari, mandamus and prohibition against the respondents.
 - c) That this honourable court be pleased to grant leave to the ex- parte applicants to commence judicial review proceedings in the nature of an order of *Certiorari* to remove and bring to this honourable court for purpose of quashing and to quash the interviews for the position of Clerk of County Assembly scheduled for July 22, 2022 and for orders of prohibition restraining the 1st respondent, its agents, employees, servants, officers or any other persons from conducting



any interviews and/or making any appointments in relation to the said interviews until this matter is heard and determined.

- d) That pending interpartes hearing of the application or commencing the judicial review proceedings, leave granted herein operate as a temporary injunction against the 1st respondent from conducting the aforesaid interviews or forwarding the name for appointment to the 2nd respondent.
 - e) That this honourable court be pleased to grant leave to the ex- parte applicants to commence judicial review proceedings in the nature of an order of prohibition to prohibit and restrain the 2nd respondent from vetting and approving any candidate for the position of clerk to the county assembly pending the hearing and determination of the suit.
 - f) Costs of the application.
2. The application is supported by the statutory statement, verifying affidavit of the ex parte applicant deposed upon on the July 20, 2020. It is based on the following grounds:-
- i. That the 1st respondent has illegally and secretly shortlisted candidates for interviews on July 22, 2022 for a vacancy for the senior position of Clerk of the County Assembly in contravention of its own human resource management manual as well as the *constitution*, an act which is manifestly an impediment to fair administrative action.
 - ii. That the actions of the 1st respondent's contravenes its human resource management manual at clause 2.5.5 (iii) that provides that the board shall publish shortlisted candidates in a newspaper of national circulation. Having failed, refused or blatantly ignored to publish the said candidates has shroud the recruitment process in mystery and therefore illegal, lacking accountability, transparency and public participation.
 - iii. It is stated that the 1st respondent has disregarded the mandatory provisions of the human resource management manual specifically at clause 2.5.1 that provides that recruitment shall be "guided by competitiveness, fairness, efficiency and productivity"; and invited six persons to interview for the position of Clerk to County Assembly, at the exclusion of other external applicants since four of the applicants are senior employees of the 1st respondent with the capability to influence its decision at the disadvantage of other applicants.
 - iv. It is contended that the hurried need by the 1st respondent to fill the sensitive senior position of Clerk of the County Assembly with urgency just days to the general elections cast aspersions on their intentions.
 - v. Despite, the 1st respondent having initially advertised for the positions of; Research Officer 1, Second Clerk Assistant, Office Attendant, Receptionist III, Human Resource Officer, Records Management Officer and Fiscal Analyst Officer, the Initial advertisement were shelved at the expense of the position of Clerk to the County Assembly without any plans for interviews for the other positions.
 - vi. He asserts that the 1st respondent's move to urgently recruit one senior position at the expense of the other positions, is an indication of strong vested interests with a pre-conceived outcome, which they urged this court to move with speed and grant the orders sought for the public to be protected against such wanton abuse of power.
 - vii. The affiant avers that, with barely few days to the general election, the 1st respondent has ulterior motives intended to identify and plant a puppet as a Clerk of the County Assembly



and therefore effectively either control the incoming county assembly or advance its vested interests in the incoming county assembly.

- viii. He avers that, among the six candidates shortlisted for interviews, four are current employees of the 1st respondent being Gideon Mukiri Muchiri - Acting Clerk, John Kieru Wambui - Deputy Chair and Simon Njogu - Human Resource Manager and Peter Gichina Karanu the Principal Clerk Assistant. This listing of internal employees erodes public confidence in the process since the issue of conflict arises is likely to arise as the internal applicants may act in cahoots with their colleagues to give them undue advantage.
 - ix. It is the applicant's contention that none of the shortlisted candidates is female and therefore being gender biased and insensitive, a violation of article 197 of the constitution which provides that that not more than two-thirds of the members of any county assembly or county executive committee shall be of the same gender. Furthermore, that, clause 2.5.4(v) of the human resource manual provides that the board will factor in the third (1/3) gender rule.
 - x. He states that, the fact that the current speaker of the 2nd respondent is vying for the position of Governor intends to avert due process and ensure that he installs a puppet as a clerk to the National Assembly when he becomes Governor.
 - xi. Also that, the fact that the speaker is the chair of the 1st respondent gives him motive to ensure that the clerk of the 2nd respondent is a friendly person once appointed. He adds that the speaker has the power to recall the county assembly currently on recess with the ill intention to vet and unprocedural appoint the tainted Clerk of the County Assembly.
 - xii. That the acts of the 1st respondent are illegal, procedurally unfair, unlawful, biased, arbitrary, unjust, unreasonable, against the tenets of fairst respondent is restrained he will continue to use his power and influence and position to ensure that the preconceived candidate is recruited to fill the vacancy.

administrative action, abuse of powers, motivated by interviews stage-managed and choreographed to prejudice the legal right of the applicant, and the general public and unless the 1
 - xiii. He states further that, should the illegal interviews be sanctioned and allowed to proceed would amount to the court furthering an unjust cause and would result in unfairness, illegality and unconstitutionality.
 - xiv. The affiant states that, there has been no vacuum in the performance of the duties of the clerk to the County Assembly for over three (3) years since those tasks have been assigned to acting officers and therefore the urgency to recruit one unprocedurally is questionable.
 - xv. That unless the court temporarily halts the intended recruitment so as to enable the applicant effectively canvass the matter, the 1st respondent will proceed to appoint its pre-determined candidate, thereby rendering the instant application an exercise in futility as a mere academic exercise and render the application will be nugatory.
3. The exparte applicant was granted leave to file a substantive motion which he filed on the July 26, 2022.
 4. The chamber summons is opposed by the respondent, through their replying affidavit deposed upon by James Wahome Ndegwa, the chairperson of the 1st respondent and the speaker of the 2nd respondent, on the July 27, 2022



5. In the said affidavit, the affiant avers that in the face of the substantive motion dated July 26, 2022, the applicant stated that the application is supported by the statutory statement and verifying affidavit of Stephen Kariuki Kuria, who is a stranger in this suit. He added that the motion is standing on a one legged stool since the motion is not supported by any statement or verifying affidavit. Also that the decision being challenged was not quoted in the application, neither was it annexed to the notice of motion.
6. Having said that, the affiant states that the County Assembly Service Board is empowered under section 24 of the *County Assembly Services Act*, number, 24 of 2017 to make appointment. Consequently, that on April 26, 2012, the 1st respondent advertised in the local dailies a vacancy for the position of Clerk of the County assembly of Nyandarua. The said advertisement attracted only 6 applicants.
7. On May 24, 2022. The members of the 1st respondent met to discuss on the issue of filling of the vacancies advertised. In the said meeting he vice chair of the board, Hon John Kieru Wambui and the secretary of the board, Mr Mukiri Muchiri expressed their interest in the said positions and hence recused themselves from further deliberation on the issue.
8. Upon the said recusal, the Board resolved that Mr. Stephen Muriithi Wairimu, the deputy clerk, would oversee the recruitment process together with the recruitment of all the other pending advertised positions. In doing so the Board directed for a committee to be formed before May 30, 2022 to undertake the recruitment exercise.
9. After the longlisting, the committee made a report that the advertisement had only attracted 6 applicants and the board resolved to shortlist all of them in the meeting held on the July 5, 2022. Interview preparation were carried out by the ICT officer in liaison with the Human Resource Officer. The invitation to the interviews was done on the July 15, 2022 through email, assembly's website, phone calls and text messages and the interview was scheduled for July 22, 2022. The method used in calling for invitation for the interview is per clause 2.5.4(iv) of the human resource management manual.
10. He states that the initial vacancies were not shelved on purpose but the same was postponed due to the matter being raised in court in Nakuru Elrc Petition number 004 of 2022 which ruling was delivered on June 30, 2022. Also that some of the employees, whose services had been terminated were reinstated by the orders of this Court in ELRC petition number 028 of 2022, necessitating the delay in recruitment.
11. The deponent states that, none of the shortlisted candidates has raised any issue with regard to the recruitment, therefore that the application by the ex parte applicant is misplaced. Further, that none of the applicant was female to justify the need to have the gender rule issues. In any case that the vacant position in issue is one and therefore not possible to balance the gender as raised by the applicant.
12. That the orders as couched as unintelligible, incapable of being issued and therefore the entire application is unmerited and should be dismissed with costs.
13. In addition to the replying affidavit the respondent filed a further affidavit deposed upon on the July 29, 2022. In the further affidavit, the respondents aver that this suit offends the mandatory provision of section 6 of the *Civil Procedure Act* on duplicity of suit, since the instant application raises similar issues with the judicial review application filed in Nyeri ELRC E003 of 2022, which matter is slated for mention on the October 5, 2022. He emphasized that the issues raised and prayers are a mirror copy of each other therefore this suit should be struck out for duplicity.



14. He stated further that the ex parte applicant in this application and the JR application in Nyeri were both interested in the seat of the County Clerk but by design they all failed to apply for the said position, therefore they are using these proceedings to buy time in order to make their applications.
15. The application was canvassed by way of written submissions with the respondent filing on the August 2, 2022. However, the applicant did not file any submissions.

Respondent's Submissions.

16. The respondent submitted from the onset that this application has been filed in total abuse of court process as similar application had been filed by another applicant which application is a mirror reflection of this application from the facts stated to the prayers sought. He argued that the application offends the mandatory provisions of section 6 of the Civil Procedure Act and the same ought to be struck out. In supporting its argument, the respondent cited the case of Republic V Paul Kibara Kariuki, Attorney General & 2 others ex parte Law Society [2020] eKLR where the court held that;

“abuse of court process in addition to the above arises in the following situations: -

- a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
- b. Instituting different actions between the same parties simultaneously in different court even though on different grounds.
- c. Where two similar processes are used in respect of the exercise of the same right.
- d. Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
- e. Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.
- f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
- g. Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
- h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first.

17. The said court further stated that;

“Thus, the multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.”



18. Similarly, it was argued that having both cases running in the different courts with regard to the same issue, will have an effect of embarrassing the proceedings of the court in the instances where the courts arrive at different conclusions. Further that the hearing of the same issue in the different court is a waste of precious judicial time and an abuse of court process.
19. The respondent urged this court to strike out the application in its entirety for being an abuse of court process.
20. I have examined the averments and submissions filed before court. The applicants sought orders to bring JR application to quash interview for position of clerk of County Assembly scheduled for July 22, 2022.
21. This ruling coming after the July 22, 2022 implies that the orders sought have been overtaken by events and is therefore dismissed.
22. The end result is that the entire application fails and is dismissed and file ordered closed.
23. There will be no order of cost.

RULING DELIVERED VIRTUALLY THIS 20TH DAY OF SEPTEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

No appearance for parties

Court Assistant - Fred

