



Republic v County Assembly of Kiambu Service Board; Gacheru (Exparte Applicant); Muiruri (Interested Party) (Miscellaneous Application E015 of 2022) [2022] KEELRC 12857 (KLR) (14 October 2022) (Ruling)

Neutral citation: [2022] KEELRC 12857 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION E015 OF 2022

SC RUTTO, J

OCTOBER 14, 2022

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF THE COUNTY ASSEMBLY SERVICES ACT NO. 4 OF 2017

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT, NO. 17 OF 2012

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 SECTIONS 5, 10(5) AND 13 OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF SECTIONS 8 & 9 OF THE

LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF SECTIONS 7 & 8 OF THE

FAIR ADMINISTRATIVE ACTIONS ACT 2015

BETWEEN

REPUBLIC APPLICANT



AND

COUNTY ASSEMBLY OF KIAMBU SERVICE BOARD RESPONDENT

AND

JAMES NJOROGE GACHERU EXPARTE APPLICANT

AND

JAMES GITHU MUIRURI INTERESTED PARTY

RULING

1. The Exparte Applicant filed the Chamber Summons Application dated 21st June, 2022, seeking the following orders: -
 1. Spent.
 2. That the Exparte Applicant, James Njoroge Gacheru, be granted leave to apply for:
 - a. An order of Certiorari do issue to quash the decision of the Respondent in issuing the letter of appointment dated 28/01/2022 to the interested party.
 - b. An order of certiorari do issue to quash the decision of the Respondent in employing the interested party as a Director Human Resource, Kiambu County Assembly as he does not meet the minimum qualification as contained in the County Assembly of Kiambu's advertisement calling for interested persons to apply for the position.
 - c. An order of Prohibition do issue directed against Respondent whether acting jointly or severally by themselves, their servants, agents, representative or howsoever otherwise from employing the interested party when he does not possess the minimum qualification for the post of Director Human Resource as contained in the County Assembly of Kiambu's advertisement calling for interested persons to apply for the position.
 - d. An order of prohibition do issue restraining the Respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from allocating duties, an office and or any work as the Director Human Resource, Kiambu County Assembly and or paying any salary, allowance, remuneration and any kind of payment whatsoever.
 - e. A declaration that the decision and conduct of the Respondents and in particular the purported hiring and or employing the interested party as a Director of Human Resource, Kiambu County Assembly vide the letter dated 28/01/2022 is ultra vires, unlawful, wednesbury(sic) unreasonable, unfair, manifestly unjust and in blatant disregard to the rules of natural justice and void ab initio;
 - f. That any other and further relief that this Honourable court may deem fit and just to grant in the circumstances.



3. That leave herein do act as a stay restraining the respondent from paying salary or wages whatsoever, allocating duties and or physical office pending hearing and determination of the substantive motion.
2. The grounds in support of the Application are stated in the statutory statement dated 21st June, 2022, and a verifying affidavit sworn on even date by James Njoroge Gacheru, the Ex parte Applicant. Briefly, he avers that: -
 - a. on 28th October, 2021, the respondent advertised for the post of Director Human Resources.
 - b. all the applicants who applied for the said post including the interested party herein did not meet the minimum qualification as per the public advertisement.
 - c. on 21st December, 2021 the respondent on its 255th meeting, resolved that the post of Director Human Resources be re-advertised as all the shortlisted candidates for the said post did not possess minimum qualification which is a Bachelor's Degree in Human Resource Management.
 - d. the Respondent communicated its resolution to the Clerk vide internal memo dated 21st December, 2021, directing the clerk to re-advertise the said post inviting the qualified interested applicant and the same has never been revoked and or set aside.
 - e. Instead of re-advertising as resolved, the respondent vide the letter of appointment dated 28th January, 2022 addressed to the interested party purported to employ the interested party when indeed he is not qualified for the said post which action about to abuse of the office.
 - f. the said letter of appointment is signed by unknow person on behalf of the Clerk county Assembly of Kiambu and Secretary to the Board who has mandate to sign such letter, has since disowned ever instructing any person to sign the said letter on his behalf.
 - g. the action by the respondent is irrational, irregular, and questionable and amount to abuse of the office and cannot stand and the only way that letter was issued was through fraud, and by corrupt means as it falls short of the required procedures.
 - h. the said letter having been signed by the person not mandated by law it amount to ultra vires and it is in the interest of justice the said decision be quashed.

The Response

3. Upon service of the Application, the 1st Interested Party filed a Replying Affidavit sworn on the 8th July, 2022. In the Replying Affidavit, James Githu Mururi, the Interested Party avers that: -
 - a. the Ex-parte Applicant is a busy body and a gun for hire acting as a proxy for the current Clerk of the Respondent.
 - b. together with seven other persons, he was employed by the Respondent through a competitive process in February 2022 and the Clerk of the Respondent as the Administrative Officer declined to implement the employment on flimsy grounds hence they filed a suit being Case No. E053 of 2022 against the Clerk and the Respondent.
 - c. the Clerk has continued to disobey the orders aforesaid despite appearing in court and promising the Judge to comply and which disobedience pushed them to file an application citing him for Contempt of Court.



- d. the orders sought herein are orders that would have been sought in the matter filed earlier but the filing of this proceedings was meant to act as an abuse of the court process and more so forum shopping where the expectation was that favourable orders would be made contrary to the orders already in place in favour of himself and his colleagues.
 - e. since his appointment, he has faced threats to his life and which threats have been attributed to the Clerk of the Assembly.
 - f. it is therefore evident that a lot of efforts has been put across board to challenge our employment status and which all are meant to harass, intimidate and compel them to leave employment for an unknown person who had been promised the seat.
 - g. he has already started his work, though the Clerk continues to deny him roles.
 - h. the allegation by an outsider that he is not qualified for the position are neither here nor there and the Ex-parte Applicant was not part of the Interviewing Panel who scrutinized his qualifications.
 - i. it is the duty of Respondent to employ Assembly Staff and an outsider like the Ex-parte Applicant has no locus to allege that the acts of the Respondent were irrational or irregular as he is not one who should be consulted the Board in the discharge of its duties.
 - j. the fact that the Ex-parte Applicant speaks so much with vigour about Resolutions made by the Board, even cites 255th Meeting and dates clearly go to demonstrate that he is being used by an insider and he is not a spirited Kenyan but simply for hire, and who is being fed with information to achieve an agenda.
4. The Respondent did not file any response to the Application.
 5. The Court directed that the Application be canvassed by way of written submissions.
 6. At the time of writing this Ruling, the Ex parte Applicant's submissions were not on the physical court record and could not be traced on the online portal. I therefore presume that none were filed.

Interested Party's submissions

7. The Interested Party submitted that the decisions made by the Respondent herein was in accordance with the stipulated procedure and which procedure was fair. He thus argues that the issuance of his letter of appointment was lawfully done. The Interested Party further submits that the Exparte Applicant has approached the Court with unclean hands by failing to disclose that Hon. Justice Nzioki wa Makau allowed him and seven others entry into their offices.
8. Citing the provisions of section 77 of the County Government Act and section 87 (2) of the *Public Service Commission Act*, the Interested Party further argued that the Exparte Applicant ought to have followed the right procedure to resolve the dispute in the event he was dissatisfied with the decision of the Public Service Board. To support this argument, the Interested Party placed reliance on the decision by the Court of Appeal in the case of *Secretary, County Public Service Board vs Hulbhai Abdille* (2017) eKLR.

Analysis and determination

9. The applicable law on leave to commence judicial review proceedings, is Order 53 Rule 1 of the *Civil Procedure Rules*, which provides that no application for judicial review orders should be made unless leave of the Court has been sought and granted.



10. The significance of the requirement for leave was aptly set out in the case of *Republic vs County Council of Kwale & Another Ex Parte Kondo & 57 Others*, Mombasa HCMCA No. 384 of 1996 where Waki J (as he then was) determined as follows:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court’s discretion but as always it has to be exercised judicially”.

11. In essence, the leave stage is used to identify and filter out cases which are frivolous and unmeritorious.
12. I am also mindful that in an application for leave such as the instant one, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make a decision as to whether an applicant’s case is sufficiently meritorious to justify leave.
13. In the instant Application, the Exparte Applicant has sought to challenge the employment of the Interested Party on grounds that he does not meet the minimum qualifications to hold the position of Director, Human Resource in the Respondent Assembly. The Exparte Applicant further states that the Interested Party’s appointment letter was signed by an unknown person.
14. I have considered the grounds in support of the Application and made two observations. First, the Exparte Applicant has not produced concrete evidence to prove that the Interested Party is not qualified to hold the position he was appointed to. I must say that the curriculum vitae he has annexed to the Verifying Affidavit in support of the Application, is not and cannot be deemed to be conclusive evidence of the Interested Party’s qualifications. Besides, the Exparte Applicant does not disclose the manner in which he came to be in possession of the said curriculum vitae. As a matter of fact, that is a document that can easily be generated by any person.
15. Second, the Exparte Applicant’s assertion that the Interested Party’s appointment letter has been signed by an unknown person, has not been substantiated. The said Clerk of the Respondent Assembly has not sworn an Affidavit to disown the said letter of appointment and to declare that the person who signed the same had no authority to do so.
16. On this score, I wish to reiterate the determination in the case of *Republic vs Kenya Revenue Authority, Commissioner Ex parte Keycorp Real advisory Limited* (2019) eKLR in which Mativo J (as he then was) rendered himself thus: -

“At the leave stage, the applicant has the burden of demonstrating that the decision is illegal, unfair and irrational. The applicant must persuade the Court that the application raises a serious issue. This is a low threshold. A serious issue is demonstrated if the judge believes that the applicant has raised an arguable issue that can only be resolved by a full hearing



of the Judicial Review application. If the court is not persuaded as aforesaid, leave will be denied and the matter proceeds no further.”

17. In light of the foregoing, I am not satisfied that the Exparte Applicant has discharged its burden and demonstrated that the decision of the Respondent Assembly to issue the Interested Party with a letter of appointment, is irrational, irregular, questionable and amount to abuse of the office.
18. Over and above, the Court takes note of the orders issued by Mbaru J on 5th May, 2022, in Nairobi ELRC Petition No. E053 of 2022, between the Interested Party and the Respondent, where the Judge ordered in part: -
 - “ 1. That the respondent shall jointly and together allow the petitioners back to work and for work already done and work to be done pending hearing of the Notice of Motion dated 22/3/2022.
 2. That the respondent shall pay the petitioners to allow for progress and for the court to hear the substance of the matter before it.”
19. Notably, the orders are still in place. What manifests to me therefore, is that what the Exparte Applicant is seeking through the instant Application, is to set aside and/or upset the orders of Mbaru J. This is moreso considering prayer no. 3 of the Application, which is couched as follows: -
 - “That leave herein do act as a stay restraining the respondent from paying salary or wages whatsoever, allocating duties and or physical office pending hearing and determination of the substantive motion.”
20. Needless to say, this Application is an utter abuse of the court process and such an action cannot and should not be sanctioned by the Court.
21. The total sum of my findings is that the Application besides being an abuse of court process, has not established an arguable and meritorious case to warrant leave to commence Judicial Review proceedings as prayed.

Order

22. The upshot of the foregoing is that the Chamber Summons Application dated 21st June, 2022 is dismissed.
23. The Exparte Applicant shall bear the costs of this Application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Exparte Applicant Mr. Mugo

For the Respondent No appearance

For the Interested Party Mr. Gachie

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

