



**Republic v Migori County Secretary & another; Migori County Public Service Board  
(Interested Party); Ngwala & 8 others (Exparte Applicants) (Judicial Review Application  
E013 of 2022) [2022] KEELRC 13209 (KLR) (16 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13209 (KLR)

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

**S RADIDO, J**

**NOVEMBER 16, 2022**

**IN THE MATTER OF AN APPLICATION BY**

**JOSHUA OTIENO NGWALA,**

**DR DALMAS OYUGI OYUGI,**

**MARY ATIENO MIDIDA,**

**PAULINE AMOLLO MUGA,**

**SAMUEL OTIENO OCHIENG,**

**MARTINE OGOLA DIMA,**

**ELIJAH MWITA GAMBERE,**

**LAZARUS JUMA SCOTCH**

**AND FREDRICK MAROA**

**MOHERAI FOR ORDERS OF**

**JUDICIAL REVIEW IN THE**

**NATURE OF CERTIORARI &**

**PROHIBITION**

**AND**

**IN THE MATTER OF THE COUNTY**

**GOVERNMENTS ACT**

**AND**

**IN THE MATTER OF SECTIONS 8 & 9 OF THE**

**LAW REFORM ACT**



**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**MIGORI COUNTY SECRETARY ..... 1<sup>ST</sup> RESPONDENT**

**GOVERNOR, MIGORI COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**MIGORI COUNTY PUBLIC SERVICE BOARD ..... INTERESTED PARTY**

**AND**

**JOSHUA OTIENO NGWALA ..... EXPARTE APPLICANT**

**DR DALMAS OYUGI OYUGI ..... EXPARTE APPLICANT**

**MARY ATIENO MIDIDA ..... EXPARTE APPLICANT**

**PAULINE AMOLLO MUGA ..... EXPARTE APPLICANT**

**SAMUEL OTIENO OCHIENG ..... EXPARTE APPLICANT**

**MARTINE OGOLLA DIMA ..... EXPARTE APPLICANT**

**ELIJAH MWITA GAMBERE ..... EXPARTE APPLICANT**

**LAZARUS JUMA SCOTCH ..... EXPARTE APPLICANT**

**FREDRICK MAROA MOHERAI ..... EXPARTE APPLICANT**

**JUDGMENT**

1. On September 6, 2022, the County Secretary & Head of County Public Service, County of Migori, sent 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 duty judge granted the leave on September 14, 2022, and pursuant to further directions issued on September 23, 2022, the *ex-parte* applicants filed the substantive motion together with submissions on September 30, 2022.
5. The Governor, Migori County (the Governor), the County Secretary and the Secretary of the County Public Service Board (the board) filed replying affidavits on October 11, 2022. The board also filed grounds of opposition to the motion.
6. They also filed submissions on the same day.



7. The court has considered the motion, the statement of facts, affidavits, and submissions by the parties, including the case-law cited.

### **The Arguments By The Ex-parte Applicants**

8. The *ex-parte* applicants contended in seeking the judicial review orders that the decision of the Governor on September 6, 2022 to issue them with the termination of appointment notices and the subsequent advertisement of the chief officer positions they held without affording them an opportunity to be heard exceeded the Governor's lawful authority as outlined in section 44(3) of the [County Governments Act](#), and was also a usurpation of the role of the board as contemplated by section 59(1) of the same Act.
9. Consequently, the *ex-parte* applicants urged that since the Governor purported to exercise disciplinary powers he did not have, they were denied the option or right of appealing to the Public Service Commission as set out in section 77 of the [County Governments Act](#).
10. The *ex-parte* applicants further submitted that they were entitled to fair administrative action, which they had been denied.
11. Drawing from the decisions in [David Ogega Kebiro & Ar v Kisii County Public Service Board & Ar](#) (2017) eKLR and [Kisumu County Public Service board & Ar v Samuel Okoro](#) (2018) eKLR, the *ex-parte* applicants contended that a Governor had no authority to remove a chief officer from office.

### **Respondents And Boards Take**

12. The respondents and the board took an objection to the competency of the judicial review proceedings on the ground that by virtue of article 234(2)(i) of the [Constitution](#) as read with the provisions of section 77 of the [County Governments Act](#) and section 87(2) of the [Public Service Commission Act](#), the court had no jurisdiction because the *ex-parte* applicants had not exhausted the appellate procedure outlined in the said Acts by invoking the mandate of the Public Service Commission.
13. The Court of Appeal decision in [Secretary, County Public Service Board & Ar v Hulbbhai Gedi Abdille](#) (2017) eKLR was cited.
14. These parties also argued that the *ex-parte* applicants had sufficient remedies under the [Employment Act](#) 2007.
15. On the merits, the respondents first assailed the judicial review proceedings on the basis that the motion was stated to be supported by a person, Martin Shikuku Arondo, who was not a party to the proceedings.
16. It was also asserted that since the governor had the power to nominate chief officers, he had the corresponding power to initiate the process of removal of the *ex-parte* applicants under section L4 of the County Public Service Human Resource Manual, 2013.
17. It was also contended that the board only advertised the position of chief officers after receiving a communication from the governor to competitively recruit for the positions and that by dint of article 179 (1)(b) of the [Constitution](#), the Governor had the authority to organise, constitute and structure his government within the confines of the law and since the *ex-parte* applicants were on fixed-term contracts with termination clauses, there was no illegality in the decision.
18. Further, the respondents countered that the extension of the appointment of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 7<sup>th</sup> *ex-parte* applicants in 2018 was invalid because the Governor did not make them within the confines



of section 45(1)(a) of the [County Governments Act](#) and the [Public Appointments \(County Assemblies\) Approvals Act](#).

## Jurisdiction

19. It cannot be disputed that the *ex-parte* applicants are (were) public officers under the county public service, Migori County.
20. The Governor commenced or attempted to commence a process to remove the *ex-parte* applicants from the county public service of Migori.
21. Section 77(2)(e) of the [County Governments Act](#) unreservedly gives the Public Service Commission of Kenya the mandate to entertain an appeal, including on a decision on retirement or other removal from the county public service. The provision does not restrict the appellate function to decisions made by a county public service board.
22. This contrasts with the provision in section 77(1) of the Act, which restricts the appellate power to decisions made by the board or on its behalf in purported the exercise of disciplinary control.
23. In terms of article 234(2)(i) of the [Constitution](#) as read with section 77(2) of the [County Governments Act](#) and section 87(2) of the [Public Service Commission Act](#), the *ex-parte* applicants' first port of call should have been through an appeal to the Public Service Commission.
24. The jurisdiction of this court is therefore deferred until the Public Service Commission considers and determines such an appeal.
25. Decisions from the Court of Appeal and the Supreme Court are clear that in these types of cases, the alternative jurisdiction should be invoked before a party approaches the court unless there are exceptional circumstances.
26. In this regard, the court stated in the Speaker of the [National Assembly v James Njenga Karume](#), civil application No Nai 92 of 1992 as follows:

In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the [Constitution](#) or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.
27. Another bench of the court took a similar position in [Secretary, County Public Service Board & Ar v Hulbbai Gedi Abdille](#) (2017) eKLR, wherein it was addressing its mind to section 77 of the [County Governments Act](#):

There is no doubt that the respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by section 77 of the Act. The section provides not only a forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one, specifically tailored by the legislators to meet needs such as the respondent's. In our view, the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance..... Her contention that she disregarded the appeal because it could not afford her an opportunity to question the procedure followed by the appellant is, in our view, without basis because section 77 has placed no fetter to the jurisdiction of the Public Service Commission.
28. The *ex-parte* applicants did not place any material before this court to convince it to take or reach a different conclusion.



29. This court agrees with the respondents that the *ex-parte* applicants invoked its jurisdiction prematurely.
30. On the assumption that it is wrong on the conclusion on the jurisdiction, the court will consider whether judicial review orders are warranted in the circumstances of these proceedings.

### **Grant Of Judicial Review Orders**

31. The *ex-parte* applicants sought judicial review orders whose impact would affect the statutory functions of the board. However, they named the board as an interested party.
32. The question, therefore, begs whether judicial review orders can issue against an interested party as opposed to a respondent in judicial review proceedings.
33. The parties did not place before the court any precedent providing or suggesting an answer to the question.
34. The court will, therefore, in an endeavour to find an answer to the question, examine the fundamental nature of a respondent (defendant) and that of an interested party.
35. 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.
36. An interested party, however, is one who is likely to be affected directly by the determination of a legal dispute between the respondent (or defendant) and the person alleging legal injury or wrong, ordinarily called plaintiff or claimant in our jurisdiction.
37. The *ex-parte* applicants have not pleaded the County Public Service Board as a respondent. Yet, they seek judicial review orders restraining it from carrying out its statutory mandate or terminating their appointments or redeploying them to other positions.
38. It is 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.
39. Further, the *ex-parte* applicants were on fixed-term contracts. A breach of any of the contracts can find a sound remedy in damages under the common law or those prescribed under the *Employment Act*.
40. 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.
41. In the circumstances of these proceedings, the court is not convinced that this is an appropriate case to grant the judicial review orders sought by the *ex-parte* applicants.

### **Conclusion And Orders**

42. From the foregoing, the court declines to grant the judicial review orders sought.
43. The motion is dismissed with no order on costs considering the employment relationship subsisted during the pendency of these proceedings.

**DELIVERED VIRTUALLY FROM LAMU, DATED, AND SIGNED ON THIS 16<sup>TH</sup> DAY OF NOVEMBER 2022.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**



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

For Respondents/Interested Party Mr Okongo instructed by Okongo Wandago & Co. Advocates

Court Assistant Chrispo Aura

