



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**

**JUDICIAL REVIEW APPLICATION NO. 5 OF 2020**

**IN THE MATTER OF JUDICIAL REVIEW APPLICATION**

**AND**

**IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR  
ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF HOMA BAY COUNTY ASSEMBLY SERVICE BOARD**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**v**

**CLERK, COUNTY ASSEMBLY OF HOMA BAY.....1<sup>st</sup> RESPONDENT**

**COUNTY ASSEMBLY HOMA BAY.....2<sup>nd</sup> RESPONDENT**

**COUNTY ASSEMBLY SERVICE BOARD, HOMA BAY.....3<sup>rd</sup> RESPONDENT**

**AND**

**JULIUS NYAMBOK.....1<sup>st</sup> INTERESTED PARTY**

**RICHARD OGINDO.....2<sup>nd</sup> INTERESTED PARTY**

**AND**

**HON MICHAEL NYANGI.....ex parte applicant**

**HON PETER JUMA.....ex parte applicant**

**JUDGMENT**

1. On 29 September 2020, the Court, after hearing submissions from the parties directed that Kisumu Petition No. 27 of 2020, *Daniel Odhiambo Kaudu v the Speaker, County Assembly & Ors*, Kisumu Petition No. 32 of 2020, *Brian Odhiambo v County Assembly Service Board, Homa Bay County* and Kisumu Judicial Review Application No. 12 of 2020, *R v Speaker, County Assembly of Homa Bay & Ors ex-parte Ramos Fidel & Ar* be consolidated.

2. This Judicial Review application was however not part of the order hence the Court has decided to write a separate judgment.

3. Hon Michael Nyangi and Hon Peter Juma (*ex-parte* applicants) are members of the County Assembly of Homa Bay under the flag of the Orange Democratic Party.
4. Around 7 November 2018, the *ex-parte* applicants took oaths of office after being nominated, to serve as members of the County Assembly Services Board (the Board).
5. On 12 March 2020, a Motion was placed before the County Assembly to debate and approve the nomination of Julius Nyambok and Richard Ogindo (Interested Parties) as members of the County Assembly Service Board (to replace the *ex-parte* applicants).
6. The reason given was that the representation of the County Assembly in the Board was incomplete because the nomination of the *ex-parte* applicants had been revoked by their nominating parties.
7. The *ex-parte* applicants were aggrieved and on 4 May 2020, they sought and got leave of the Court to commence judicial review proceedings against the Respondents.
8. The substantive motion was filed on 5 May 2020 and on the same day, the Court gave an order restraining the Interested Parties from assuming office as members of the Board.
9. The Court also directed that the Motion be served and that the *ex-parte* applicants file and serve a supplementary affidavit and submissions within 7 days and that the Respondents file submissions within 7 days of service.
10. The firm of Lumumba & Ayieko Advocates filed a Notice of Appointment to act on behalf of the Respondents on 13 May 2020 while the firm of N.E. Mogusu & Associates came on record for the Interested Parties on 14 July 2020.
11. The latter firm also filed a Notice of Preliminary Objection contending that the Court did not have jurisdiction over the subject matter as the Political Parties Dispute Tribunal had determined the dispute and therefore the cause of action was *res judicata*.
12. The Interested Parties also asserted that the proceedings were *sub judice* as the 2<sup>nd</sup> *ex-parte* applicant had filed Kisumu High Court Petition No. 7 of 2020, *Hon John Peter Njira & Ors v Hon Jeff Ongoro & Ors* contesting his removal from the County Assembly Service Board and the nomination of Richard Ogindo amongst other orders, and Political Parties Dispute Tribunal Complaint No. 7 of 2020, *Omondi Owuocha & Ar v Orange Democratic Party & Ar*.
13. Interestingly, on 15 May 2020, the County Assembly purported to approve the nomination of one Hon Jeff Ongoro as a member of the Board to replace Julius Nyambok and this prompted the *ex-parte* applicants to move the Court on 20 May 2020.
14. The Court reiterated the orders issued on 5 May 2020.
15. The 1<sup>st</sup> Respondent (Daniel Kaudo) filed a replying affidavit on 19 May 2020 attesting that the County Assembly had passed a resolution on 12 March 2020 to revoke the nomination of the *ex-parte* applicants to the Board and that the decision was well anchored in section 12 of the County Governments Act (as amended).
16. When the *ex-parte* applicants got wind of the motion on the nomination of Hon Jeff Ongoro, they moved the Court on 20 May 2020 alleging that the Respondents had breached the orders of 5 May 2020. The *ex-parte* applicants sought an order to cite the Speaker and the said Hon Jeff Ongoro for contempt.
17. Upon perusal of the application, the Court reiterated the existence of the restraining orders given on 5 May 2020.
18. Pursuant to Court orders, the *ex-parte* applicants filed their submissions on the judicial review motion on 1 July 2020.
19. The Interested Parties filed a replying affidavit and a Notice of Preliminary Objection to the contempt application on 14 July 2020.
20. On 14 July 2020, the Interested Parties filed a Notice of Preliminary Objection to the judicial review application, citing lack of jurisdiction and *sub judice*.
21. The firm of Omondi, Abande & Co. Advocates filed a Notice of Change of Advocates to act for the *ex-parte* applicants on 20 July 2020.
22. When the Judicial Review Motion came up for highlighting of submissions on 21 July 2020, it turned out that the Respondents had not filed or served their submissions.
23. The Court gave them 3 days to file and serve the submissions.
24. The Deputy Speaker of the County Assembly filed a replying affidavit in opposition to the contempt application on 27 July 2020, but because the Interested Parties had failed to attend Court, warrants of arrest were issued against them.
25. On 28 July 2020, the Interested Parties moved the Court to lift the warrants of arrest.
26. The *ex-parte* applicants filed a further affidavit on 30 July 2020 deposing that the Interested Parties had continued to participate in the

meetings of the Board.

27. On the same day, the Court discharged the warrants of arrest.

28. On 27 August 2020, the Interested Parties filed a motion seeking that the *ex-parte* applicants serve them with the judicial review Motion ahead of highlighting of submissions on 22 September 2020.

29. Before the Court could determine the application, the *ex-parte* applicants filed another Motion on 22 September 2020 to cite the Speaker and the acting Clerk for contempt.

30. Barely a week later, on 30 September 2020, the *ex-parte* applicants filed another motion to cite the Speaker and the acting Clerk with contempt.

31. On 1 October 2020, the Court directed that the 2 Motions be consolidated and be placed before this Court (the Judge who had hitherto been handling the proceedings was on transfer).

32. On the same day, the firm of Owiti, Otieno & Ragot filed a Notice of Appointment to act for County Assembly of Homa Bay instead of Lumumba & Ayieko Advocates.

33. The Respondents filed a replying affidavit and consolidated submissions on 9 December 2020.

34. In the replying affidavit, it was deposed that the proprietor or advocate managing the law firm of Odinga Oboge Advocates, a Mr Meshack Edward Otieno did not have a license to practice for the year 2020 (extract from the Law Society of Kenya website was exhibited).

35. It was further deposed that the advocate *Stephine Odinga* who signed the pleadings on behalf of Odinga Oboge & Co. Advocates did not appear in the database of advocates kept by the Law Society of Kenya.

36. The Court has considered all the material placed before it.

## **Evaluation**

### **Participation of Owiti, Otieno & Ragot Advocates**

37. At the time the firm of Owiti, Otieno & Ragot Advocates were filing a Notice of Appointment to act for the County Assembly on 1 October 2020, there was already an advocate on record.

38. The said firm, therefore, ought to have filed a Notice of Change of Advocate.

39. Without such a Notice of Change of Advocate, the Court finds that the filing of the Notice of Appointment was not only irregular but unparalleled in terms of practice and procedures of this Court.

40. The Court, *suo moto* strikes out the said Notice of Appointment of Advocate.

### ***Ex-parte* applicants' Motion filed on 22 September 2020**

41. The firm of Odinga Oboge Advocates purported to file a Motion on 22 September 2020 citing the Speaker of the County Assembly and the 2<sup>nd</sup> Interested Party for contempt.

42. By this date, the firm of Omondi, Abande & Co. Advocates had filed a Notice of Change of Advocates (filed on 20 July 2020). The motion was filed by a firm of advocates which was not on record and was thus incompetent and a nullity.

### ***Ex-parte* applicants' Motion filed on 30 September 2020**

43. For the same reason as in the preceding paragraphs, the Court finds the Motion filed by the firm of Odinga Oboge on behalf of the *ex-parte* applicants on 30 September 2020 incompetent and a nullity.

### **Further submissions by *ex-parte* applicants on 4 December 2020**

44. The *ex-parte* applicants filed further submissions on 4 December 2020. These submissions were filed by the firm of Odinga Oboge Advocates. The firm was not on record and the submissions are expunged from the record.

## **Competence of the Motion**

45. The Court has perused the record keenly and come to the conclusion that the Notice of Motion seeking judicial review orders dated and filed in Court on 5 May 2020 should be dismissed.

46. First, leave was granted *ex parte* (without affording the Respondents an opportunity to be heard) as contemplated by Order 53 Rule 1 of the Civil Procedure Rules. The application for leave was accompanied by a Statutory Statement.
47. Order 53 Rule 4 of the Rules makes it mandatory that the Notice of Motion filed after the grant of leave should be accompanied with the Statutory Statement and any affidavits which were filed at the time of seeking leave.
48. The Notice of the Motion filed by the *ex-parte* applicants was not accompanied by the Statutory Statement. The affidavits which had accompanied the application for leave were also not exhibited. The *ex-parte* applicants filed fresh affidavits.
49. Second, on 27 August 2020, the Interested Parties filed an application seeking an order compelling the *ex-parte* applicants to serve upon them the Notice of Motion.
50. The *ex-parte* applicants did not respond to the application.
51. There are no affidavits of service on record that the *ex-parte* applicants served the Notice of Motion dated 5 May 2020 upon the Interested Parties as required by Order 53 Rule 3(1) of the Civil Procedure Rules.
52. The import of the failure to exhibit the Statutory Statement and the affidavits was that the Respondents were put at a disadvantage as to what the initial complaints by the *ex-parte* applicants were and upon which leave had been granted.
53. Lastly, judicial review orders are discretionary and may not be granted even when merited. In Halsbury's Laws of England 4<sup>th</sup> Edn. Vol. 1(1) para 12 page 270 it is stated thus

The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver of the right to object may all result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has the ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.

54. In the instant case, the *ex-parte* applicants did not demonstrate that they served the Interested Parties or comply with the dictates of Order 53 Rule 4 of the Civil Procedure Rules.
55. They also zealously kept on filing application after application thus not affording the Court an opportunity to determine pending applications on the merit. Such conduct disentitles them from the discretionary orders sought.
56. The Court also notes the prima facie evidence that the *ex-parte* applicants at some point retained a person without a valid practising certificate for 2020. Some of the primary pleadings were also signed by a person not appearing in the database kept by the Law Society of Kenya.
57. Considering the foregoing, the Court finds that there is no basis upon which it should exercise its discretion in favour of the *ex-parte* applicants.
58. The Notice of Motion dated 5 May 2020 is dismissed with costs to the Respondents.

**Delivered through Microsoft teams, dated and signed in Kisumu on this 11<sup>th</sup> day of December 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For *ex parte* applicants Omondi, Abande & Co. Advocates

For Respondents Lumumba & Ayieko Advocates

Court Assistant Chrispo Aura