



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

JUDICIAL REVIEW NO. 12 OF 2020

(Originally Eldoret Misc Appl No. 10 of 2020)

IN THE MATTER OF JUDICIAL REVIEW APPLICATION AND

IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY

FOR AN ORDER OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF HOMA BAY COUNTY ASSEMBLY SERVICE BOARD

BETWEEN

REPUBLIC.....APPLICANT

v

SPEAKER, COUNTY ASSEMBLY OF

HOMA BAY.....1st RESPONDENT

COUNTY ASSEMBLY SERVICE BOARD, COUNTY

OF HOMA BAY.....2nd RESPONDENT

COUNTY ASSEMBLY OF HOMA BAY.....3rd RESPONDENT

AND

DANIEL ODHIAMBO KAUDO.....INTERESTED PARTY

AND

RAMOS FIDEL.....EX PARTE APPLICANT

OWUOCHA OMONDI.....EX PARTE APPLICANT

JUDGMENT

1. On 8 September 2020, Ramos Fidel and Owuocha Omondi (*ex-parte* applicants) applied for leave to commence judicial review proceedings before the Employment and Labour Relations Court, Eldoret.
2. The Court granted leave, ordered that the leave operates as a stay of a decision to suspend from office, Daniel Odhiambo Kaudo (Interested Party). The stay was to be in place until 29 September 2020.
3. The Court, in the same order, directed that a substantive Motion be filed within 10 days and that the proceedings be transferred to the

Court sitting in Kisumu.

4. When the file was placed before Nduma J on 30 September 2020 and after the parties drew his attention to Kisumu Petition no. 27 of 2020, *Daniel Odhiambo Kaudo v Speaker, County Assembly of Homa Bay & Ar* and Kisumu Petition No. 32 of 2020, *Brian Odhiambo v County Assembly Service Board, Homa Bay*, the Judge directed that the 3 files be consolidated, the parties file and exchange pleadings and submissions within 7 days apiece ahead of the giving of further directions on 2 November 2020 by the incoming Judge (the Judge was on transfer).

5. On 6 October 2020, the *ex-parte* applicants filed the substantive Motion, outside the 10 days window prescribed by the Court.

6. On 2 November 2020, this Court gave further directions as the parties had not complied fully with the directions issued on 30 September 2020.

7. The *ex-parte* applicants filed their submissions on 13 November 2020 while the 1st and 3rd Respondents filed a replying affidavit and consolidated submissions on 9 December 2020.

8. It seems that the parties did not place all the pertinent facts before the Judge before he made the consolidation order.

9. The Court had ordered the *ex-parte* applicants to file a substantive Motion within 10 days. The *ex-parte* applicants did not comply nor did they seek leave to be allowed to file the Motion out of time, or have it admitted out of time.

10. The Court also notes that the substantive Motion was not accompanied by the Statutory Statement and/or affidavits which had been filed at the leave stage as demanded by Order 53 of the Civil Procedure Rules.

11. The Court also notes that the Clerk of the County Assembly on whose behalf the judicial proceedings had purportedly been instituted had commenced action much earlier on 27 July 2020, seeking to vindicate his rights.

12. It cannot be that the *ex-parte* applicants were not aware as they conveniently moved the Court in Eldoret and not in Kisumu within the jurisdictional limit of the Court sitting in Kisumu.

13. Lastly, judicial review orders are discretionary and may not be granted even when merited. In Halsbury's Laws of England 4th 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 to 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.

14. For the above reasons, the Court finds that the judicial review proceedings herein are not only incompetent but an abuse of the court process.

15. The Notice of Motion dated 27 September 2020 and filed in Court on 6 October 2020 is dismissed with costs to the Respondents.

Delivered through Microsoft teams, dated and signed in Kisumu on this 11th day of December 2020.

Radido Stephen

Judge

Appearances

For *ex-parte* applicants Owuocha & Associates Advocates

1st Respondent did not file a formal notification of Appointment of Advocate.

For 2nd Respondent Mwamu & Co. Advocates

Court Assistant Chrispo Aura