



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

JUDICIAL REVIEW APPLICATION NO.1 OF 2019

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

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT SECTION 57, 58 AND 59

AND

IN THE MATTER OF NAKURU COUNTY PUBLIC SERVICE BOARD

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

HON. LEE KINYANJUI MAIYANI GOVERNOR

NAKURU COUNTY GOVERNMENT.....1ST RESPONDENT

BENJAMIN NJOROGE COUNTY SECRETARY

NAKURU COUNTY GOVERNMENT.....2ND RESPONDENT

AND

JAMES K MBUGUA

PETER MURITHI MWARANIA

MONICA CHERUTICH.....EX PARTE APPLICANTS

RULING

The ruling herein relates to Notice and Preliminary objections filed by the respondents and dated 25th January, 2019 on the grounds that the judicial proceedings and application filed on 22nd January, 2019 is opposed on the grounds that;

- 1. The remedies for judicial review are only available against public bodies or administrative bodies and cannot be issued against private individuals.*
- 2. The judicial review proceedings against the respondents as private persons in their individual capacity and judicial review orders cannot issue against them in that capacity.*
- 3. Judicial review is the means through which the courts supervise the actions or decisions of public, administrative bodies or tribunals and not private individuals.*

The respondents have relied on the cases of **Humphrey Makokha & another versus Communications Authority of Kenya & 2 others [2018] eKLR**; **Mureithi & 2 others (for Mbari Ya Murathimi Clan) versus Attorney General & 5 others (Nairobi) HCMCA No.158 of 2005** on the findings that judicial review orders can only issue against public bodies; and **John Harun Mwau versus Andrew K Mullei & 3 others [2009] eKLR** and he findings that a respondent sued in his private capacity is not a proper respondents against whom judicial review orders can issue.

The respondents also submitted that the primary purpose of judicial review is to keep the government and its agencies within their legal boundaries and to ensure they do not exceed or abuse their powers to the detriment of the citizens. The 1st and 2nd respondent is enjoined in these proceedings as individuals and judicial review orders sought against them cannot issue. Sending of an employee on compulsory leave is not a disciplinary action but the start of investigations process as held in **Amraphael Mbogholi Msagha versus Chief Justice & 7 others**.

The respondents also submitted that the *ex parte* applicants have challenged that there is no employer and employee relationship and therefore without such a relationship existing, the proceedings herein should have been filed with the High Court and not with the court whose mandate is under section 12 of the Employment and Labour Relations Court Act. without jurisdiction, the court should not issue the orders sought as held in the case of **Mary Wambui Mutonyi versus Laikipia County Government & 2 others [2018] eKLR**. The application made by the *ex parte* applications is bad in law and should be dismissed with costs.

The *ex parte* applicants submitted that the matter before court is filed against the respondents in their official and not private capacity as they hold public office as governor and head of Public Service Nakuru County. Where the *ex parte* applicants' intention was to file suit against the respondents in their private capacity, then their offices should not have been included as to do so would be contrary to what judicial review proceedings requires. The respondents are proper parties herein.

Under Article 159(2)(d) of the Constitution, 2010 the intentions of the *ex parte* applicants and the nature of orders sought are clear and technicalities should not be used to lock them out of court. such technicalities are cured under the constitution.

The *ex parte* applicants have moved the court seeking for orders against the respondents that;

The court be pleased to issue Writ of Certiorari to bring to this court and quash the decision of the respondents to send the applicants and the secretariat on compulsory leave for 45 days communicated by letter dated 14th January, 2019.

The court be pleased to issue a writ of prohibition against the respondent herein from interfering with the operations of the members of the Nakuru County Public Service Board and the Secretariat of the board.

The objections then made by the respondents is that such orders and remedies sought in judicial review proceedings can only issue against a government or its agencies and not against them as private persons.

Judicial review proceedings in their nature in employment and labour relations should abide Rule 7 (2) of the Employment and Labour Relations Court (Procedure) Rules, 2016;

(2) A person who wishes to institute judicial review proceedings shall do so in accordance with section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules.

In this regard, as a rule of practice, the law and procedures applicable under Law Reform Act and Order 53 of the Civil Procedure Rules, a respondent(s) in judicial review proceedings must be against a party in the nature of the government, tribunal or an agency of government with powers under the constitution and or statute and with powers flowing from therefrom. See **Hydro Waterwell (K) Limited versus National Water Conservation & Pipeline Corporation [2019] eKLR**.

upon the promulgation of the Constitution, 2010 Article 23 has created a fundamental shift where Judicial Review is one of the Remedies the Court can grant under Article 23 of the Constitution. this is given meaning by the Supreme Court of Kenya which recognised that the power of any Judicial Review is now found in the constitution in the case of **C.C.K. versus Royal Media Services Ltd [2014] eKLR**. In that case, the Supreme Court held that the power of Judicial Review in Kenya is found in the Constitution, as opposed to the principle of the possibility of Judicial Review of legislation established under Articles 23(3)(d) and 165(3)(d) of the constitution.

in addressing the question as to who can be a proper respondent in judicial review proceedings, the court in the case of **Republic versus Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another [2018] eKLR** held as follows;

The Constitution has expressly granted the High Court jurisdiction over any person, body or authority exercising a quasi-judicial function. The point of focus is no longer whether the function was public or private or by a statutory body, or whether the decision was communicated orally or in writing or whether it's an order or proceedings by a tribunal or public body, but whether the function was judicial or quasi-judicial and affected constitutional rights including the right to fair administrative action under Article 47, or the right to natural justice under Article 50. In this regard, refusal to honour a Court order is an act or conduct that is capable of affecting rights of the ex parte applicant. [underline added].

in this case, proceedings herein are made against the respondents in person and in their official capacity and premised on the provisions of sections 57, 58 and 59 of the County Government Act, 2012. In view of Article 23 (3)(d) of the Constitution, 2010 read together with articles 159(d), the respondents properly defined the court should address the substantive issue at hand being the sending on compulsory leave of the *ex parte* applications vide letter dated letter dated 14th January, 2019 and whether an order of prohibition should issue against the respondents in that capacity from interfering with the operations of the members of the Nakuru County Public Service Board and the

Secretariat of the board.

That said, the *ex parte* applicants should make and give reference to the provisions of Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016 as a whole and further given attention to the Law Reform Act and Order 53. Even with the best application of Article 23(3) (d) of the constitution, the procedural requirements of Rule 7 and order 53 have not abated. These remain alive.

The above addressed, the respondents have raised the issue of the *ex parte* applicants assertion that the respondents have no power to issue letter dated 14th January, 2019 sending them on compulsory leave and on this basis the respondents assert the court thus moved there is no jurisdiction there being no employer and employee relationship. To delve into this matter is to go into the merits of the motion at the preliminary stage and without going into the substantive issues to be addressed by the *ex parte* applicants. Such should not be gone into at this stage. The *ex parte* applications are however invited to do a thorough introspection on this matter. The court will only say that much.

On this basis, the objections made are found without merit and are hereby declined. As these objections raise important matters of law, no costs are awarded.

Delivered at Nakuru this 25th day of April, 2019.

M. MBARU

JUDGE

In the presence of:

.....

.....