



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

MISC JR APPLICATION NO. 4 OF 2017

IN THE MATTER OF: SECTIONS 8 & 9 OF THE LAW REFORM ACT, CAP. 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF: SECTION 21 OF THE GOVERNMENT PROCEEDINGS ACT

AND

IN THE MATTER OF: THE JUDGMENT AND RULING RESPECTIVELY DELIVERED ON 22ND JULY, 2016 AND 11TH OCTOBER, 2016 IN ELR PETITION NO. 10 OF 2015

AND

IN THE MATTER OF: AN APPLICATION FOR ORDERS OF MANDAMUS COMPELLING THE RESPONDENTS HEREIN TO COMPLY WITH AND IMPLEMENT THE JUDGMENT AND RULING OF COURT RESPECTIVELY DELIVERED ON 22ND JULY, 2016 AND 11TH OCTOBER, 2016 IN ELR PETITION NO. 10 OF 2015

REPUBLIC

APPLICANT

v

BARINGO COUNTY PUBLIC SERVICE

BOARD

RESPONDENT

Ex parte

ZIPPORAH MWANGI & 18 ORS

JUDGMENT

1. On 30 March 2017, the Court granted the *ex parte* applicants leave to apply for judicial review orders
1.
2. THAT this Honourable court be pleased to grant leave to the applicants herein to apply for

ORDERS of:-

- i. Certiorari to bring to this court for purposes of being quashed the letters of appointment dated 24th October, 2016 issued by the respondent in contravention of the judgment delivered on 22nd July, 2016.
- ii. Mandamus compelling the respondent to issue to the applicants fresh letters of appointment on permanent and pensionable terms effective 1st July, 2015 as directed by the court in its judgment above referred to.
- iii. Mandamus compelling the respondent to pay to the applicants costs as assessed by the Deputy Registrar in the ELR Petition No. 10 of 2015 and certified by the certificates issued on 20th October, 2016.

3. THAT costs of this application be provided for.

2. The *ex parte* applicants filed the substantive application on 11 April 2017 under certificate of urgency and on the same day, the Court directed that the motion be served for further directions on 28 April 2017.
3. On 28 April 2017, none of the parties attended Court and the motion was stood over generally.
4. When the motion next came up on 18 July 2017, Ms. Sabaya for the *ex parte* applicants and Mr. Opar for the Respondent proposed that the motion be determined on the basis of submissions to be filed.
5. Because the Respondent had not filed any response to the motion, the Court directed it to file and serve response(s) before 18 August 2017, and hearing was scheduled for 9 October 2017.
6. When the motion was called for hearing on the scheduled date, the Respondent was not represented nor was it in Court.
7. There was also no response or affidavits on record from or on behalf of the Respondent.
8. The Court consequently allowed Mr. Juma to urge the application because the hearing date had been taken in the presence of all the parties.
9. The Court has considered all the material placed before it.

Quashing appointment letters dated 24 October 2016 and Issuance of fresh letters

10. The Court in its judgment ordered the Respondent to absorb the *ex parte* applicants on permanent and pensionable terms with effect from 1 July 2015.
11. The Respondent, instead issued appointment letters to the *ex parte* applicants indicating that they were being absorbed with effect from 1 July 2016.
12. That was in error and not in accord with the judgment of the Court and the Court is satisfied that the order(s) of certiorari and mandamus are merited.

Mandamus for payment of costs

13. The *ex parte* applicants have not demonstrated that they had made any attempts to have the Respondent to pay the costs as taxed.
14. There is also no evidence that the certificates of costs were served upon the Respondent.

15. In the view of the Court, an order compelling the Respondent to pay the taxed costs should only issue after a demonstration that the Respondent has refused, failed or neglected to pay the costs.

16. It would not be prudent to issue an order compelling the performance of a duty or obligation without evidence that the party under the duty or obligation has failed to act.

17. Before concluding a few observations on issues which may appear to be legal technicalities.

18. The *ex parte* applicants purported to file a supporting affidavit to the motion, which was not filed at stage of seeking leave.

19. My understanding of Order 53 rule 4 of the Civil Procedure Rules is that no further affidavits (save for those filed at the leave stage) are allowed unless leave of Court is sought and granted.

20. Instead of turning this judgment into a prose on the practice and procedure of judicial review, the Court would draw the attention of the *ex parte* applicants to *Republic v Chief Magistrates Court Thika & Ar ex parte Joseph Kamunya Kinuthia* (2016) eKLR.

21. It is also not clear to the Court whether it was competent for the *ex parte* applicants to combine an order for payment of costs together with the other 2 orders sought.

Conclusion and Orders

22. The upshot of the foregoing is that the Court allows orders (i) and (ii) as proposed in the motion dated 31 March 2017.

23. Order (iii) is declined.

24. No order as to costs.

Delivered, dated and signed in Nakuru on this 8th day of December 2017.

Radido Stephen

Judge

Appearances

For *ex parte* applicants Mr. Juma/Ms. Sabaya instructed by Julius Juma & Co. Advocates

For Respondents Limo R.K & Co. Advocates (did not participate in proceedings)

Court Assistants Nixon/Martin