County Assembly of Nyamira v Ogori; County Assembly of Nyamira (Exparte Applicant) (Judicial Review E007 of 2024) [2025] KEHC 679 (KLR) (30 January 2025) (Ruling)

Neutral citation: [2025] KEHC 679 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

JUDICIAL REVIEW E007 OF 2024

WA OKWANY, J

JANUARY 30, 2025

BETWEEN

COUNTY ASSEMBLY OF NYAMIRA .... APPLICANT

AND

ENOCK OKERO OGORI .... RESPONDENT

AND

COUNTY ASSEMBLY OF NYAMIRA .... EXPARTE APPLICANT

RULING

1. This ruling is in respect to the Application dated 1st December 2024 wherein the Respondent/ Applicant, Enock Okero Ogori, seeks the following orders: -
    1. SPENT
    2. SPENT
    3. That the Honourable Court be pleased to set aside, vacate, vary and discharge the Orders granted ex-parte on 29th November 2024.
    4. That costs of and incidental to this Application be in the cause.
2. The Application is brought under Section 80 of the *Civil Procedure Act*, Order 45 of the Civil Procedure Rules as read with Articles 19, 23, 47, 48, 50 and 159 of *the Constitution*. It is predicated on the grounds of the face of the Application and is supported by the Respondent's affidavit wherein he avers that; he was the current legitimate and lawful Speaker of the Nyamira County Assembly, having obtained conservatory orders on 11th October 2024 restraining anyone from interfering with the discharge of his duties; that the Applicant filed JR E005 of 2024 seeking to quash Gazette Notices Nos. 14229, 14230 and 14273 of 2024 and the present Application with the full knowledge that they

addressed the same subject matter; that substantive orders were made against him contrary to the rules of natural justice on the right to be heard; that there is potential risk of conflicting court orders being issued by different courts and that the filing of the present Application constitutes an abuse of judicial processes since it amounts forum shopping through multiplicity of suits.

3. The Applicant further avers that the granting of leave to institute JR proceedings against him through the Court orders of 29th November 2024 automatically ousted the Court's orders issued on 11th October 2024 and that had the Court been made aware of the existence of JR E005 of 2024, it would not have issued the impugned orders at the ex-parte stage because of the sub-judice rule. He states that there is an error apparent on the face of the record as the Court issued substantive ex-parte orders without hearing the Respondent's case.

4. The ex-parte Applicant filed the Replying Affidavit of its Acting Clerk, Mr. Duke Onyari in response to the Application. The said deponent avers that the Application is incurably defective for failure to annex the Orders sought to be stayed, varied or vacated. He further states that judicial review proceedings are sui generis in nature and that the court therefore lacks the jurisdiction to entertain the present Application and that there is no court order or subsequent gazette notice revoking Gazette Notice No. 14050 of 2024 that gazetted the Respondent's impeachment.

5. He faults the Respondent for abusing the court processes by filing multiple petitions in three different courts but adds that there is no risk of conflicting orders because JR E005 of 2024 has since been withdrawn.

6. The Respondent/Applicant filed a further affidavit dated 14th December 2024 in which he avers that this court is clothed with the jurisdiction to hear the Application as there is no provision requiring that the Order sought to be vacated be annexed to the Application. He further avers that the Notice of Withdrawal of suit filed in JR E005 was cleverly filed on 29th November 2024 at 11.11 a.m. in bad faith without the leave of court. He also states that any issues relating to competence of the appointees listed under Gazette Notice 14273 could only be dealt with in a different forum because Judicial Review proceedings deals with the procedure of administrative decisions and not their merits.

7. The Application was canvassed by way of written submissions which I have considered.

Analysis and Determination.

8. I have considered the pleadings filed herein and the parties' rival submissions. I find that the main issue for my determination is the Application is merited.

9. The court's power to review its own decisions is provided for under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules which stipulate as follows:-

    80. Any person who considers himself aggrieved-

        a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

        b. by a decree or order from which no appeal is allowed by this Act,

        May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

    Order 45 Rule 1 (1) Any person considering himself aggrieved-

    a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.

10. I note that impugned orders granted the exparte Applicant leave to institute Judicial Review proceedings against the Respondent which leave was also to operate as stay of the impugned Gazette Notices.

11. In Judicial Commission of Inquiry to the Goldenberg Affair vs. Job Kilach Civil Appeal No.77 of 2003 the Court of Appeal rendered itself as follows:-

> " The next point to make is that although appeal does lie to this court against an ex-parte order made by a judge of High Court......nevertheless in his judgment in that case, Sir Donalds on MR [1983] 3 All E.R. 589 at page 593 said:
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> > "I have said ex-parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the Applicant is under duty to make full disclosure of all relevant information in his possession whether or not it assists his application this is no basis for making a definite order and every judge knows this. He expects, at a later stage, to be given opportunity to review his provisional order in the light of evidence and argument adduced by the other side and in so doing he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order. This being the case it is difficult if not impossible to think of circumstances in which it would be proper to appeal to this court against an ex-parte order without just giving the High Court judge an opportunity of reviewing it in light of argument from the defendant and reaching a decision."[emphasis added]

12. Similarly, in Republic vs. Vice Chancellor Moi University & 3 others Ex-Parte Benjamin J. Gikenyi Magare [2018] eKLR H. Omondi J. (as she then was) held as follows when faced with a similar Application to vacate stay orders issued in a judicial review application: -

> " To request the court to re-look at the background leading to the issuance of stay, is in my view, not asking the court to sit on appeal on orders of a court of equal status. It is simply telling the court to reconsider the orders issued in light of the fact that the beneficiary of those orders concealed or did not disclose all the material facts prevailing. All the other issues raised will be better addressed at the hearing of the main motion."

13. My understanding of the above decisions is that the court's hands are not tied when it comes to reviewing ex-parte orders made in Judicial Review proceedings. This is to say that the law permits the court to vary its decisions particularly where the circumstances warrant review/variation, such as where the ex-parte Applicant has concealed some facts which may have been relevant in making a decision at that preliminary ex-parte stage. I find that this court has the jurisdiction to hear and determine the Application for review and to grant any appropriate orders even if the Applicant may have already filed a substantive motion.

14. It was not disputed that on 11th October 2024 this court issued conservatory orders directing the parties to maintain status quo pending the hearing and determination of an Application filed in Nyamira Petition No. E008 of 2024 wherein the exparte Applicant is also a party. To my mind, the effect of the said conservatory orders was to stop any subsequent actions against the holder of the office of the Speaker of the County Assembly including, removing from office by way of impeachment.

15. Flowing from the above position, it is clear that the Applicant/Respondent did not disclose the existence of conservatory orders in Petition No. E008 of 2024 when it appeared before the Court at Kisii on 29th November 2024. It is also clear that the exparte Applicant did not disclose the existence of the earlier Judicial Review that they filed in JR E005 of 2024 over the same subject matter, being the impugned gazette notices.

16. It is therefore clear that the Court granted the orders of 29th November 2024 without the benefit of the full set of facts and background of the case. The effect of the leave granted herein operating as a stay of the impugned Gazette Notices automatically had the effect of conflicting with the said existing conservatory orders. It is on this basis that I find that it would have been prudent for the Applicants to disclose all material facts to the Court to enable it make a proper decision. Failure to disclose all the material fact paint the exparte applicant in bad light and portray it as a party who was driven by mischief with the intention of circumventing the judicial process that was already in motion.

17. The ripple effect of the impugned orders, as has been seen, is the potential embarrassment that may be caused to the Court with the ensuing confusion arising from conflicting orders. A very untidy scenario has thus been created where on one hand the Speaker has conservatory orders to remain in office and conduct his duties which include issuance of gazette notices and on the other hand, the said gazette notices are put on hold following the non-disclosure of material facts.

18. I find the Supreme Court decision of Kaluma vs. NGO Co-ordination Board & 5 others (Application E011 of 2023) [2023] KESC 72 (KLR) (Civ) (12 September 2023) (Ruling), relevant in this regard, where the apex court outlined the circumstances under which it could review its own decisions as follows: -

> "(a) The judgment, ruling or order is obtained through fraud, deceit or misrepresentation of facts;
>
> (b) The judgment, ruling or order is a nullity by virtue of being made by a court which was not competent;
>
> (c) The court was misled into giving judgment, ruling or order under the belief that the parties have consented; and
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> (d) The judgment, ruling or order was rendered on the basis of repealed law or as a result of a deliberate concealment of a statutory provision."

19. It is my finding that the circumstances in the present case fall under the first scenario, where the Court issued the ex-parte orders based on a misrepresentation of facts or lack of full disclosure. This therefore calls for this Court to review its previous orders.

20. Turning to the claim that the instant JR Application offends the subjudice doctrine, I note that it was not disputed that the Applicants had previously filed a Judicial Review Application No. E005 of 2024 wherein they sought to quash the Gazette Notices No. 14229 and 14230 of 2024 on the basis that the Respondent had issued them after he had been impeached from office. I find that even though the Applicants/Respondents (County Assembly) argued that the said Judicial Review Application did

not challenge the third Gazette Notice No. 14273 of 2024, such an argument does not vitiate the fact that they filed two similar Applications at different times in respect to the same subject matter.

21. It is my view that the substratum of the Application in JR E005 of 2024 speaks to the same issue in the present Application JR E007 of 2024 which is primarily to nullify any gazette notices issued by the Respondent/Applicant (Speaker) after his alleged impeachment. I find that JR E007 of 2024 was filed after JR E005 of 2024 in contravention with the Res Sub-Judice Rule.

22. The Res Subjudice rule is codified under Section 6 of the *Civil Procedure Act* as follows: -

> " No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

23. The Supreme Court further expounded on this rule in the case of Kenya National Commission on Human Rights vs. Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties), as follows: -

> " (67) The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must, therefore, establish that there is more than one suit over the same subject matter, that one suit was instituted before the other, that both suits are pending before courts of competent jurisdiction, and lastly; that the suits are between the same parties or their representatives."

24. I have considered the Applicant/Respondents claim that they had withdrawn the Application in JR E005 of 2024. I find that this claim was not proved as the exparte applicant did not demonstrate that it obtained the of the court to withdraw the said JR. It is my finding that the filing a multiple suits with the intention of obtaining a favourable outcome not only amounted to the undesirable act of forum shopping but also constituted outright abuse and mockery of the judicial processes and systems. (See Purity Moraa *Kirere vs. The Senate and 8 Others Petition No. 4 of 2024*).

25. For the reasons that I have stated in this ruling, I find that the Respondent/Applicant has made out a case for the setting aside of the Orders issued on 29th November 2024. Consequently, I allow the Application dated 1st December 2024 in the following terms:

    i. That the ex-parte orders granted on 29th November 2024, specifically in respect to the stay of the gazette notices, are hereby set aside.

    ii. Since this is a Public Interest matter where there are other pending matters, I make no orders as to costs.

26. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 30TH DAY OF JANUARY 2025.

W. A. OKWANY

JUDGE