Onyango Orato Development CBO v State Law Office & another (Civil Miscellaneous E062 of 2024) [2025] KEHC 12041 (KLR) (26 June 2025) (Ruling)

Neutral citation: [2025] KEHC 12041 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL MISCELLANEOUS E062 OF 2024

OA SEWE, J

JUNE 26, 2025

BETWEEN

ONYANGO ORATO DEVELOPMENT CBO ..... APPLICANT

AND

STATE LAW OFFICE ..... 1ST RESPONDENT

THE SUB COUNTY GENDER & SOCIAL DEVELOPMENT OFFICER, RACHUONYO NORTH ..... 2ND RESPONDENT

RULING

1. Upon being granted leave on 4th September 2024, the applicant filed the Notice of Motion dated 5th September 2024 seeking the following orders:

    a. That an order of *certiorari* do issue to quash the notices for meetings/conflict resolution meetings sent by the 1st and 3rd respondents to the applicant.

    b. That an order of *certiorari* do issue to quash the proceedings of the meeting held by the 1st, 2nd and 3rd respondents in the absence of the applicant on the 27th August 2024.

    c. That an order of *certiorari* do issue to quash the ruling made by the 1st, 2nd and 3rd respondents on the 27th August 2024 which stipulated that there has been a vacuum within all the applicant's management position since the year 2022.

    d. That an order of Prohibition do issue restraining the 1st, 2nd and 3rd respondents from hearing a complaint already lodged by the applicant dated 16th August 2024 against the said respondents because it goes against the laws of natural justice.

    e. That an order of Prohibition do issue restraining the 1st, 2nd, 3rd and 4th respondents from meddling and interfering with the operations of the applicant.

f. That an order of Prohibition do issue restraining the 1st, 2nd, 3rd and 4th respondents from overseeing an election run by non-registered members of the applicant with an intention to overthrow legitimate members of the applicant.

g. That an order of *Certiorari* do issue directed to the 1st and 2nd respondents to quash their decision dated 27th August 2024 to disband the whole existence of the applicant without following the due procedure.

h. That an order of *Mandamus* do issue to the 1st and 2nd respondents for change of signatory in the position of treasurer owing to the Resignation Letter in place dated 19th April 2024 by the outgoing treasurer.

i. That the costs of the application be borne by the respondents.

2. The application was premised on the facts that the applicant is a registered CBO; and that its Registration Certificate was last renewed on 17th July 2024. It was further averred that, although the 1st respondent severally mentioned that it had received a complaint against the applicant, it had completely declined to serve the applicant with a copy of the complaint. Instead, the 1st respondent delegated to the 2nd and 3rd respondents the duty to forcefully grab the Registration Certificate from the applicant.

3. The applicant further averred that it filed a complaint with the 2nd respondent on the 15th August 2024 seeking that the complaint against it be revealed and settled; and that instead, the 1st respondent went ahead and sent a notice for a meeting through WhatsApp on 23rd August 2024 at

4. 12 p.m., which was a Friday, summoning the applicant's chairman together with the applicant's executive committee members for a conflict resolution meeting on Tuesday the 26th August 2024. The applicant contended that although it wrote to the 1st respondent indicating that the notice was too short, the 1st respondent proceeded with the meeting on 27th August 2024 at which it was ruled that:

a. There was a vacuum in the executive offices of the applicant since 2022.

b. The applicant was disbanded owing to the said vacuum.

c. Elections would be held on 11th September 2024 by the whole clan to take over the executive positions of the applicant.

5. The application was supported by the Supporting Affidavit sworn on 5th September 2024 by the chairman of the applicant, Mr. Silas Agira. He reiterated the assertions set out herein above.

6. The respondent opposed the said application vide the Replying Affidavit sworn on the 30th September 2024 by the 1st respondent, Mr. Jacob O. Agutu. He confirmed that the applicant is a duly registered CBO; and that on 10th June 2024, he received a request for the applicant's chairman to preside over the taking over by the newly elected officials. He averred that since no elections had been held since 2022 when the then chairman, Mzee Anthony Ochieng Karuga passed away, it would have been improper to officiate at a function that would perpetuate an illegality. He soon established that there were two wrangling factions over the leadership of the applicant and hence saw the need for a meeting to discuss the root causes of the dispute and propose a way forward.

7. The 1st respondent further averred that he called for a meeting via WhatsApp for the 27th August 2024 but the applicant's chairman and his faction failed to attend that meeting. Nevertheless, the members present resolved that fresh elections be held on the 11th September 2024 after 14 days' notice to all the members. The 1st respondent concluded his affidavit by stating that, although his office was to preside over the elections, the same did not take place because he was served with a court order following

the filing of the instant suit. He denied the allegations against him and urged for the dismissal of the application.

8. In its written submissions dated 31st October 2024, the applicant proposed the following issues for determination:

   a. Whether the 1st respondent was duly served with the pleadings.

   b. whether failure by the respondents to reply to the applicant's Supporting Affidavit dated 5th September 2024 amounts to admission.

   c. Whether the new issues raised by the 1st respondent in his Replying Affidavit raises any justiciable decision-making processes by his office.

   d. Whether the applicant has demonstrated through evidence on a balance of probabilities that the 1st, 2nd, 3rd and 4th respondents flouted the principles of natural justice.

   e. Whether the applicant has demonstrated through evidence on a balance of probabilities that the 1st, 2nd, 3rd and 4th respondents flouted the law on legitimate expectation.

   f. Whether the applicant is entitled to an order of *Mandamus* directing the 1st and 2nd respondents to change the applicant's signatory in the position of treasurer owing to the resignation of its outgoing treasurer vide the letter dated 19th April 2024.

9. On his part, the 5th respondent filed written submissions dated 12th November 2024 on behalf of all the respondents. The issues proposed for determination are:

   a. Whether the application is legally sound;

   b. Whether the Court can exercise its discretion in favour of the applicant in the circumstances; and,

   c. What orders are available.

10. It was the submission of the respondents that although the application is presented as a judicial review application pursuant to Sections 8 and 9 of the *Law Reform Act* and Order 53 Rules 3(1) and (3) of the *Civil Procedure Rules*, the substantive motion was not brought in the name of the Republic as required. The respondents relied on *Farmers Bus Service & others v The Transport Licensing Appeal Tribunal* [1959] EA 779 and *Cosmas Muriungi Thambo v District Land Adjudication Officer Tigania East District & Margaret Kaberia* [2013] KEHC 916 (KLR) for the proposition that prerogative orders are issued in the name of the Republic at the instance of the person affected by the action or omission complained of. They accordingly urged for the striking out of the suit for being fatally defective.

11. The respondents also addressed the Court on the nature and purpose of judicial review as expounded in *Municipal Council of Mombasa v Republic, Umoja Consultants Ltd*, [2002] eKLR. They submitted that in this case, the applicant does not question the jurisdiction of the 1st respondent to make the impugned decision dated 27th August 2024. Thus, the applicants prayed for the dismissal of the Notice of Motion dated 5th September 2024.

12. I have carefully considered the application, the averments in the affidavits filed in respect thereof as well as the written submissions filed by the parties. This is a matter in which the court has been called upon to exercise its supervisory jurisdiction as provided under Articles 165(6) and (7) of the *Constitution* which provides:

13. The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

14. For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

15. The applicant approached the Court under Sections 8 and 9 of the *Law Reform Act* as well as Order 53 Rule 3 of the *Civil Procedure Rules*. Section 8(1) of the *Law Reform Act* provides that:

> "1. The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of *mandamus*, prohibition or *certiorari*."

16. Section 9 of the *Law Reform Act* and Order 53 of the *Civil Procedure Rules*, on the other hand, make provision for the applicable procedure. Indeed, the right to fair administrative action has now been entrenched in the *Constitution*. In this regard, Article 47 of the *Constitution* is explicit that:

> "(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
>
> 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
>
> 3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
>
> a. provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
>
> b. promote efficient administration."

17. Accordingly, in the case of *Saisi & 7 others v Director of Public Prosecutions & 2 others* (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment), the Supreme Court held:

> "73... The Fair Administrative Actions Act provides the parameters of judicial review to be the power of the court to review any administrative or quasi-judicial act, omission or decision of any person, body or authority that affects the legal rights or interests of an aggrieved person. The judicial review court examines various aspects of an act, omission or decision including whether the body or authority whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required...
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> 74. It is our considered opinion that the framers of the *Constitution* when codifying judicial review to a constitutional right, the intention was to elevate the right to fair administrative action as a constitutional imperative not just

> for state bodies, but for any person, body or authority. It was a clarion call to ensure that the constitutional right to fair administrative actions permeated every aspect of the lives of Kenyans, from their engagements with educational facilities such as universities, to employer-employee relationships, to engaging with public bodies in whatever capacity, or any body, person or authority that exercises quasi- judicial functions. We further take the view, that this approach is consistent with realizing the right of access to justice because justice can be obtained in other places besides a courtroom."

18. When exercising its judicial review jurisdiction, the Court does not focus on the merits of the challenged decision. Instead, the judicial review process examines the legality, reasonableness, or procedural propriety of decisions made by subordinate courts, tribunals, individuals, bodies, or authorities performing judicial or quasi-judicial functions.

19. Accordingly, in *Municipal Council of Mombasa v Republic & another* [2002] eKLR, the Court of Appeal held:

> "... The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review..."

20. It has since been recognized that in undertaking judicial review, some measure of merit analysis may be called for in respect of undisputed facts. The Supreme Court made this point in the *Saisi case* as follows:

> "For the court to get through an extensive examination of section 7 of the, there had to be some measure of merit analysis. That was not to say that the court had to embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly in the circumstances of the case without examining those circumstances and measuring them against what was reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. It was not to be limited to the examination of uncontroverted evidence. The controverted evidence was best addressed by the person, body or authority in charge. There was nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review was limited to a dry or formalistic examination of the process only led to intolerable superficiality. That would be against article 259 of the *Constitution* which required the courts to interpret it in a manner that inter alia advanced the rule of law, permits the development of the law and contributes to good governance."

21. With the foregoing in mind, I now turn attention to the issues raised by the parties. They can be summarized as follows:

a. Whether the application before the Court is competent; and if so,

b. Whether the applicant has made out a case to warrant the issuance of the judicial review orders sought herein.

c. What orders ought to issue?

A. On the competence of the suit:

22. The applicant commenced this suit as a miscellaneous application when it filed the Chamber Summons dated 30th August 2024. By that application, the applicant sought leave to file a substantive judicial review application. The matter was disposed of ex parte on 4th September 2024 when leave was granted along with an order of stay of the impugned decision. The applicant thereafter filed the instant application, maintaining the capacities in which the initial application was brought. Thus, in the substantive application, the applicant remains Onyango Orato Development CBO instead of the Republic. This is indeed anomalous.

23. In *Farmers Bus Service and others v The Transport Licensing Appeal Tribunal* (*supra*) the East African Court of Appeal held:

> " Prerogative orders are issued in the name of the crown and applications for such orders must be correctly instituted. On Kenya's assumption of Republican status on December 12, 1964, the place of the crown in all legal proceedings was taken by the Republic.
>
> Accordingly, the orders of *certiorari*, *mandamus* or prohibition now issue in the name of the Republic and applications therefor are made in the name of the Republic at the instance of the person affected by the action or omission in issue."

24. Similarly in *Jothan Mulati Welamondi v Chairman, Electoral Commission of Kenya* [2002] KEHC 1123 (KLR), it was restated that:

> " ...the objection that the application is made in the name of the wrong person is well merited. In *Farmers Bus Service And Others v The Transport Licensing Appeal Tribunal*[1959] E.A. 779, the East African Court of Appeal held that prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled. On Kenya's assumption of Republican status on 12th December 1964, the place of the crown in all legal proceedings was taken by the Republic. Accordingly, the orders of *Certiorari*, *Mandamus* or Prohibition now issue in the name of the Republic and applications therefor are made in the name of the Republic at the instance of the person affected by the action or omission in issue. In the premises, the proper format of the substantive motion for *Mandamus* would have been *Republic Applicant v The Electoral Commission Of Kenya. Respondent Ex Parte Jotham Mulati Welamondi*"
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> The upshot of my consideration of the grounds of objection taken is that I find the motion to be completely muddled in form and thus incompetent and also misconceived in substance. Accordingly, the preliminary objection thereto is sustained and it is consequently, ordered that the motion be struck out will costs to the respondent."

25. Granted the foregoing conclusion, it follows that the instant suit is fatally defective and does not deserve a merit consideration. I find succor in *Cosmas Muriungi Thambo v District Land Adjudication Officer Tigania East District & another* (*supra*) in which it was held:

> " Judicial Review is a special jurisdiction governed by provisions of sections 8 and 9 of the *Law Reform Act* and Order 53 of the *Civil Procedure Rules*. Where there are statutory provisions, failure to observe them is not a mere procedural technicality. It is a substantive legal issue. In the case of Judicial Review, which is a special jurisdiction, non-compliance is fatal. It will render an application incompetent."

26. Indeed, as was aptly pointed out by Hon. Kiage, JA, in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others* [2013] eKLR:

> " ...it is in the even-handed and dispassionate application of rules that Courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity."

27. In the result, it is my finding that the application dated 5th September 2024 is fatally defective and is therefore hereby struck out with no order as to costs, granted the circumstances of this case.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY OF JUNE 2025

SIGNED BY: HON. LADY JUSTICE OLGA A. SEWE

THE JUDICIARY OF KENYA.

HOMABAY HIGH COURT