

KENYA / JUDGMENT

# Republic v Public Service Commission & another; Kisii County Assembly Service Board & another (Ex parte Applicants) [2026] KEELRC 946 (KLR)

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COURT

Employment and Labour Relations Court

CASE / FILE NUMBER

Judicial Review E009 of 2025

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Republic v Public Service Commission & another; Kisii County Assembly Service Board & another (Ex parte Applicants) (Judicial Review E009 of 2025) [2026] KEELRC 946 (KLR) (20 April 2026) (Ruling) Neutral citation:

[2026] KEELRC 946 (KLR) Republic of Kenya In the Employment and Labour Relations Court at Kisii Judicial Review E009 of 2025 Nzioki wa Makau, J April 20, 2026 IN THE MATTER OF ARTICLES 47, 162(2)(a) AND 232 OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF SECTIONS 12 AND 20 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT AND IN THE MATTER OF SECTIONS 86 AND 88 OF THE PUBLIC SERVICE COMMISSION ACT, CAP 185 AND IN THE MATTER OF COUNTY APPEAL 131 OF 2025- PETER OROO ONGERI Between Republic Applicant and Public Service Commission Respondent and Peter Oroo Ongeru Interested Party and Kisii County Assembly Service Board Ex parte Applicant Clerk Kisii County Assembly Ex parte Applicant

## Ruling

1. Through Chamber Summons dated 16th December 2025, the Ex-parte Applicants seek leave to commence judicial review proceedings for orders of certiorari to quash the Respondent's decision in County Appeal No. 131 of 2025, and prohibition to restrain the enforcement of that decision. They further pray that the grant of leave operates as a stay of the impugned decision pending the hearing and determination of the substantive judicial review application. The Chamber Summons is premised on the grounds set out on its face, the statutory statement, and the verifying affidavit sworn by Mr. Jacob Oneko, the 2nd Ex-parte Applicant. They contend that, in the impugned decision, the Respondent acted ultra vires by allowing the Interested Party's appeal, thereby reinstating him and effectively validating an unlawful six-year contract extension contrary to section B8(c) of the Kisii County Assembly Human Resource Manual (2016, Revised 2021), which limits such extensions to five years. They assert that the Respondent acted ultra

vires by enforcing an illegal contract, unlawfully by exceeding its statutory mandate, and irrationally by directing public expenditure on the basis of an invalid contract. Additionally, they contend that the decision unlawfully interferes with the 1st Ex-parte Applicant's internal disciplinary mandate, in breach of the principles of separation of powers, natural justice, and fair administrative action. On this basis, they maintain that they have an arguable case warranting the grant of leave to seek orders of certiorari, prohibition, and mandamus. 2.The Respondent opposes the application through a replying affidavit sworn on 16th January 2026 by its Secretary/CEO, Mr. Paul Famba. He deposes that the Respondent lawfully entertained and determined the Interested Party's appeal pursuant to its mandate under Article 234(2) of the Constitution, section 85 of the Public Service Commission Act, and Regulation 4 of the Public Service Commission (County Appeals Procedures) Regulations, 2022. He avers that, upon hearing the appeal, the Respondent properly found the Interested Party's dismissal to have been both procedurally and substantively unfair, and consequently ordered his reinstatement together with other reliefs. The Respondent therefore contends that the present application is an attempt to circumvent a lawful decision and should be dismissed. 3.The Interested Party also opposes the application through a replying affidavit sworn on 8th January 2026. He deposes that he was initially employed on a three-year contract, which he served diligently until its expiry on 10th September 2018. He states that the contract was thereafter renewed for a further six-year term, a duration determined solely by the 1st Ex-parte Applicant, and for which he bears no responsibility. He further contends that the issue regarding the alleged illegality of the length of the contract is an afterthought raised only after the Ex-parte Applicants were confronted with the unlawfulness of his termination. He maintains that the Respondent acted within its mandate in reinstating him and urges the Court to dismiss the application as an abuse of the court process. 4.The Chamber Summons was canvassed by way of written submissions. Ex-Parte Applicants' Submissions 5.The Ex-parte Applicants identify two issues for determination, namely:a.Whether they have met the threshold for grant of leave to commence Judicial Review proceedings; andb.Whether such leave should operate as stay of the Respondent's decision pending the determination of the substantive motion. 6.On the first issue, the Ex-parte Applicants submit that they have established a prima facie case. They argue that the interpretation and application of section B8(c) of the Kisii County Assembly Human Resource Manual, the scope of the Public Service Commission's appellate jurisdiction under sections 86 and 88 of the Public Service Commission Act, and the legality of enforcing ultra vires administrative actions raise arguable issues deserving judicial interrogation. They emphasize that, at the leave stage, the Court is not required to delve into the merits but only to determine whether the matter discloses an arguable case fit for further consideration. In support, they rely on Order 53 Rule 1 of the Civil Procedure Rules and *Meixner & another v Attorney General* [2005] 2 KLR 189. Furthermore, they assert that the appeal before the Respondent enforced an invalid contract under their Human Resource Framework and that the application invokes Article 47 of the Constitution thereby making Judicial Review the appropriate remedy. 7.Regarding whether leave should operate as stay, they maintain that it should. They assert that the purpose of leave is to preserve the status quo so that the substantive proceedings are not rendered moot. They rely on *Taib A. Taib v Minister for Local Government & others* [2006] eKLR, which underscored that stay is discretionary and is meant to prevent a situation where the

decision complained of is fully implemented before the Court has had an opportunity to consider its legality. Without prejudice to the foregoing, they nonetheless submit that they open to any conditions the court may impose for the avoidance of unnecessary hardship to any party. In conclusion they urge the court to grant leave. Respondent's Submissions 8. The Respondent submits that the Ex-parte Applicants have failed to meet the threshold for the grant of leave. It argues that the legality of the Interested Party's contract was not an issue before it on appeal and that the present application improperly invites the Court to interrogate the merits of the decision rather than the legality of the decision-making process. The Respondent further contends that the Applicants have not demonstrated any jurisdictional error, breach of the right to be heard, or consideration of irrelevant factors. It maintains that the appeal was properly determined within its constitutional and statutory mandate under Article 234(2)(i) of the Constitution and Part XV of the Public Service Commission Act. In support of its position the Respondent relies on *Republic v County Council of Kwale & another; Kondo & 57 others (Ex parte)* [1998] KEHC 2 (KLR), for the proposition that leave should only be granted where there exists an arguable case fit for further investigation. The Respondent also cites *Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji* (2014) eKLR, in which it was held: "Judicial review applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore, judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant....." 9. In view of the foregoing, it urges the Court to dismiss the chamber summons with costs. Interested Party's Submissions 10. The Interested Party submits that the application offends the doctrine of exhaustion. He asserts that the Applicants have failed to invoke the review mechanism provided under section 88 of the Public Service Commission Act. Further reliance is placed on sections 9(2) and 9(4) of the Fair Administrative Action Act, which bar judicial review proceedings where alternative remedies have not been exhausted, unless exceptional circumstances are demonstrated. He cites *Ketupei Ole Ateti Maya v County Land Registrar Kajiado & another* [2017] KEHC 6914 (KLR), in which it was stated: "It is clear from the foregoing that where there are internal mechanisms such as review or appeal or where a written law provides for a remedy for an administrative action or decision, this court is barred from entertaining any application for judicial review of such action or decision unless it is satisfied that such remedies have been exhausted. The court has no discretion in the matter save where due to exceptional circumstances an applicant has sought exemption from the provisions

of section 9(2) of the Fair Administrative Action Act, 2015 pursuant to section 9(4) of the said Act. ... The applicant has not satisfied me that it had exhausted that remedy before approaching this court for leave to apply for judicial review of the 1st respondent's decision in question. The applicant has also not satisfied me that exceptional circumstances exist in this case that would justify the exemption of the applicant from the provisions of section 9(2) of the Fair Administrative Action Act, 2015 neither has the applicant applied for such exemption. If leave sought by the applicant is granted, the applicant's application for judicial review would offend the provisions of section 9(2) of the Fair Administrative Action Act, 2015 aforesaid. I am of the view that the legislature had good reason for requiring persons aggrieved by administrative actions to first exhaust alternative remedies before applying for judicial review." 11. On whether a prima facie case has been established, the Interested Party submits that none has been demonstrated. He argues that the appeal before the Respondent concerned his dismissal for alleged misconduct and not the legality of his contract. Accordingly, he maintains that the Respondent acted within its mandate by confining itself to the issues properly before it. He further submits that the question of contractual validity pertains to the merits and falls outside the scope of judicial review, which is limited to the legality of the decision-making process. He relies on Republic v Attorney General & 4 others ex parte Diamond Hashim Lalji and Ahmed Hasham Lalji (2014) eKLR, where the Court emphasized that judicial review is concerned with the legality of the process and not the merits of the decision. In light of the foregoing, the Interested Party contends that no arguable case has been established to warrant the grant of leave. In conclusion, he maintains that his termination was unfair, that the Respondent rendered a lawful decision, and urges the Court to dismiss the Chamber Summons with costs.

## Disposition

12. The question before the Court is one of whether there is a prima facie case for the grant of leave to commence judicial review proceedings. The case of Ketupe Ole Ateti Maya v County Land Registrar Kajiado & another is instructive. In that case, the provisions of section 9(2) of the Fair Administrative Actions Act, 2015 were brought into sharp focus. Where there are internal mechanisms such as review or appeal or where a written law provides for a remedy for an administrative action or decision, a court is barred from entertaining any application for judicial review of such action or decision unless it is satisfied that such remedies have been exhausted. The Court has no discretion in the matter save where due to exceptional circumstances an applicant has sought exemption from the provisions of section 9(2) of the Fair Administrative Action Act, 2015. 13. The case by the Applicants is one whose remedies lie before this Court. The Court is persuaded that the action by the Respondent is capable of challenge before this Court and in that regard, grants leave to commence judicial review proceedings. The leave so granted is to operate as stay of the decision being challenged. The substantive motion must be filed within 7 days of today with leave to the Respondent and Interested Parties to file replies within 14 days of service. The matter will be placed before the Employment and Labour Relations Court on 12th May 2026 sitting at Kisii Law Courts for further directions. It is so ordered. DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF APRIL 2026 NZIOKI wa MAKAU, MCI Arb. JUDGE

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