



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. E951 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

ROBERT KHAMALA SITUMA.....1ST CLAIMANT
JAMES MACHARIA MWANGI.....2ND CLAIMANT
PAULINE SARAH AKUKU.....3RD CLAIMANT
ERIC OMONDI AGURE.....4TH CLAIMANT
AUSTIN MAT AYO INUNDELE.....5TH CLAIMANT
SHADRACK OMWEBA MAKOKHA.....6TH CLAIMANT
SAMMY KIPLIMO KIPTOO.....7TH CLAIMANT
JENNIFER CHEPCHUMBA KORIO.....8TH CLAIMANT
WILFRED MANYI.....9TH CLAIMANT

VERSUS

**THE ACTING CLERK OF THE
NAIROBI CITY COUNTY ASSEMBLY.....RESPONDENT**

RULING

1. Before me for determination is a Notice of Preliminary Objection filed by the Respondent dated 6th December 2021 in which it raises the following grounds:

- (i) This court lacks jurisdiction to hear this matter in view of the doctrine of exhaustion of internal dispute resolution mechanisms.*
- (ii) The Claimants have not exhausted the internal dispute resolution mechanisms set out under Section 77 of County Government Act 2012 and Section M3.0 of the Nairobi City County Assembly Human Resource Manual.*
- (iii) This claim is defective, incompetent and bad in law and does not disclose any reasonable cause of action and for non-joinder of the Claimant employer.*
- (iv) This claim offends the requirements of Section 9(2) of the fair Administrative Actions Act.*

2. The preliminary objection was disposed of by way of written submissions.

Respondent's submissions

3. It is the Respondent's position that the issues in dispute in this suit arise from disciplinary proceedings commenced against the Claimants following their violation of Section 26(1)(b) of the County Assembly Powers and Privileges Act.

4. That the Nairobi City County Assembly Resource Manual (the Human Resource Manual) provides general guidelines and instruments to be used by the County Assembly Service Board and the Clerk in handling discipline cases. That the Manual is made pursuant to the Provisions of the County Assembly Service Act and is word for word in tandem with the General Guidelines prescribed by the Discipline Manual for the Public Service (May 2016).
5. The Respondent contends that even if the Claimants were aggrieved by the decision of the Authorized Officer to institute disciplinary process against them and consequently interdict them, the Claimants ought to have invoked the provisions of section M.3.0 of the Human Resource Manual which gives any person who is dissatisfied with a decision made in exercise of delegated powers a right of appeal to the County Assembly Service Board through the Authorized Officer within a period of forty-two (42) calendar days.
6. That the County Government Act in Section 77 also provides a right of appeal to the Public Service Commission by any County Public Service employee over complaints relating to disciplinary control.
7. That the Claimants came to Court without exhausting the internal mechanism provided for by the Human Resource Manual and Appeal to the Board which has the residual powers to exercise disciplinary control over the Staff of the Service.
8. The Respondent further raise objection to the Claimants failure to enjoin their employer being the County Assembly Service Board of Nairobi. Thy avers that the Respondent is but an Authorized Officer exercising delegated powers of the Board.
9. The Respondent submits that an appellate procedure has been provided for by both the Human Resource Manual and statute to address grievances such as those raised by the Claimants. That the dispute resolution mechanism should have been invoked and or exhausted before the Claimants approached this Court.
10. The Respondent submits that the doctrine of exhaustion has been hackneyed before these Courts time again. To buttress this position, the Respondent relied on the case of **Martin Kabubii Mwangi v County Government of Laikipia [2019] eKLR**:

*“The exhaustion principle enunciated in precedents such as the case of Secretary, County Public Service & Another v **Hulbhai Gedi Abdille (supra)** does not permit an election as to the parts of a statute that one should rely on. Put another way, it removes discretion on the part of a litigant from choosing whether to follow the provision or not. In this case the suit was filed before the exhaustion of the remedy under the law, namely the provisions of Section 77 of the County Governments Act, The Claimant ought to have appealed against his removal to the Public Service Commission before moving the court. The suit did not fall in the category of suits that can be entertained by the court. As he did not appeal as provided for in law, the suit is a non-starter and is accordingly struck out with no order as to costs.”*

11. The Respondent submits that time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute. The Respondent relied on the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR**, where the Court of Appeal held that: -

“... In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observed without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions....”

12. The Respondent also relied on the case of **Republic v National Environment Management Authority Ex parte Sound Equipment Ltd, [2011] eKLR**, where the Court of Appeal observed: -

“... Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it....”

13. The Respondent further relied on the Court of Appeal decision in **Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017] eKLR** where the Court held that:

“There is no doubt that the respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by Section 77 of the Act. The section provides not only a forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one, specifically tailored by the legislators to meet needs such as the respondent’s. In our view, the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance. In terms of Republic v National Environment Management Authority (supra), we discern no exceptional circumstances in this appeal that would have warranted the bypassing of the statutory appellate process by the respondent. Her contention that she disregarded the appeal because it could not afford her an opportunity to question the procedure followed by the appellant is in our view, without basis because Section 77 has placed no fetter to the jurisdiction of the Public Service Commission. There is no requirement for instance that reasons for the decision be availed to an aggrieved party before he can prosecute an appeal before it.”

14. It is the Respondent’s position that this Court should be hesitant to interfere in internal disciplinary processes of the Respondent as it will be an usurpation of the responsibility of management of the Respondent. That the disciplinary process is at a preliminary stage and the Respondent ought to be allowed to proceed with the disciplinary process to conclusion.

15. On the second ground of objection the Respondent posits that pursuant to Section 17 of the County Assembly Service Act, 2017, the Clerk is the Chief Executive Officer, the custodian of all legal records of the Board, the administrative head of the Assembly as well as the accounting officer. The Clerk is also pursuant to Section 13 (4) of the County Governments Act, the Authorized Officer of the County Assembly for the purposes of disciplinary process with the Assembly.

16. That Section 27 of the County Assembly Services Act provides for disciplinary control of officers to be undertaken by the County Assembly Service Board, who has the power to terminate the employment of an employee of the Service.

17. The Respondent submits that the Claimants are employees of the Nairobi City County duly recruited, selected and appointment by the Nairobi City County Assembly Service Board. That it is strange that the Claimants failed to sue the Board which in accordance with section 35 of the County Assembly Services Act specifically provides that proceeding against the Board shall be commenced in the name of the Board.

18. That the failure to sue the right party, makes the claim fatally defective and for that reason ought to be struck out.

19. That the Claimants being dissatisfied with the decision of the Clerk as the Chief Administrative Officer, ought to have appealed to the County Assembly Service Board as provided for in Section M.3.0 of the Human Resource Manual.

20. That Section 77 of the County Government Act provides not only a forum through which the Respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one, specifically tailored by the legislators to meet needs such as the Claimants. The Respondent submits that this position has been hackneyed by the Court of Appeal in **Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017] eKLR**.

Claimants' Submissions

21. The Claimants oppose the preliminary objection. It is submitted for the Claimants that the doctrine of exhaustion is not applicable to this suit as it falls within the exceptions of the Rule. The Claimants rely on Section 9(4) of the Fair Administrative Actions Act and the decisions in **Republic v Independent Electoral and Boundaries Commission [IEBC] Ex Parte National Super Alliance (NASA) Kenya & 6 Others [2017]**

22. The Claimants further rely on the decision in **Fleur Investments Ltd v Commission of Domestic Taxes & Another [2018] eKLR** where the court stated that courts would be in order to intervene even where the litigant who approaches the court has not exhausted the preliminary process where arbitrariness, malice, capriciousness, and disrespect of the Rules of Natural justice are manifest.

23. It is the Claimants' position that the issues giving rise to this suit relate to the Respondent's actions borne out of malice, abuse of discretion and disrespect of the Constitution, statute and Rules of Natural justice. The Claimants submit that the impugned interdictions were triggered by their commencement of Judicial Review proceedings against the Respondent in **ELRC JR NO. E030 of 2021** where they are challenging the illegal and unilateral alteration of their terms of employment to their detriment by demotions without complying with due procedure. That the interdictions were vengeful and an unfair retaliation by the Respondent upon being served with court orders in **ELRC JR. No. E030 of 2021**. That the interdictions are in violation of Section 46(b) of the Employment Act which prohibit an employer from disciplining employees because of initiating complaints against their employer.

24. It is further the Claimants averment that the interdictions were in violation of the Nairobi County Assembly Human Resource and Procedure Manual (the HR manual).

25. The Claimants rely on the decision of the Court of Appeal in **Chief Justice and President of the Supreme Court of Kenya & another v Bryan Mandila Khaemba [2021] eKLR** where the Court of Appeal held that the doctrine of exhaustion notwithstanding, courts still retain residual jurisdiction to intervene in exceptional circumstances despite existence of alternative remedies where the action complained of is marred by illegality and procedural irregularities.

26. It is further the submission of the Claimants that the issues raised in the suit herein do not fall within the jurisdiction of the Public Service Commission as outlined under Section 77 of the County Governments Act or the County Assembly Service Board under the Human Resources Manual. For emphasis the Claimant rely on the decision in **James Orre v Office of the Governor, County Government of Marsabit & Another [2021] eKLR** to the effect that a suit which seeks to test the Constitutionality and legality of the termination of employment is outside the limits of Section 77 of the County Governments Act 2012.

27. The Claimants further rely on the decision in **Thuranira Salesio Mutuma v County Public Service Board & 2 others [2019] eKLR** where the Court cited with approval the decision in **Abdikadir Suleiman v County Government of Isiolo & another [2015] eKLR**. In the case, the Court held that in appeals to the Public Service Commission, the Commission applies the same substantive law and facts as applied by the primary authority in the decision appealed from. That such appeals only deal with the merits or substance of the case and not the procedural or legal propriety of the case.

28. On whether the claim is defective, incompetent and bad in law for failure to disclose reasonable cause of action and non-joinder of the Claimants' employer, the Claimants submit that the Respondent has been sued in person for acting ultra vires the authority delegated to the office and is therefore personally liable for assuming authority she/he did not wield.

29. It is further the submission of the Claimants that this is a procedural technicality that can be dealt with under Article 159 of the Constitution and cannot warrant the striking out of the claim.

Analysis and Determination

30. Having considered the submissions and authorities cited by the parties, it is my view that the issues for determination and whether this Court has jurisdiction to hear the instant suit, whether Section 77 of the County Government Act 2012 and Section M.3.0 of the Nairobi City County Assembly Human Resource Manual ousts the jurisdiction of this Court and lastly whether the suit is defective and incompetent for non-joinder of the employer of the Claimants.

31. Section 77 of the County Governments Act provides as follows –

77. Appeals to the Public Service Commission

(1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the “Commission”) against the decision.

(2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of—

(a) recruitment, selection, appointment and qualifications attached to any office;

(b) remuneration and terms and conditions of service;

(c) disciplinary control;

(d) national values and principles of governance, under Article 10, and values and principles of public service under Article 232 of the Constitution;

(e) retirement and other removal from service;

(f) pension benefits, gratuity and any other terminal benefits; or

(g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.

(3) An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of the Commission, the circumstances warrant it.

32. Section M.3.0 of the Human Resource Manual of the County Assembly Board of Nairobi City County provides as follows:

i Delegation of disciplinary powers to the Clerk (Authorized Officer) as per the County Assembly and the Public Service Commission regulations and the Clerk having from time to time powers to Interdict any public officer (M. 3.0);

ii Where the powers have been delegated, the cases shall be considered and finalized at the Assembly level through the County Assembly Human Resource Management Advisory Committee (CAHRMAC) (M.3.0).

iii A person who is dissatisfied with a decision made in exercise of delegated powers has a right of appeal to the County Assembly Service Board through the Authorized Officer within a period of forty-two (42) calendar days (M.3.0).

iv Offences under gross misconduct leading to interdiction

(M.10).

33. It is the position of the Respondent that the Claimants have not exhausted the procedure provided under the Respondent’s Human Resources Manual and Section 77 of the County Government Act and therefore the suit offends the doctrine of exhaustion.

34. The Doctrine of Exhaustion is defined in **Blacks Law Dictionary 10th Edition** as follows –

“exhaustion of remedies. The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine’s purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary.

35. Section 90 of the Fair Administrative Action Act provides for the Doctrine of Exhaustion thus –

9. Procedure for judicial review

(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

36. The doctrine was aptly captured by the Court of Appeal in **Republic v National Environment Management Authority Ex parte Sound Equipment Ltd, (supra)**, where the Court of Appeal observed: -

“... Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it ...”

37. In **William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR** the Court held as follows;

“The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency’s action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.”

38. As observed by the Court in the case of **Republic v National Environment Management Authority Ex parte Sound Equipment Ltd, (supra)**, and as provided in Section 9(4) of the Fair Administrative Action Act, there are exceptions to the exhaustion rule in exceptional circumstances.

39. In **Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR**, the Court while asserting that exceptions to the doctrine of exhaustion requirement will be decided on a case-by-case basis, held that;

*“As the Court of Appeal acknowledged in the **Shikara Limited Case (supra)**, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.”*

40. Further in **Fleur Investments Limited v Commissioner of Domestic Taxes & another [2018] eKLR** the Court of Appeal while determining whether a litigant can be exempt from the doctrine of exhaustion held thus, “Whereas courts of Law are enjoined to defer to specialized Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.”

41. In the memorandum of claim the Claimant pleads as follows at paragraphs 10 to 10 of the memorandum of claim –

“10. The Claimants contend that through and in the company of a representative of their advocates, they proceeded to serve the Respondents in that suit who are the Ag. Clerk County Assembly and the County Assembly Service Board with the court order at the county offices on 16th of November, 2021 to ensure compliance.

11. The Claimants contend that in an utterly malicious and vengeful move, the Respondent has now issued the claimants with interdiction letters citing various preposterous and farfetched reasons for the interdiction and one of them being the manner in which they effected service on the Respondents secretary.

12. The Claimant states that the Respondents decision and action of interdicting them is not based on any factual or legal basis and is only a backlash stemming from the suit for redress that the Claimants have filed against the Respondent and the County Assembly

Service Board.

13. The Claimants further state that their interdiction is and should be seen for what it is, which is a retaliation and victimization of employees intended to intimidate and prevent them from seeking justice contrary to and threatening their right to access justice and their right to fair labour practices as outlined both in the constitution of Kenya and section 46 (h) of the Employment Act.

14. The Claimants further contend that under the County Assembly Services Act the Respondent has no authority/power, delegated or otherwise, to unilaterally make the decision of interdicting a County Assembly Officer without the consideration and input of the Staff Advisory Committee which is responsible for advising the Board on matters including the interdiction of an employee.

15. The Claimants further state that the manner and process of their interdiction is in violation of the general provisions of the Discipline procedure of County Officers as provided under Section N.5.0 and N.5.1 of the Human Resource Policies and Procedure Manual for the County Assembly Service.

16. The Claimants aver that the Respondents action of interdicting them is malicious, ultra vires and tainted with illegality from the face of it, is a violation of their constitutional rights, a violation of the national values and principles of good governance and a violation of the values and principles of Public Service.

PARTICULARS OF ILLEGALITY BY THE RESPONDENT

a) Initiating disciplinary action against the Claimants on unfair and unreasonable grounds contrary to section 46(h) of the Employment Act and in violation of section 76(2) of the County Governments Act.

b) Abuse of the powers delegated to the Respondent by the County Assembly Service Board by: -

i. Unilaterally and illegally interdicting the Claimants without any decision/direction of their employer, The Nairobi City County Assembly Service Board.

ii. Interdicting the Claimants without following due procedure and in usurpation of the role of the Staff Advisory Committee Contrary to section 29 of the County Assembly Services Act.

c) Victimizing the Claimants for seeking redress to the court for violation of their rights to fair labour practices.

d) Maliciously and vengefully intimidating the Claimants in an attempt to limit/inhibit their right to access to justice.

17. The Claimants aver that there is no suit pending and that there have been no previous proceedings in any court of competent jurisdiction between the parties herein over the same subject matter.”

42. The Claimants moved the Court as soon as they received the letters of interdiction. The case had therefore not progressed to a stage where it could be referred to the Public Service Commission as under Section 77 of the County Government Act, the Commission could only hear appeals from the County Public Service Board which is not even a party herein. Further, Section 77 of the County Government Act uses the word “may appeal” meaning that it is not a mandatory process. That it is the discretion of a complainant to appeal to the PSC.

43. Further, it is the averment of the Claimants that their interdiction is a backlash by the Board following their filing of the juridical review application. The Board would thus according to the Claimants, not be in a position to be objective in the handling of their disciplinary case. They are claiming that they cannot get a fair hearing from the Board.

44. The prayers in the claim confirm that the reliefs the Claimants seek are not capable of being granted either by the Public Service Commission or the County Assembly Service Board. They have prayed for –

a. A DECLARATION that the interdiction of the Claimants is unfair, unconstitutional, illegal, null and void.

b. An ORDER directing the Respondent to reinstate the Claimants to work.

c. A PERMANENT INJUNCTION restraining the Respondent from proceeding with any further disciplinary proceedings against the Claimants as indicated in the interdiction letters of 15th November, 2021.

d. An order for payment of salaries withheld.

e. Costs of this suit

f. Any other relief that this Honourable Court will deem fit to grant.

45. Under Article 50 of the Constitution, fair hearing constitutes a dispute being resolved before an impartial court, tribunal or body. Article 50(1) provides –

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public

hearing before a court or, if appropriate, another independent and impartial tribunal or body.

46. The Claimants are in the suit accusing the Respondent of being vengeful on account of them having filed **ELRC JR No. 030 OF 2021** where they obtained orders against the Respondent and the Board.

47. The fears of the Claimants that their interdictions were as a result of the suit and orders filed against the Board are in my opinion well founded and the Claimants were justified in approaching this Court to protect them from being subjected to a disciplinary process by the Respondent whom in their perception was reacting to their filing a suit against the Board.

48. I find that there are indeed special circumstances to warrant the Claimants approaching this Court instead of appealing to the County Assembly Service Board where the Respondent sits as Secretary.

49. It is further my finding that the suit as filed by the Claimants does not fall under the purview of the Public Service Commission as provided under Section 77 of the County Governments Act as there was no decision of the Board capable of being presented as an appeal to the Public Service Commission. The prayers sought in the claim are also matters that neither the County Assembly Board or the Public Service Commission are authorised to determine.

50. On the issue whether the suit is defective for non-joinder of their employer, it is my view that this is a matter that can be cured by amendment of the suit and which cannot be a reason to strike out the same. As has been stated by courts in many instances, striking out should only be resorted to as a last resort, where the defect in the pleadings is incapable of cure by amendment. See **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR**. See also **Olympic Escort International Co. Ltd. & 2 Others v Parminder Singh Sandhu & Another [2009] eKLR**.

51. It is for these reasons that I find the preliminary objections filed by the Respondent herein to be without merit and dismiss the same with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31ST DAY OF JANUARY 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE