



Owalla v County Attorney of Siaya County Government & 2 others (Judicial Review E006 of 2023) [2024] KEHC 3896 (KLR) (18 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3896 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
JUDICIAL REVIEW E006 OF 2023
DO OGEMBO, J
APRIL 18, 2024**

BETWEEN

CHRISPINE OMOLLO OWALLA APPLICANT

AND

**COUNTY ATTORNEY OF SIAYA COUNTY GOVERNMENT 1ST
RESPONDENT**

SIAYA COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

SECRETARY/CEO COUNTY GOVERNMENT OF SIAYA 3RD RESPONDENT

RULING

1. The applicant, Chrisphine Omollo Owalla has moved this court by way of an application dated 15/9/2023. Though the pleadings christen the applicant as a petitioner, the applicant has moved this court, not by way of a petition, but rather by an application by way of Chamber summons. Also filed with the application is a statutory statement (under Order 53 Rule 1 (2) of the Civil Procedure Rules. The application of the applicant prays for:

1

- (a). An order of certiorari to quash the decision of the 2nd, 3rd and 4th Respondents of Appointment and deployment pursuant to job vacancies advertisement dated 13/12/2022.
 - b. An order of prohibition directed to the 2nd, 3rd and 4th Respondents to restrain from proceeding with the recruitment exercise of applicants pursuant to job vacancies advertisement dated 25/7/2023.
2. That the leave so granted does operate as stay of the recruitment exercise by the Respondents pending the hearing and determination of the application.



2. This application is supported by an affidavit of the applicant sworn also on 15/9/2023.
3. Upon being served, the Respondents duly entered appearance. The Respondents at the same time filed a Notice of Preliminary Objection. As drafted, the objection is on the following grounds.
 1. That this court is devoid of original jurisdiction to entertain this application for leave to commence judicial review proceedings.
 2. That this application offends Article 159 (2) (1) OF *THE Constitution*, Sections 9 (2) of the *Fair Administrative Action Act*, and Section 77 of the County Government Act.
4. Parties have made submissions on the Notice of Preliminary Objection filed by the Respondents. On the Objector's side, it was submitted that the applicant seeks to challenge the decision of the Respondents in recruitment or appointment of various staff as per job vacancies advertisement dated 13/12/2022 and 25/7/2023 as well as the deployment of the staff that the relevant guiding laid is Section 77 of the County Government Act that:
 1. Any person dissatisfied or affected by a decision made by the County Public Service Board, or a person in exercise control or purported exercise of disciplinary 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 qualification attached to any office.
 - b. ..
 - c. Etc
5. That Section 85 of the Public Service Commission' Act, bestows on the commission the original jurisdiction and states:-

"The commission shall in order to discharge its mandate under Article 234 (2) (1) of *the constitution*, hear and determine appeals in respect of any decision relating to engagement of a person in a County Government, including a decision in respect of:

 - a. Recruitment, selection, appointment and qualification attached to that office etc.
6. It was submitted that the application before the court is prematurely filed as the applicant has not exhausted the procedure of resolution of disputes as per Section 77 of the County Government Act, and Section 85 of *Public Service Commission Act*.
7. The court was referred to the exhaustion doctrine that requires an aggrieved party to exhaust statutorily available remedies against the actions of an administrative body before invoking the jurisdiction of the court. Counsel referred the court to Geoffrey Muthinja & Ano. Vs Samuel Muguna Henry and 1756 Others (2015) eKLR, in which the court held:-

"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts can be invoked. Courts ought to be fora of last resort and not the first part of call the moment a stone brew.... The exhaustion principle is a sound one and serves the purpose of ensuring that a postponement of judicial consideration



of matters to ensure that a party first of all diligent in the protection of interests within the mechanisms in place for resolution outside the courts. This accords with Article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution.

That position has been confirmed in the court of Appeal decision in Speaker of National Assembly Vs- James Njenga Karume (1992) Eklr, that;

“in our view there is a 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 must be strictly followed.”

7. Also the court of Appeal decision in Kisumu County Public Service Board and two Others Vs Samuel Okuro and 7 Others (2018) eKLR, where it was held:

“We have come to the conclusion that the Governor initiated the removal of the Respondent without following the appropriate machinery. The Respondents being County Public Officers, the Governor could not terminate their services without involving the County Board and the County Assembly. In sending the Respondent on compulsory leave and terminating the Respondent’s contract, the Governor usurped the role of the County Board. This denied the Respondent’ their rights under Section 77 of the County Government’s Act that allows any county offices that is dissatisfied with the decision of the County Board in a disciplinary process to appeal to the Public Service Commission.

8. Counsel also referred the court to yet another authority of the court of Appeal in Secretary, County Public Service and Ano. Vs- Hulbhai Gedi Abdille (2017) EKLR, where the court, dealing with Section 77 of the Act, held:

“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, specially tailored by the legislators to meet the need such as the Respondents’, 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.

.....The invocation of Judicial Review jurisdiction of the court was in the circumstances premature and uncalled for.”

9. The Respondent has gone on to cite other authorities making determinations on the same line on the question of exhaustion principle including;

- i. Martin Kababii –Vs- County Government of Laikipia (2019) eKLR.
- ii. Catherine Gathoni Otenyo –Vs- County Government of Kakamega & 3 Others (2022) eKLR.
- iii. Anthony Miano & Others –Vs- A.G & others (2021) eKLR.

10. Lastly, it was submitted that in any case, persons have been appointed and deployed to their respective work stations and consequently acquired employment rights which can not be taken away without being given an opportunity to be heard. Counsel relied on Oliver Mukhebi & 28 Others –vs- County Service Board of Bungoma & Ano. (2022) eKLR, in which the court held;



11. In the alternative, if I am wrong on the lack of jurisdiction, the court finds that the person appointed as village administrators have vested employment rights which cannot be taken away without them being heard, a cardinal principle of justice. None of the said appointees have been sued in this case.....’
12. The court has been urged to dismiss this application.
13. On the other hand, the Petitioner/Respondent, has submitted that based on the case of Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696, at 700,

A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleading and it argued as a preliminary point may dispose of the suit. Examples are objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

14. It was submitted that the facts of this case are not disputed and that the Preliminary Objection only unnecessarily increases costs and confuse issues. That whereas the doctrine of exhaustion of remedies is available, it is to maintain comity between the courts and administrative agencies so that courts are not barded by cases in which judicial relief is unnecessary.
15. It was further submitted that the doctrine of exhaustion does not apply herein as this suit falls within the exceptions to the rule. He relied on the case of Fleur Investments Ltd –vs- Commission of Domestic Taxes and Ano. (2018) eKLR, 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 National Justice are manifest.
16. The applicant referred the court to Section 90 of the Fair Administrative Act on the Procedure for Judicial Review of R –Vs- National Environment Managemnet Authority Ex Parte Sound Equipments LTD. In which the court held;

“... Where there is an alternative remedy, and especially where Parliament has 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.....”

17. The Petitioner has relied on several authorities on suitability of the exhaustion principle including William Odhiambo Ramogi & 3 others –vs- A.G and 4 others [2020] eKLR, R –vs- IEBC and 6 others [2017] EKLR and also Fluer Investments Lts –vs- Commissioner of Domestic Taxes & Ano. [2018] EKLR.
18. Coincidentally, the Petitioner also relies on the authority in Speaker of National Assembly –vs- Karume [1992] the same authority relied on by the Respondent.
19. Singling out the court of Appeal case of Geoffrey Muthiga Kabiru & 2 others –Vs- Samuel Munga Henry & 1756 Others [2015] Eklr, the Petitioner relied on the wilding of the Court that;

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the court is invoked, court ought to be fora of last resort and not the first port of call the moment a storm brews...exhaustion doctrine is a



sound one and serves the purpose of ensuring 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.’

20. But that in the IEBC case, the court dealt with the exceptions to the general rule on application of the principle. That courts must undertake an extensive analysis of the facts, regulatory scheme involved and the polycentricity of the issue to determine whether the exception applies.
21. As to the possibility of this matter being resolved by way of Alternative Dispute Resolution (ADR) Mechanism, the Petitioner has submitted that an illegality is not subject to ADR mechanism. (Goldenberg Case).
22. Summing up, it was submitted that this preliminary objection sits on the way of justice for people of Siaya and that the same be dismissed.
23. I have considered this Notice of Preliminary Objection of the Respondents dated 2/10/2023. I have also considered the submissions made by the 2 sides to this notice and the authorities relied on by the parties. As I understand if the objection of the Respondent herein is that this petition (suit) as filed is in contravention of Section 77 of the County Governments Act. The said section states in part;
 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 public officer may appeal to the Public Service 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 qualification attached to any office.
24. It was therefore the submissions of the Respondent that the Public Service Commission is bestowed with the original jurisdiction on matters relating to a dispute arising out of decisions of the Public Service Commission Act, provides:

The commission shall in order to discharge its mandate under Article 234 (2) (i) of the Constitution, hear and determine appeals in respect of any decision relating to engagement of any person in a County Government, including a decision in respect of:

 - a. Recruitment, selection, appointment and qualification attached to any office
 - b. National values and principles of governance under Article 10 and values and principles of Public Service under Article 232 of the Constitution.
25. It is therefore the position of the Respondents that the position of the Respondents that the Petitioner has failed to pursue this dispute as provided for both under the County Government Act, and the Public Service Commission Act, that the Petitioner is in breach of the Exhaustion Principle, making this petition incompetent.
26. From the submissions made, it is clear that both sides are agreed this is an objection that touches on the jurisdiction of the court and so qualifies to be raised as a Preliminary Objection. In the celebrated



case of Mukisu Biscuits Manufacturing Co. Ltd –vs- West End Distributors LTD [1969] EA, the court held a Preliminary Objection is:

"A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit."

27. I therefore find that the issue of this court's jurisdiction being raised is indeed a preliminary issue as the same, if allowed may dispose of this suit.

28. Both sides, having agreed that indeed the doctrine of exhaustion is applicable in this matter, have gone ahead to make splendid submissions on the applicability and suitability of the doctrine of exhaustion. The parties have cited many binding and persuasive authorities in this respect. In fact quite a number of authorities have been relied on by both the Respondents and the Petitioners. Such include:

In Geoffrey Muthinja & Another –Vs- Samwel Muguna Henry and 1756 Others [2015] eKLR, the court of Appeal held;

29. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts can be invoked. Courts ought to be of last resort and not the first part of call the moment a storm brew. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interests within the mechanism in place for resolution outside the courts. And this accords with Article 159 of *the Constitution* which commends courts to encourage alternative means of dispute resolution.

30. The court of Appeal in the earlier case of Speaker of National Assembly -Vs- James Njenga Karume [1992] eKLR, admitted to be good and relevant authority, even by the Petitioner herein, held;

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.

31. Another authority cited to this court on the same issue of the court of Appeal is the case of Kisumu Public Service Board & ano. –Vs- Samwel Okuro & 7 Others [2018] eKLR

32. In which the court dealing with an issue of illegal termination, held;

"We have come to the conclusion that the Governor initiated the removal of the Respondent without following the appropriate machinery. The Respondents being public service officers, the Governor could not terminate their services without involving the County Board and County Assembly. Sending the Respondents on compulsory leave and terminating the Respondents' contract, the Governor usurped the role of the County Board. This denied the Respondent their rights under Section 77 of the County Government Act that allows any County Public Officer that is dissatisfied with the decision of the County Board in disciplinary process to appeal to the Public Service Commission."

33. It is the same position held by the court in the other cited cases of Secretary, County Public Service & Another –Vs- Halbhai Gedi Abdille [2017] eKLR, Martin Kubebii Mwangi Vs- County Government of Laikipia [2019] Eklr, Cathering Gathoni Otenyo –Vs- Governor, County Government of Kakamega & 3 Others [2022] eKLR, William Odhiambo Ramogi & 3 Others Vs- AG and 4 Others [2020] Eklr,



and R Vs- IEBC & 6 Others [2017] eKLR, and Fleur Investments Ltd Vs. Commissioner, Domestic Taxes and Ano. [2018] eKLR.

34. The unbroken thread that this court finds in these decisions of the courts is that where the law prescribes for a special mechanism of dispute resolution, then the same process must first be exhausted before a party can come to seek remedies in court. And that for our case, since Section 77 of the *County Governments Act* prescribes for such dispute resolution mechanism directing such appeals against the appointment, recruitment, qualification etc made by the County Government be filed, heard and determined by the Public Service Commission, then this dispute resolution mechanism must first be exhausted. That the court must in that event be the last call and not the first for ventilating on the dispute. There is therefore no ambiguity in either the law or the judicial decisions on where appeals emanating from such decisions of the Public Service Board lies. That it is with Public Service Commission. That is a fact the Petitioner herein has clearly acknowledged.
35. Relying on the decisions of the court of Appeal in R –Vs- IEBC exparte NASA & 6 others [2017] EKLR, the Petitioner has submitted that his case falls within the exception to the general rule on the exhaustion principle. That the court therein held;
- "As the court of Appeal acknowledged in the Shikara Limited case, the High Court may in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law, permit the suit to proceed before it."
36. And also on fleur investments Ltd -Vs- Commissioner of Domestic Taxes and Ano. [2018] eKLR, wherein the court held;
- "Whereas courts of law are enjoined to differ 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 ran 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, capricidusness, 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."
37. As already observed above, there is no doubt as to the fact that appeals from the County Service Board lie with the Public Service Commission. The court of Appeal, never the case cited by the Petitioner, is clear that it is only in exceptional circumstances that the court may be the first port of call. It is therefore the opinion of this court that for the petitioner to come to court in the manner in which he does the onus is on him to show such exceptional circumstances in his case.
38. Section 85 (d) of the Public Service Act (seen above) declares that issues of National values and Principles of governance, under Article 10 values and principles of public service under Article 232 of *the Constitution* are some of the grievances whose appeals lie with the Public Service Commission. From the submissions of the Petitioner, the Petitioners grievances relate to alleged arbitrariness by the Public Service Board. It is the view of this court that it is upon the petitioner to convince this court the exceptional circumstances of his case that would grant this court the original jurisdiction away from the express provisions of both the *County Governments Act* and the *Public Service Commission Act*. With respect, the petitioner has failed to show any such exceptional circumstances in his case.
39. This court, is therefore, convinced that the petitioner has not exhausted the statutory resolution mechanism available to him and that this case is incompetent having been filed pre maturely before this court. I accordingly uphold the objection of the applicant herein dated 2/10/2023 and struck out



this petition of the petitioner and the chamber summons application dated 15/9/2023. I award costs of this objection to the Respondents. It is so ordered.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 18TH DAY OF APRIL, 2024

D.O. OGEMBO

JUDGE

18/4/2024

Court

Ruling read out in court in the presence of the Applicant (virtually) and Mr. Okanda for Respondent present in Court.

D.O. OGEMBO

JUDGE

18/4/2024

Mr. Okanda

We apply for certified copies of the ruling.

Petitioner

I agree with you though disagree. We shall consider appeal.

Court

Certified copies of the proceedings and ruling to be prepared and served on the parties. Comments of the Petitioner noted.

D.O. OGEMBO

JUDGE

18/4/2024

