



**Magwan’ga v Homa-Bay County Government & 3 others (Petition E007 of 2024) [2024] KEELRC 1336 (KLR) (5 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1336 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E007 OF 2024**

**S RADIDO, J**

**JUNE 5, 2024**

**IN THE MATTER OF ARTICLES 3(1), 10, 12, 19, 20, 21, 22(1), 23, 27, 28, 41, 43 & 47 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS**

**AND**

**UNDER ARTICLES 27(1), 28 AND 30, 41, 43, 47, 54 & 244(C) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTIONS 5, 17, 18 & 97 OF THE EMPLOYMENT ACT, 2017**

**AND**

**IN THE MATTER OF SECTIONS 3, 5 & 6 OF THE COUNTY GOVERNMENTS ACT, 2012**

**BETWEEN**

**ODHIAMBO GEORGE MAGWAN’GA ..... PETITIONER**

**AND**

**HOMA-BAY COUNTY GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY EXECUTIVE COMMITTEE MEMBER FOR FINANCE ..... 2<sup>ND</sup> RESPONDENT**

**THE COUNTY EXECUTIVE COMMITTEE MEMBER FOR EDUCATION AND ICT ..... 3<sup>RD</sup> RESPONDENT**

**THE COUNTY ATTORNEY, HOMA BAY ..... 4<sup>TH</sup> RESPONDENT**



## JUDGMENT

1. Odhiambo George Magwan'ga, a person living with a disability (the Petitioner) was appointed as an ECDE teacher on 5 July 2022 by the County Public Service Board, Homa Bay (the Board).
2. The petitioner was posted to Kamuga ECDE Centre at Kamuga Primary School on 7 July 2022 and the Head Teacher signed a Casualty Return notifying the respondents that the petitioner had reported.
3. On 19 February 2024, the petitioner sued the respondents alleging that by failing to pay him the requisite remuneration, the respondents had violated his constitutional rights to dignity, equal protection of the law, not to be held in servitude, fair labour practices, social security, and fair administrative action.
4. The Petitioner sought the following remedies:
  - i. Declaration that the Petitioner's rights and fundamental freedoms guaranteed under articles 21(1), 28, 30(1), 41(1), 43(1) & (47(1) & (2) of the *Constitution of Kenya*, 2010 were violated and infringed by the Respondents by withholding and denying the Petitioner his wages/salaries and allowances worked for 18 months and treated in a cruel, inhuman and degrading manner akin to slavery or servitude under article 28 of the *Constitution*.
  - ii. A declaration that the Petitioner is entitled to payment of withheld and denied salaries/wages of Kshs 396,108/- and compensation by way of damages for the violation of his rights and fundamental freedoms under the aforementioned provisions of the *Constitution of Kenya*, 2010 and for the above-mentioned consequences of such violation.
  - iii. A mandatory injunction and/or *mandamus* order requiring that the wages and/or allowances for 18 months amounting to Kshs 396,108/- as of January 31, 2024 with annual increment be immediately paid to the Petitioner without any further delay.
  - iv. A prohibition order restraining the Respondents from prejudicing and/or victimising the Petitioner for filing this suit against them.
  - v. General and exemplary damages.
  - vi. Costs and interest on (iii) above.
5. Upon service, the respondents filed grounds of opposition on 4 March 2024, contending:
  - i. That the application is frivolous, an abuse of the court process, made in bad faith, against public interest and an attempt by the Petitioner to bypass the set-out procedure as set by law.
  - ii. That the orders sought cannot be granted as the Court lacks jurisdiction to issue the orders as per section 87(2) of the *Public Service Commission Act* which states that
    - (2) A person shall not file any legal proceedings in any court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from county government service unless the procedure provided under this Part has been exhausted.
  - iii. That the petition is an abuse of the court process and a waste of court's time as there are laid out statutory laws with regards to handling complaints raised by an employee of the county government, this is per article 234(2)(i), section 87(2) of the *Public Service Commission Act* and section 77 of the *County Governments Act*.



- iv. The Respondents state that the dispute between the parties herein, is one that lies in the first instance to the Public Service Commission and the Petitioner has not led any evidence to show that he has attempted the alternative dispute mechanisms as provided for under the Constitution, the County Governments Act and the Public Service Commission Act, before invoking the jurisdiction of this court.
- v. That it is in the wider public interest that the Petition be dismissed with costs.
6. The Petitioner filed what he referred to as reply affidavit to grounds of opposition by the respondents dated February 22, 2024 on 14 March 2024.
7. The Court gave directions on 18 April 2024 and 7 May 2024.
8. The Petitioner filed his submissions on 22 May 2024 (should have been filed and served by 17 May 2024), and the Respondents submissions were not on record.
9. The Petitioner argued in his submissions that since none of the parties felt dissatisfied with the recruitment process or appointment, it was not necessary to invoke the appellate mandate of the Public Service Commission.
10. Nevertheless, the Petitioner contended that the decision of the Board to deny him his remuneration over 18 months was unlawful and contravened section 17 of the Employment Act, 2007.
11. The Petitioner further contended that he was entitled to approach the Court directly by dint of article 22 as read with article 41 of the Constitution because the Respondents had violated his constitutional rights.
12. The Court has considered the Petition, affidavits, Grounds of Opposition and the submissions.
13. It is not in dispute that article 234(2)(i) of the Constitution as read with section 77 of the County Governments Act and section 87(2) of the Public Service Commission Act have divested this Court of first instance jurisdiction in disputes emanating from or decisions concerning a county public service. The jurisdiction has been given to the Public Service Commission.
14. In a situation where a party feels that the Public Service Commission may not be competent to issue or grant remedies in terms of the Constitution, then such a party should seek leave of the Court before moving for substantive redress from the Court.
15. The Petitioner herein did not seek leave of Court or demonstrate the existence of exceptional circumstances to bypass the appellate jurisdiction of the Public Service Commission.
16. This Court, therefore, declines to assume jurisdiction despite the apparent egregious legal violations by the Respondents.

## **Orders**

17. The Court declines to assume jurisdiction and the petition is struck out with no order on costs considering that the parties are in a subsisting employment relationship.

Delivered virtually, dated and signed in Kisumu on this 5<sup>th</sup> day of June 2024.

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**



For Petitioner Ochillo & Co. Advocates  
For Respondents Office of the County Attorney  
Court Assistant Chemwolo  
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