



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**County Assembly Service Board, Nyamira County & 3 others v Bundi & 11 others  
(Appeal E021 of 2023) [2024] KEELRC 1910 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1910 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E021 OF 2023**

**CN BAARI, J**

**JULY 25, 2024**

**BETWEEN**

**COUNTY ASSEMBLY SERVICE BOARD, NYAMIRA COUNTY .... 1<sup>ST</sup>  
APPELLANT**

**THE SPEAKER, COUNTY ASSEMBLY NYAMIRA ..... 2<sup>ND</sup> APPELLANT**

**THE CLERK, COUNTY ASSEMBLY NYAMIRA ..... 3<sup>RD</sup> APPELLANT**

**THE COUNTY ASSEMBLY, NYAMIRA COUNTY ..... 4<sup>TH</sup> APPELLANT**

**AND**

**GRACE MASESE BUNDI ..... 1<sup>ST</sup> RESPONDENT**

**VINCENT NYAMBANE NYAKIENI ..... 2<sup>ND</sup> RESPONDENT**

**WINNIE MAKORI ..... 3<sup>RD</sup> RESPONDENT**

**GLADYS MOTANYA ..... 4<sup>TH</sup> RESPONDENT**

**JOB RODGERS NYARIBO ..... 5<sup>TH</sup> RESPONDENT**

**EDSON MOGENI MAYAKA ..... 6<sup>TH</sup> RESPONDENT**

**GATWERE ALLOYS ..... 7<sup>TH</sup> RESPONDENT**

**JOASH ORUKO NYACHIRO ..... 8<sup>TH</sup> RESPONDENT**

**LAMECK OSORO KOMETA ..... 9<sup>TH</sup> RESPONDENT**

**JONES ONDUKO ..... 10<sup>TH</sup> RESPONDENT**

**DAVID MATWA NYABWARI ..... 11<sup>TH</sup> RESPONDENT**

**MONG'ARE ONDIEKI OBWOCHA ELVIS ..... 12<sup>TH</sup> RESPONDENT**



*(Being an appeal from the Ruling of Hon W .K. Chepseba (CM) Nyamira delivered on 28 th March 2023 in Nyamira CMEELRC Cause No. E002 Of 2023)*

**JUDGMENT**

1. The Respondents sued the Appellant's at the Nyamira Magistrate's court alleging unlawful termination. Vide an application dated 10<sup>th</sup> January, 2023 before the same court, the Respondents sought conservatory orders inter-alia stopping implementation of their termination letters and seeking salary arrears from August, 2022 to December 2022.
2. On 11<sup>th</sup> January, 2023 upon consideration of the application ex parte, the Magistrate suspended the implementation of the termination letters. Subsequently on 16<sup>th</sup> January, 2023, the Appellants filed an application seeking inter alia stay of the orders of 11<sup>th</sup> January, 2023, and the striking out of the Respondent's application and claim. The Appellants equally filed a Notice of Preliminary Objection evenly dated impugning the Court's jurisdiction on account of the exhaustion principle.
3. In a ruling on the preliminary objection delivered on 28<sup>th</sup> March, 2023, the Magistrate held that the Court had jurisdiction to handle the claim as the reliefs therein were incapable of being granted by the Public Service Commission.
4. Aggrieved by the magistrates ruling, the Appellants lodged a Memorandum of Appeal dated 17<sup>th</sup> April, 2023 contending that: -
  - i. The Learned Trial Magistrate erred in law and fact in finding that it had Jurisdiction to hear and determine the claim herein, when the contrary was true.
  - ii. The Learned Trial Magistrate failed to apply the Law properly, particularly the provisions of Articles 234 (2) (i) of *the Constitution*, Sections 77 of the *County Governments Act* and Sections 87 and 88 of the *Public Service Commission Act*, which vests the Public Service Commission with the function and powers to hear and determine Appeals from officers serving in County Governments.
  - iii. The Learned Trial Magistrate erred in Law and in fact in failing to take into account the provisions of the *Public Service Commission (County Appeals Procedures) Regulations, 2022* which provides mandatorily for lodging of Appeals before the Public Service Commission by any person who is dissatisfied with a decision of a County Government Public Service,
  - iv. The Learned Trial Magistrate erred in Law and fact in failing to take into account issues he should have taken account of, particularly on the jurisdictional question, doctrine of exhaustion and *locus standi*. Consequently, the decision of the Trial Magistrate is fraught and/or wrought with contradictions, misconceptions and/or misapprehensions of the law.
  - v. The Learned Trial Magistrate erred in law and fact by over relying on the 1<sup>st</sup> - 12<sup>th</sup> Respondents' submissions and legal authorities which were not relevant and without addressing his mind to the circumstances of the case.
  - vi. The Learned Trial Magistrate erred in law and fact in purporting to determine the suit at an interlocutory stage by making orders that are final in nature and import.



- vii. The Learned Trial Magistrate erred in law and fact by failing to appreciate the weight of the Appellant's evidence and the facts, and thereby arrived at an erroneous finding in respect of the Preliminary Objection dated 16<sup>th</sup> January, 2023.
  - viii. The Trial Magistrate erred in law and in fact in considering the merits of the suit at interlocutory stage, thus aiming to a wrong decision.
  - ix. The Trial Magistrate failed to properly and/or sufficiently appraise and/or evaluate the totality of the submissions tendered by and/or on behalf of the Appellants herein, and thereby arrived at an erroneous conclusion, informed by obvious and palpable ignorance of the law.
  - x. The ruling of the magistrate was fraught with errors.
5. The Appellants pray that their appeal be allowed and the decision of the Trial Court set aside.
  6. The appeal was canvassed through written submissions.

### **The Appellants' Submissions**

7. The Appellants submit that the Magistrate's Court lacked jurisdiction to entertain the claim on account of the provisions of Articles 234 (2) (a) and 235 (1) (c) of *the Constitution*, Section 77(1) of the *County Governments Act* and Sections 85 (c) and 87 (2) of the *Public Service Commission Act*. It is their contention that the procedure in the above provisions had to be followed before filing suit.
8. They sought to rely in the Court of Appeal decision in *Secretary County Public Service Board and another v Hulbbhai Gedi Abdille* (2017) eKLR where the court frowned upon the initiation of judicial review proceedings in utter disregard of Section 77 of the *County Government Act*.
9. The Appellants submit that by opting to bypass the procedure in the above provisions, the claim was premature. They cite the case of Speaker of the *National Assembly v Njenga Karume* (2008) 1KLR 425 where the court stated that where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure had to be followed strictly.

### **The Respondents' Submissions**

10. On their part, the Respondents submit that the issue of jurisdiction was still pending at the Magistrate's Court and if determined herein, would lead to embarrassment. Additionally, they contend that a similar appeal was pending before the ELRC Court 1.
11. The Respondents further submit that the County Assembly Service Board was a separate entity from the County Public Service Board having been established under separate provisions of the *County Governments Act*.
12. The Respondents submit further that Section 77 of the *County Governments Act* was in reference to the County Public Service Board and not the County Assembly Service Board. They cite Section 77 (1) which expressly states: -

“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.”



13. On the strength of the wording in Section 77, the Respondents submit that the jurisdiction of the Public Service Commission as defined, does not extend to disputes arising from the County Assembly Service Board.
14. It is the Respondents submission that Section 85 read with Sections 86 and 87 of the [Public Service Commission Act](#), expressly indicate that appeals to the Public Service Commission arise from the County Government Public Service. They cite Section 86 of the [Public Service Act](#) and specifically Section 86 (1). The Respondents argue further that if the framers of statute intended for appeals from the County Assembly Board to lie to the Public Service Commission, they would have expressly said so.
15. The Respondents submit that the interlocutory reliefs sought in the application could not be granted by the Public Service Commission. Furthermore, the Respondents affirm that it is only the court that can determine the legality of the actions of public bodies. They had reliance in [Abdikadir Suleiman v County Government of Isiolo & another](#) [2015] eKLR as affirmed in [Thuranira Salesio Mutuma v County Public Service Board & 2 others](#) [2019]eKLR where Ongaya J held as follows:-
 

“...the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions rests with the court as vested with the appropriate jurisdiction under Article 162 (2) (a) as read with Article 165(5) and (6) of [the Constitution](#); Article 22(1), and section 12 of the [Employment and Labour Relations Act, 2011](#).”
16. The Respondents assert that the claim before the Magistrate’s Court is for unfair termination which issue does not fall within the jurisdiction of the [Public Service Commission Act](#) as alluded to in section 77 (2) of the [County Governments Act](#).
17. The Respondents submit that courts are empowered to grant temporary reliefs to prevent breach of contract based on Order 42 Rule 2 of the [Civil Procedure Act](#). Their submission is that the interim relief was warranted to prevent severe prejudice on their part. They cite the case of [Kiken Properties Limited & Anor v Vipingo Ridge Limited](#) [2020] eKLR which cited [Breweries Ltd v Auther Washington Okeyo](#) (2002) eKLR where the court stated: -
 

“if the defendant attempted to break a contract on the plaintiffs, a mandatory injunction will be granted on an interlocutory application.”
18. The Respondents finally submit that the order did not determine the issue with finality, but was only meant to preserve the substratum of the dispute.

### **Analysis and Determination**

19. Upon careful consideration of the record of appeal and the submissions by parties, the only issue that arises for determination is whether the trial Court has jurisdiction to entertain the suit in light of Articles 234 (2) (i) of [the Constitution](#), Section 77 of the [County Governments Act](#) and Sections 87 and 88 of the [Public Service Commission Act](#)
20. It is the Appellant’s contention that the trial court lacks jurisdiction on the matter before it in the first instance, on account of non-adherence with the exhaustion doctrine by the Respondents. On their part, the Respondents aver that they are employees of the County Assembly Service Board, hence are not subject to the exhaustion procedure alluded to by the Appellants.
21. The issue in contestation is whether as employees of the County Assembly Service Board, the Respondents were subject to the principle of exhaustion stipulated under Article 234 (2) (i) of [the](#)



Constitution, Section 77 of the County Governments Act and Sections 87 and 88 of the Public Service Commission Act.

22. In the case of Secretary, County Public Service Board & Another v Hulbbai Gedi Abdille [2017] eKLR the court stated thus: -

“There is no doubt that the Respondent initiated the judicial review proceedings in 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 his grievance at first instance, but the jurisdiction thereof is a specialized one, specifically tailored by the legislators to meet the 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.”

23. Further, in Republic v National Environment Authority Ex Parte Sound Equipment Ltd [2011] eKLR, the Court of Appeal held that a party should not be allowed to bypass the statutory appellate process provided under the County Governments Act and the Public Service Commission Act, save in exceptional circumstances.

24. Section 77 (1) of the County Governments Act provides as follows:

“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.

- a. ....
- b. ....
- c. Disciplinary control
- d. ....
- e. retirement and other removal from service;..”

25. the foregone section spells out the persons and the decisions subject to the appellate mandate of the Public Service Commission (PSC). My reading and interpretation of Section 77, is that the decision subject of the appellate power of the PSC are not only those made by County Public Service Boards, but also include decisions made by persons in exercise or purported exercise of disciplinary control against any county public officer.

26. The decision subject of the Respondents’ claim, is a decision of the County Assembly Service Board which no doubt was exercising disciplinary control over the Respondents. The question then, is whether the Respondents herein are/were county public officers.

27. The County Government Act defines “county public officer” to mean any person appointed by the county government and holding or acting in any county public office whether paid, unpaid, or on contractual or permanent terms but does not include a person engaged on a part-time basis in a county public body paid at an hourly or daily rate;

28. In my view, and going by the foregone provisions and analysis, employees of County Assemblies are county public officer, hence subject by dint of Section 77 of the County Government Act to the appellate mandate of the Public Service Commission.



29. The upshot therefore, is that the Magistrates Court, just like this Court, lacks jurisdiction to entertain the Respondents' claim in the first instance, and they thus ought to have lodged an appeal before the PSC before invoking the jurisdiction of the Court.
30. In the end, the appeal succeeds and the decision of the Trial Court is set aside in its entirety.
31. I further proceed to strike out the claim before the Trial Court.
32. I make no orders on costs.
33. It is ordered.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 25<sup>TH</sup> DAY OF JULY, 2024.**

**C. N. BAARI**

**JUDGE**

Appearance:

Ms. Ndemo present for the Appellants

Mr. Mokuu present for the Respondents

Ms. Anjeline & Debra - C/As

