



**Ouma v County Government of Kisumu & 2 others (Petition E011 of 2023) [2024] KEELRC 1869 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1869 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E011 OF 2023**

**CN BAARI, J**

**JULY 18, 2024**

**IN THE MATTER OF ARTICLE 1, 2, 10, 47, 49, 50  
AND 159 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF EMPLOYMENT AND LABOUR  
RELATIONS COURT ACT/ RULES LAWS OF KENYA**

**AND**

**IN THE MATTER OF EMPLOYMENT ACT LAWS OF KENYA**

**AND**

**IN THE MATTER OF IRREGULAR, UNREASONABLE AND ILLEGAL  
TERMINATION OF CONTRACT ON KISUMU COUNTY SECRETARY**

**BETWEEN**

**JOHN OCHIENG OUMA ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF KISUMU ..... 1<sup>ST</sup> RESPONDENT**

**GOVERNOR, KISUMU COUNTY GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**HON. PETER ANYANG' NYONG'O ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. Before Court is an amended petition initially dated 29<sup>th</sup> March, 2023 and amended on 16<sup>th</sup> February, 2024. Under the amended petition, the Petitioner seeks the following reliefs:



1. A declaration that the decision contained in the Respondent's letter of 28<sup>th</sup> March, 2023 Reference CGK/GVN/ADM/02/VOL 2/0045 was in breach of the Petitioner's rights under Articles 10, 41 and 47 of *the Constitution* of Kenya 2010.
2. A declaration that the termination of the Petitioner through a letter dated 28<sup>th</sup> March 2023 amounted to unfair termination.
3. An order of Judicial Review in the nature of certiorari to bring before this court and to quash the illegal termination notice dated 28<sup>th</sup> March, 2023, Reference CGK/GVN/ADM/02/VOL 2/0045.
4. An order of prohibition be issued prohibiting the Respondents from interfering with the Petitioner from executing his duty.
5. In the alternative, compensation be granted to the Petitioner in the following terms: -
  - i. One-month salary in lieu of notice at Kshs 413,079.
  - ii. Maximum compensation for unfair termination (12 Months) at 4,956,948/=
  - iii. Four months' salary arrears of 1,230,316 for the month of July, August, September and October 2023
  - iv. General, exemplary, aggravated damages for breach of constitutional rights.
  - v. Certificate of service
  - vi. Costs of the suit and interest on (5) above until payment in full.
2. Parties agreed to dispose off the petition by way of written submissions. Submissions were filed for both parties.

### **The Petitioner's Case**

3. It is the Petitioner's case that he was appointed to the position of County Secretary of Kisumu on 21<sup>st</sup> October, 2022, where he served diligently until 28<sup>th</sup> March 2023, when his employment was terminated.
4. The Petitioner avers that the termination was without reason and sufficient notice. It is his contention that the termination from employment was followed by impractical demands to hand over and vacate office and the official residence with immediate effect.
5. The Petitioner's further case is that the Respondents underpaid him contrary to the SRC's directions. It is his case that the termination of his employment greatly inconvenienced him as he had relocated his family to Kisumu, and enrolled his children in school within Kisumu County.
6. The Petitioner contends that his dismissal infringed on his right to Fair Administrative Action and fair labour practices protected under Article 47 and 41 of *the Constitution*.

### **The Respondent's Case**

7. In response to the petition, the Respondents filed a replying affidavit sworn by Ajode Stephen the 1<sup>st</sup> Respondent's Director of Human Resource. Their case is that the dismissal was a decision of the 3<sup>rd</sup> Respondent in exercise of his disciplinary control.



8. The Respondents' contend that the petition offends the exhaustion doctrine as envisaged by Article 234(2) (i) of *the Constitution*, Sections 85, 86 (2) of the *Public Service Commission Act* and Section 77(1) of the *County Governments Act*.
9. The Respondents further aver that by virtue of serving in the County Public Service, the Petitioner was subject to the exhaustion principle provided for by statute before approaching court.
10. The Respondents' further case is that the dispute herein arose out of an employer-employee relationship and was therefore under the purview of private law. The Respondents assert that the petition offends the principle of Constitutional avoidance as the issues herein, would have been sufficiently handled under a normal claim.
11. The Respondents pray that the petition be dismissed with costs.

### **The Petitioner's Submissions**

12. It is the Petitioner's submission that as a state officer, he is not subject to the exhaustion procedure outlined in Article 234 (2) (i) of *the Constitution*, Sections 85, 86 (2) of the *Public Service Commission Act* and section 77(1) of the *County Governments Act*. He cites Articles 260 of *the Constitution* on the definition of a state officer, and Article 179 (2) on appointment of a County Executive Member by the Governor with the approval of the assembly.
13. The Petitioner submits that the County Public Service Board is not responsible for appointment or removal of County Secretaries. The Petitioner submits that his appointment is by the Governor and not the County Public Service Board. The Petitioner asserts that the exhaustion principle only relates public officers in the county public service.
14. In further buttressing this position, the Petitioner states that even a plain reading of Article 234 (2) (i) as read with Article 234(3) (b) shows that the Public Service Commission can only hear and determine appeals in respect of county governments service.
15. The Petitioner further submits that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were rightfully sued as they are the ones who appointed him. The Petitioner cites Section 15 (3) (c) of the *County Governments Act* on removal of the County Secretary by the Governor.
16. The Respondent strongly reiterates that the propriety of removal of a County Secretary is inextricably linked with the Governor's office.
17. Regarding the issue of unfair termination, the Petitioner submits that no reasons were advanced for his termination of employment and neither was he given an opportunity to present his case. He sought reliance in the case of Antony Mkala Chitavi v Malindi Water & Sewerage (2013) eKLR on the Employer's duty to demonstrate to court adherence with the dictates of procedural fairness.
18. The Petitioner avows that he was entitled to information on the charges against him and a right to present his side of the case. His further submission is that Section 44 (c) of the *County Governments Act* does not give the Governor the carte blanche to act as he wishes. He cites the case of John Jaoko Othino v Intrahealth International (2022) eKLR for the holding that: -

“Employers are no longer free to dismiss with impunity those whom they judge worthy of dismissal. The right to dismissal is tempered by the right of the individual not be unfairly dismissed and the balance between the two is to be struck by the court.”



19. In respect of infringement of his rights, the Petitioner submits that the Respondents infringed on his right to fair administrative actions enshrined in Article 47 (1) of *the Constitution*. He cites Article 47 (2) of *the Constitution* on the rights of a person likely to be affected by administrative action being given written reasons for the action.
20. The Respondent equally cites the case of *Kenneth Njiru Njorani v Dodbia Packaging Limited Cause No.431 of 2010* where the court recognised that termination had constitutional basis under Article 47 (1) of *the Constitution*. The court equally held that it did not matter whether the employer was in the public or private sector, they were still bound to adhere to the rules of natural justice.
21. The Petitioner contends that the lack of reasons coupled with being denied a chance to present his case, violated his rights under Article 47 of *the Constitution*.
22. On the reliefs sought, the Petitioner submits that he is entitled to orders of certiorari and a declaration of unfair termination on account of his demonstration that the termination process had not been followed.
23. In respect of general, aggravated and exemplary damages, the Petitioner cites the case of *James Orenge v Attorney General HCC No. 207 of 2002*, where the basis for awarding of damages for breach of constitutional rights was laid out as follows:

“There are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording practical justification for admitting into the civil law a principle which ought logically to belong to the criminal. The first category is oppressive, arbitrary and unconstitutional action by the servant of the government.. where one man is more powerful, it is inevitable that he will try to use his power to gain his ends.”
24. Given the legitimate expectation that he would be in employment for 3 years, the Petitioner urges the court to award him Kshs 2,500,000/=.
25. On the claim for underpayments, it is the Petitioner’s submission that he is entitled to Kshs.1,230,316/= as the Respondents did not effect his salary increment as stipulated by the SRC. The Petitioner equally stakes his claim to one months’ pay in lieu of notice on account of dismissal without notice.
26. In respect of damages for unfair termination, the Petitioner cites the lack of reasons for dismissal and urges the court to award him 12 months salary. He relies on the case of *Cooperative Bank of Kenya v Yator (2021) KECA 75 (KLR)*.
27. In conclusion the Petitioners urges the court to reinstate him and to award him costs of the suit.

### **The Respondent’s Submissions**

28. The Respondents submit that the Petitioner acquiesced to subjection to the rules and regulations in force for officers in the public service by signing the contract. The Respondents submit further that paragraph 4 of the contract of employment provided that the Petitioner would be subject to regulations in force for Public officers, hence was subject to the exhaustion procedures provided for in statute.
29. The Respondents submit that in as much as Section 77 of the *County Governments Act* is not couched in mandatory terms, Section 87(2) of the *Public Service Commission Act* is. The Respondents contend that Section 87(2) of the *Public Service Commission Act*, ousts the jurisdiction of the court to hear this matter in the first instance.



30. It is submitted for the Respondents that by signing the contract and refusing to be subjected to the exhaustion principle in place for public officers, was tantamount to approbation and reprobation. In urging the court to frown upon such conduct, the Respondents cite the case of *Banque de Moscou v Kindersley* (1950)2 ALL ER where Sir Evershed stated: -
- “This is an attitude of which I cannot approve, nor do I think in law the defendants are entitled to adopt it. They are as the Scottish Lawyers (frame it) approbating and reprobating or, in the more homely English phrase blowing hot and cold.”
31. The Respondents strongly urge the court not to rewrite the contract between the parties. It is their submission that entertaining the suit would be equivalent to rendering the Public Service Commission irrelevant.
32. In emphasising the requirement to exhaust statutory alternative dispute resolution mechanisms before filing suit, the Respondents urge the cases of *Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 others* [2015] eKLR and *Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others* (2019) eKLR where the common thread was that where alternative dispute resolution mechanisms existed, they had to be exhausted before invocation of the court’s jurisdiction.
33. In reiterating that the petition was in breach of the doctrine of constitutional avoidance, the Respondents submit that the petition regards an employer-employee dispute. It is their contention that the disputes in the petition could be resolved under the *Employment Act* as a normal claim. They cite the case of *CNM v WMG alias HNC* (2018) eKLR where the court held that where infringement of rights can be founded on substantive law, the proper course would be to bring the claim under the law, and not *the Constitution*.
34. The Respondents equally cite the case of *Communications Commission of Kenya & 5 others v Royal Media Services & 5 others* [2014] eKLR to support this position.
35. On the assertion that the 3<sup>rd</sup> Respondent was wrongly enjoined in the proceedings, the Respondents submit that it was superfluous as the 3<sup>rd</sup> Respondent dismissed the Petitioner in his official and not personal capacity.
36. On whether the petition meets the Constitutional threshold, the Respondents submit to the contrary. They aver that the rights under Articles 41 and 47 are enacted in the *Employment Act* and the Fair Administrations Act, hence there was no need to file a Constitutional petition. They sought to rely in the case of *Summayya Athmani v Paul Masinde Simidi & Another* [2019] eKLR where the court held that Article 41 rights were enacted in the *Employment Act* and the *Labour Relations Act* which provided adequate remedy and enforcement mechanisms.
37. With respect to unlawful termination of the Petitioner, the Respondents submit that the argument is moot given that the Petitioner had improperly approached court.
38. On whether the Petitioner is entitled to the remedies sought, the Respondents submit that damages for breach of Constitutional rights should be awarded to vindicate and not to compensate the victim. They cite the South African case of *Dendy v University of Witwatersrand Johannesburg & Others* [2006] 1 LRC 291 and the Kenyan case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR to buttress this position.
39. The Respondents finally submit that in the event the Court finds that damages are merited, it should take into consideration the fact that the Petitioner has been drawing a salary since March 2023, and that he had been in employment for just about six months. It is their further contention that the Petitioner



was a well trained and educated individual with a probability of acquiring alternative employment. They placed reliance in the holding in *Menginya Salim Murgani v KRA (2008) eKLR* to buttress this assertion.

### **Analysis and Determination**

40. I have considered the petition, the joint reply by the Respondents and the submissions by all the parties. The following issues present for determination:
- i. Whether this court has jurisdiction to entertain the petition
  - ii. Whether the petition as drawn violates the doctrine of Constitutional avoidance and if not;
  - iii. Whether the Petitioner is entitled to the reliefs sought.

### **Whether the Court has Jurisdiction to entertain the petition**

41. The Respondents' contention is that this Court's jurisdiction in this petition is ousted by the principle of exhaustion which demands that parties exhaust available alternative dispute resolution mechanisms before approaching the court.
42. On his part, the Petitioner avers that the office of county Secretary is a state office, and having been a State Officer, he is not subject to the exhaustion principle alluded to by the Respondents.
43. Section 77 of the County Government Act states thus: -
- “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.”
44. Section 44 of the County Government Act, provides for the establishment of the office of the county Secretary as follows: -
- “There is established for each county the office of the county secretary who shall be secretary to the county executive committee.”
45. By this provision, it is clear that a County Secretary is not a County Executive Committee Member, but only the secretary to the committee, and it therefore follows that contrary to the Petitioner's submission the definition of 'state officer' that includes CEC members does not apply to a County Secretary.
46. Section 44 (2) (c) of the County government Act further provides: -
- “The county secretary—
- (c) may, subject to the conditions and terms of appointment, be dismissed by the governor.”
47. It is clear that the decision to dismiss the Petitioner herein, was a decision of the 3<sup>rd</sup> Respondent pursuant to Section 44(2)(c) of the county Government Act. Further, the matters that fall under the appellate mandate of the Public Service Commission under Section 77 of the same Act, are the decisions of the County Public Service Board and not the decisions of the County Governor.



48. In light of the foregoing, I reach the conclusion that the dismissal of the Petitioner does not fall under the appellate mandate of the PSC, and the jurisdiction of this Court on the petition is therefore not ousted by the virtue of the doctrine of exhaustion.

### **Whether the petition as drawn violates the doctrine of Constitutional avoidance**

49. The Respondents fervently submitted that the petition violates the doctrine of constitutional avoidance. They assert that the issues in dispute are not constitutional in nature, and could have been dealt with under a normal claim.

50. It is trite law that where legislation has been enacted to give effect to a constitutional right, it is not permissible to base a cause of action directly on *the Constitution*.

51. The Supreme Court of Kenya in the case of Communication Commission of Kenya & Others v Royal Media Services Limited & 5 others [2014] eKLR opined thus on Constitutional avoidance: -

“The appellants in this case are seeking to invoke ‘the principle of avoidance’; also known as ‘constitutional avoidance’. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.”

52. Similarly, the Court of appeal in Sumayya Athmani Hassan vs Paul Masinde Simidi & another [2019] eKLR, spelt out the doctrine of constitutional avoidance thus;

“The article 41 rights are enacted in the *Employment Act* and the *Labour Relations Act*. The two Acts and the Rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1<sup>st</sup> Respondent filed a petition directly relying on the provisions of *the Constitution* for enforcement of contractual rights governed by the *Employment Act* without seeking a declaration of invalidity of the provisions of the *Employment Act* or alleging that the remedies provided therein are inadequate.

The petition did not raise any question of the interpretation or application of *the Constitution*.

We adopt and uphold the general principle in the persuasive authority in Barbara De Klerk [supra] that where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on *the Constitution* without challenging the legislation in question. That principle has reinforced by the Supreme Court in Communications Commission case [supra]....”

53. The reliefs sought by Petitioner under the petition, include a declaration that his termination was unlawful, compensation for unfair termination and salary arrears amongst others. These are all clearly remedies provided for under the *Employment Act*, 2007, and which should have, as correctly submitted by the Respondents, been sought under a normal claim under statute and not by way of a Constitutional petition.

54. In the final analysis, I find and hold that the petition does not disclose a cause of action anchored on *the Constitution*, and which renders the petition incompetent and is for striking out.

55. The petition is thus struck out with no orders on costs.

56. Judgment of the Court.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 18<sup>TH</sup>  
DAY OF JULY, 2024.**

**C. N. BAARI**

**JUDGE**

Appearance:

Mr. Obiero h/b for Mr. Ayieko for the Petitioner

Mr. Ouma Njoga present for the Respondents

Ms. Anjeline & Debra - C/As

