

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT KISUMU

PETITION NO. E005 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

**IN THE MATTER OF ARTICLES 2, 10, 22, 23, 27, 41,
47, 50, 232 AND CHAPTER SIX OF THE
CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF VIOLATION OF THE PRINCIPLES
OF FAIR ADMINISTRATIVE ACTION, FAIR LABOUR
PRACTICES, PUBLIC PARTICIPATION AND ABUSE OF**

**POWER
AND**

**IN THE MATTER OF THE COUNTY GOVERNMENT'S
ACT**

BETWEEN

COLLINS OTIENO.....1ST

PETITIONER

BRIAN ODHIAMBO.....2ND

PETITIONER

LENCER ADHIAMBO.....3RD

PETITIONER

ALLAN OMONDI.....4TH

PETITIONER

VERSUS

THE GOVERNOR, HOMA BAY COUNTY

GOVERNMENT.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF

HOMA BAY.....2ND RESPONDENT

HOMA BAY COUNTY GOVERNMENT PUBLIC SERVICE

COMMISSION.....3RD RESPONDENT

AND

CHARLES ODHIAMBO.....INTERESTED PARTY

JUDGMENT

The Petitioner's filed the instant Petition on 4th April, 2025 alleging that one Mr. Charles Odhiambo (Interested Party) was appointed as Chief of staff on an undisclosed date and served for undisclosed number of years.

That on or about 3rd March, 2025 bloggers on social media users circulated false and unverified allegations suggesting that the Interested Party was romantically involved and or linked with one Lucille alleged to be the spouse to the Governor's brother and the claims were widely spread across multiple social media platforms

creating a public outcry and as a consequence, on 28th March, 2025 the 2nd respondent dismissed the Interested Party from employment for gross misconduct.

The Petitioner's case is that the Interested Party was not accorded opportunity to defend himself or taken through any disciplinary process.

The Petitioner's prayed for:

- 1. A declaration that the dismissal of the Interested Party was unconstitutional, unlawful and null and void.*
- 2. Reinstatement of the Interested Party as Chief of Staff.*
- 3. An order compelling the Respondent's to follow due process in future disciplinary action against employees.*
- 4. A declaration that the Respondents violated Articles 10, 27, 41, 47 and 232 of the Constitution of Kenya.*
- 5. Damages for unlawful dismissal.*
- 6. Any other relief the court deemed fit.*

Respondent's case

In opposition to the Petition, the respondents filed a Replying Affidavit sworn by Mr. George Illah Advocate

who deponed that the Petition was bad in law, incompetent, fatally defective and an abuse of court process.

The affiant deponed that the Petitioners had no employment relationship with the respondents and as such had no *locus standi* to institute the Petition and were strangers to the employment relationship in question.

The affiant further deposed that the instant Petition was filed prematurely and violated the doctrine of exhaustion and express provisions of the County Government's Act and the Public Service Commission Act.

The affiant admitted that the Interested Party was employed by the 1st respondent as a Chief Officer vide letter dated 22nd November, 2022 and the 2nd respondent approved the same pursuant to Circular EACC Ref: EACC 7/10/1/VOLX(36) dated 31st August, 2023 and his employment was terminated on 28th March, 2025 for gross misconduct.

The affiant further deponed that the Petitioners had not demonstrated any legitimate interest in the Petition

which did not raise any constitutional issue, being a termination of employment matter.

That the Petitioners had not demonstrated any public interest in the matter.

Petitioners submissions

As to whether termination of the Interested Party's employment was procedural, counsel cited the provisions of Section 45(1) of the County Government's Act to submit that the Interested Party was not accorded a chance to state his case.

Reliance was placed on the sentiments of Onguto J in **Kenya Human Rights Commission V Non-Governmental Organisations Co-ordination Board [2016] eKLR**.

Counsel submitted that the Petitioners' case was also that the Interested Party was not accorded a fair hearing and placed reliance on **Ridge V Baldwin [1964] AC 40**, as well as Halsburys Laws of England, 5th Edition 2010 Vol. 61 at paragraph 639 on the right to be heard.

On reliefs, counsel submitted that since the Interested Party was not accorded fair administrative action and fair hearing the Petitioners were entitled to the reliefs sought.

Respondents submissions

On alleged violation of the Constitution, counsel submitted that the Petitioners had not demonstrated the same and cited the decision in **Revital Health Care (EPZ) Ltd & another V Ministry of Health & 5 others [2015] eKLR** to urge that the Petition majorly questioned the termination process.

That there was employment relationship between the Petitioners and the respondents.

Reliance was placed on the Court of Appeal decision in **Moi Teaching & Referral Hospital & 3 others V Gikenyi B & 152 others [2025] KECA 937 (KLR)**.

Counsel submitted that the Petitioners had not exhausted the provisions of Section 77 of the County Government's Act citing **Emmanuel Nyongesa & 34 others V County Government of Trans Nzoia [2021] eKLR** among others.

Counsel urged that the issues raised by the Petitioners were well addressed by the provisions of the Employment Act. Reliance was placed on **South Lake Panorama Ltd V Kenya Electricity Transmission Co. Ltd & 3 others [2021] eKLR.**

On costs counsel cited the sentiments of the court in **DGM V EWG [2021] eKLR.**

Analysis

From the documents filed by the respondents, it is clear that the 1st respondent employed the Interested party vide a letter of appointment dated 22nd November, 2022, as a Chief of Staff in the County Public Service and the Interested Party accepted the offer on even date.

Puzzlingly, the Petitioners had no copy of the appointment letter nor were they aware of the Interested Party's terms of service or duties other than the letter of termination of the Interested Party's employment dated 28th March, 2025 and the alleged social media postings. The Petitioners had no other factual foundation of the instant Petition.

Closely related to the foregoing, the Petitioner's failed to disclose who they were other than stating that they were

residents of Homa Bay County. Their interest in the suit is difficult to discern as they did not introduce themselves as public interest litigators pursuing a private interest and none of the reliefs sought reflect any public interest.

Notwithstanding the fact that the Petitioners instituted this suit as a Petition so as to take refuge under Article 22(2) of the Constitution of Kenya, their *locus standi* is exceedingly tenuous. This is the far the court is prepared to go on this issue.

Be that as it may, the more pertinent issues on which this petition turns are:

- (i) *Whether the instant Petition meets the threshold of a Constitutional Petition; and*
- (ii) *Whether the Petition violates the doctrine of exhaustion.*

As to whether this Petition meets the threshold of a Constitutional Petition, the guiding principles were articulated by the court in **Anarita Karimi Njeru V Republic [1979] eKLR**, where Trevelyn and Hancox JJ stated:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if

only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed”.

See also **Trusted Society of Human Rights Alliance V Attorney General & 2 Others [2021] eKLR** and **Kiambu County Tenants Welfare Association V Attorney General & another [2017] eKLR**.

A constitutional Petition *stricto sensu* raises a constitutional question as opposed to boilerplate issues which can and are typically raised within the confines of statutory provisions as the Petitioners reveal in the Petition.

Although the Petitioners cite Articles 10(2)(a) and (c), 232(1)(d), 41, 51(1), 47, 73(2)(b) and 75(1) of the Constitution of Kenya, they also rely on the provisions of Section 45(1), 59(1)(b) and 87 of the County Government’s Act as well as provisions of the Fair Administrative Actions Act and Section 45 of the Employment Act, to urge that the respondents failed to comply with the safeguards under employment law,

including issuance of notice, provisions of reasons and fair hearing.

As deposed by the respondents in their Replying Affidavit sworn on 11th June, 2025 the Petitioners are basically challenging the dismissal of the Interested Party which was not a constitutional issue.

The court is in agreement with the respondents that the instant Petition does not meet the threshold of a constitutional Petition.

The foregoing is fortified by the sentiments of the Court of Appeal in **Gabriel Mutava & 2 Others V Managing Director Kenya Ports Authority and another** as follows:

“Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation... The Constitution should not be turned into a thorough fare for every kind of common grievance. The

duty of the employers to act fairly is now recognized in the Act as well as the Constitution. The court is mandated further by the Constitution and the Act to resolve all employment disputes expeditiously and its procedures have been rendered less technical. We are saying all these in answer to the appellants' submissions on the twin question of the applicability of the rules of natural justice and the Constitution to the dispute. This was purely a labour dispute that could have been resolved by the application of the Employment Act..."

The court expressed similar sentiments in **Daniel N. Mugendi V Kenyatta University & e others [2013] eKLR.**

As to whether the instant suit offends the doctrine of exhaustion or is premature, the court is guided by the sentiments of the court in **Republic V Commissioner General Kenya Revenue Authority Ex Parte Sanofi Aventis Ltd [2017] eKLR** as follows:

"The doctrine of exhaustion of administrative remedies arises when a litigant aggrieved by an agency's action seeks judicial view of that action without pursuing remedies before the agency itself. The court must decide whether to review the agencies action or to remit the

*case to the agency, permitting judicial review when all available administrative proceedings fails to produce satisfactory resolution. This doctrine is now of esteemed judicial lineage in Kenya. It was felicitously stated by the Court of Appeal in **Speaker of National Assembly V Karume...***

Similarly, in **NGO'S Co-ordination Board V EG & 4 Others: Katiba Institute (Amicus Curie) [2023] KESC 17 (KLR)** the Supreme Court of Kenya expressed itself as follows:

"...Even when superior courts had jurisdiction to determine profound question of law, the first opportunity had to be given to the relevant persons, bodies, tribunals and any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute..."

It is now firmly established that in cases where there is an alternative dispute resolution mechanism established by legislation, the courts must exercise restraint in exercising their jurisdiction and accord deference to such dispute resolution bodies under the doctrine of exhaustion. This court in its previous decision has settled the jurisprudence regarding the doctrine of exhaustion of administrative remedies".

The Court of Appeal expressed similar sentiments in **Geoffrey Muthinja Kabiru & 2 Others V Samuel Munga Henry & 1756 others [2015] eKLR.**

See also in this regard **William Odhiambo Ramogi & 3 Others V Attorney General & 4 Others: Muslim for Human Rights & 2 others Interested Parties [2020] eKLR** and **Secretary County Public Service Board & another V Hulbhai Gedi Abdille [2017] eKLR.**

It requires no belabouring that the Petitioners' grievance is the manner in which the Interested Party was dismissed from employment and being an employee of the County Government, it behooved the Petitioners to invoke the grievance resolution mechanisms under the County Government's Act and the Public Service Commission Act. The Interested Party was a public officer and was bound by the provisions of these statutes, so were the Petitioners in their attempt to enforce his rights.

Admittedly, there are statutorily ordained procedures which ought to be complied with before the court's jurisdiction is invoked, unless a case for judicial intervention has been demonstrated.

In the instant Petition, the Petitioners have not cited any unique or other circumstance(s) which would remotely qualify as an exception to the doctrine of exhaustion.

Section 87 of the Public Service Commission Act provides:

1....

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 Public Service unless the procedure provided for under this part has been exhausted.

Under Article 234(2)(i) of the Constitution of Kenya, the Public Service Commission is mandated to hear and determine appeals on matters germane to the County Government's Public Service including discipline, recruitment, retirement, pension, removal from office and remuneration among others.

Section 85 of the Public Service Commission Act confer upon the Public Service Commission jurisdiction to hear appeals from County Public Service as follows:

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 person in a County Government including a decision in respect of-

(a) ...

(b) ...

(c) disciplinary control;

(d) ...

(e) retirement and other forms of removal from the Public Service.

Other than the foregoing provisions, the provisions of the County Governments Act impose an obligation on employees of County Governments Public Service to appeal to the Public Service Commission in the first instance and any person(s) purporting to enforce the rights of such an employee are not exempted from this procedure.

Section 77 of the County Government's Act provides:

(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.

Although the foregoing provisions would appear to suggest that persons aggrieved or affected by decisions of the County Governments have an option to appeal to the Public Service Commission, they do because the Constitution of Kenya mandates the Public Service Commission, in mandatory tone to hear and determine appeals in respect of County Governments Public Service. It should also be borne in mind that the Public Service Commission Act was enacted after the County Governments Act and parliament was aware of the provisions of the County Government's Act.

The foregoing argument is fortified by the sentiments of Mumbi Ngugi J. (as she then was) in **James Tinai Murete & Others V County Government of Kajiado & another; Nailantei Supeyo & 19 Others; Interested Parties [2023] eKLR** as follows:

"...The Petitioners were dissatisfied with the decision of the respondents with regard to recruitment to various positions within the county and they cannot argue, in the face of the clear provisions of Section 77 of the County

Government Act, that they can bypass the legislation and come to this Court by way of a constitutional provision.

*Aside from the views expressed in the two decisions set out above, I take this view for two additional reasons. First, it is my view that the legislature could not have intended to establish a dispute resolution mechanism, and then render it redundant immediately by giving parties the option to choose whether to follow it or not. Read as a whole, the provisions of section 77 of the County Governments Act evince an intention to have all disputes arising out of appointments by County Service Boards dealt with by the Public Service Commission, hence its grant to the Commission of the mandate in mandatory terms by providing that the Commission “... **shall entertain appeals in respect of recruitments, selection, appointment and qualifications attached to any office**”. There is no option given to a party to choose whether or not to file grievances with the Commission...*

In the circumstances, I find that the issues raised in the present petition should have been raised before the Public Service Commission, which has the statutory mandate under Section 77 of the County Governments Act to deal with such disputes”.

Needless to accentuate, the foregoing sentiments of the learned Judge apply analogously to the circumstances of the instant Petition.

In the court's view, if the Petitioners were driven by the enthusiasm to remedy the wrongs against the Interested Party, they ought to have filed an appeal with the Public Service Commission before invoking the court's jurisdiction.

In the end, the court is satisfied and finds that the instant Petition was filed prematurely and it is accordingly struck out with costs to the respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 30TH DAY OF SEPTEMBER, 2025.

DR. JACOB GAKERI
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.

DR. JACOB GAKERI
JUDGE