REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. E062 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

PRITTY ALUMASA……

…….CLAIMANT

VERSUS

COUNTY GOVERNMENT OF VIHIGA……1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD……2ND RESPONDENT

RULING

The claimant instituted the instant claim vide a Memorandum of claim dated 18th July, 2025 and filed on 8th July, 2025 alleging unlawful termination of employment by the respondent. Praying for a declaration that termination of employment was unlawful, malicious and unprocedural, unpaid house allowance, general damages, unpaid salary and interest on the amount awarded.

After filing its Memorandum of Appearance on 30th July, 2025, the respondent filed the instant Notice of

Preliminary Objection challenging the court's jurisdiction on the grounds that the claim:

1. *Contravenes the provisions of Article 234(2)(i) of the Constitution of Kenya and Sections 77 of the County Governments Act and Section 87(2) of the Public Service Commission Act on exhaustion.*
2. *Was statute barred by Section 89 of the Employment Act.*
3. *Discloses no cause of action.*
4. *Was fatally and incurably defective.*
5. *Ought to have been filed at the Kakamega ELRC.*

On 31st July, 2025 parties were accorded 14 days a piece to file and exchange documents and submissions and the matter reserved for Ruling on 2nd October, 2025.

By the time the court retired to prepare this ruling, none of the parties had filed submissions, directions on the same issued on 31st July, 2025 notwithstanding.

After careful consideration of the respondent's Notice of Preliminary Objection dated 29th July, 2025 and the claimant's Memorandum of Claim together with the annexures, the singular issue for determination is

whether the respondents' Notice of Preliminary Objection is merited.

As to whether the respondent's Notice of Preliminary Objection meets the threshold of Preliminary Objection, the often cited sentiments of Law JA and Sir Charles Newbold P. in **Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd [1969] EA 696** are instructive.

According to Law JA;

"...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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration".

In the words of Sir Charles Newbold P.,

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact

has to be ascertained or if what is sought is the exercise of judicial discretion".

Since the respondent's objections are grounded on the jurisdiction of this court to hear and determine the claimant's case and are clear, the court is satisfied that Notice of Preliminary Objection dated 29th July, 2025 meets the threshold of a Preliminary Objection as envisioned by the Court of Appeal **in Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd (supra)**.

It requires no gainsaying that a Preliminary Objection is a threshold issue and whenever raised must be disposed of at the earliest opportunity owing to its potential to scuttle the suit before hearing and final determination.

As to whether the claimant's suit is statute barred. It is trite law that the court of law has no jurisdiction to hear and determine a stale suit. A claim grounded on a contract of employment or contract of service generally becomes statute barred three years after the act, default of conduct complained of under the provisions of Section 89 of the Employment Act which provides:

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

Under this provision, the three (3) years start running from the date of the act neglected or default because it is the earliest date the employee would have maintained an action against the employer.

In cases grounded on unfair or unlawful termination of employment, the cause of action accrues on the date of termination of employment or summary dismissal, as was held in **Attorney General V Andrew Maina Githinji & another [2016] eKLR** and **G4S Security Services (K) Ltd V Joseph Kamau & 468 others [2018] KECA 827 (KLR)** where the Court of Appeal held:

"In the circumstances of this case we find that the contracts of 464 respondents were terminated in 2008, 2009 and 2010 and the claim was filed in 2014. Pursuant to Section 90 of the Employment Act, the claims should

have been filed within three years of the termination of employment. The claims in respect of the 464 respondents were therefore time barred...

Time does not stop running on the commencement of reconciliation or other alternative dispute resolution mechanisms provided for under the Constitution or any other law. This is fortified by the decision of this court in the case of ***Rift Valley Railways (Kenya) Ltd V Hawkins Wagunza Musonye and another [2016] eKLR …"***

The court is guided and bound by these propositions of law.

In the instant case, the claimant admits that employment was terminated by the respondent on an undisclosed date.

The Memorandum of Claim indicates that the claimant was interdicted vide a letter dated 4th July, 2019.

Among the claimant's List of Bundles of documents was a Reply to the dismissal letter dated 19th March, 2020, altered by hand to read to read 2021 and received by the Vihiga County Government Public Service Board on 19th

March, 2021 as well by the County Government Records Management office on even date.

The appeal or reply to dismissal letter was contesting the termination of services vide letter dated 12th March, 2021 Ref: VCG/CPSB/DCR/4/1VOL.1/21(54).

Relatedly the most recent letter from the claimant to the County Public Service Board dated 15th January, 2024 adverted to her appeal on 22nd September, 2023 having been allowed.

Puzzlingly, the letter makes reference to an interdiction on 13th March, 2021 yet a copy of the interdiction letter on record is dated 4th July, 2019.

By default or design, the claimant did not avail a copy of the dismissal letter nor did the respondent which had not filed a response to the claim.
Assuming that the claimant's letter dated 15th January, 2024 received on even date represent the true state of affairs, the claimant's action may not be statute barred after all. However, the most potent ground of objection by the respondent is the doctrine of exhaustion. That the claimant has not exhausted the internal disciplinary

mechanisms are by law required before filing the instant suit.

Needless to belabour, the doctrine of exhaustion is an integral part of Kenya's litigation, jurisprudence and predates the Constitution of Kenya, 2010 whose Article 159(2) enjoins courts and tribunals to promote other mechanisms and approaches to dispute resolution including alternative justice systems.

In the **Speaker of National Assembly V Karume [1992] KECA 42(KLR),** the Court of Appeal stated:
"In our view there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the constitution or an Act of Parliament that procedure should be strictly followed".

Similarly, in **NGO'S Co-ordination Board V E. G. & 4 OTHERS Katiba Institute (Amicus Curie) [2023] eKLR** the Supreme court held:
"...Even where superior courts had jurisdiction to determine profound questions of law, the first opportunity has to be given to the relevant persons, bodies, tribunals or other quasi-judicial authorities and organs to deal with

the dispute as provided for in the relevant parent institute.

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 decisions has settled the jurisprudence regarding the doctrine of exhaustion of administration remedies".

Finally, in **Geoffrey Muthinja & 2 Others Samuel Muguna Henry & 1756 others [2017] eKLR**, the Court of Appeal captured the rationale of the doctrine of exhaustion as follows:

"... It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call...

The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is 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 of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution...”

(See also **Republic V Commissioner General Kenya Revenue Authority *Ex Parte* Sanofi Aventis Ltd [2019] eKLR**, **Secretary County Public Service Board & another V Hulbhai Gedi Abidlle [2017] eKLR, William Odhiambo Ramogi & 3 others V Attorney General & 4 others; Muslim for Human Rights & 2 Others Interested Parties [2020] eKLR, In the matter of Mui Coal Basin Local Community, Republic V Kenya Bureau of Standards & 4 others & the Department of Health Services County Government of Nakuru (Interested Party) *Ex Parte* United Millers Ltd, United Millers Ltd V Kenya Bureau of Standards, Directorate of Criminal Investigations and 5 Others, Albert Chaurembo Mumbo & 7 Others V Maurice Munyao & 148 Others [2019] eKLR, Dhow House Ltd V Kenya Power & Lighting Co. Ltd [2022] KEHC 11840 (KLR).**

Significantly, the provisions of the Constitution of Kenya, County Governments Act and the Public Service

Commission Act are explicit on the place of the doctrine of exhaustion and in particular as regards grievances between public officers and their employers.

As regards employees of the County Public Service, Article 234(2)(i) of the Constitution provides:

The Commission (PSC) shall hear and determine appeals in respect of County Governments' Public Service; …"

This Article confer upon the Public Service Commission jurisdiction to entertain appeals on matters relating to County Governments Public Service and is further amplified by the provisions of Section 77 of the County Governments Act and those of the Public Service Commission Act.

Under Section 77 of the County Governments 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.

(2) <u>The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect</u> of—

(a) …

(b) …

(c) disciplinary control;

(d) …

(e) retirement and other removal from service.

Similarly, Section 85 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 qualifications attached to any office; (b) remuneration and terms and conditions of service; (c) disciplinary control (e) retirement

and other forms of removal from the public service;

Finally, Section 87(2) of the Public Service Commission Act provides

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.

For purposes of context of the foregoing provision, Part XV of the Public Service Commission Act is entitled

'Hearing and determination of appeals in respect of County Government Public Service'.

Under Section 86(4) of the Act, after hearing an appeal the Commission may—

(a) uphold the decision;

(b) set the decision aside;

(c) vary the decision as it considers to be just; or

(d) give such directions as it may consider appropriate with respect to the decision.

Needless to belabour, the decision of the Commission marks the end of the internal disciplinary process in the case of employees of the County Public Service and a party dissatisfied or affected by the decision may invoke the jurisdiction of the Employment and Labour Relations Court.

Although Section 77(1) of the County Governments Act and Section 86(1) of the Public Service Commission Act use the term "may", which suggests that an employee could opt out of the appellate mechanism, sub-section 2 of this provision, Article 234(2)(i) of the Constitution and Section 87(2) of the Public Service Commission Act are couched in mandatory tone to underscore the essence of the appellate mechanism in dispute resolution involving the County Governments Public Service.

The foregoing view 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 Party [2023] eKLR** where the Judge stated:

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

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".

The foregoing sentiments of the learned Judge apply on all fours to the circumstances of the instant case as the claimant is challenging termination of employment by the respondent.

In the instant case, the claimant has not demonstrated that any appeal was lodged with the Public Service Commission before instituting the instant suit.

Similarly, it has not been shown that there was any interaction with the Public Service Commission, the body empowered to hear and determine appeals from persons dissatisfied or affected by decisions of the County Public Service Board or any other person exercising or purporting to exercise powers relating to disciplinary control over an employee.

Having failed to demonstrate that the appellate process prescribed by the County Government's Act and the Public Service Commission Act had been invoked, it is clear that the claimant has failed to prove that the internal dispute resolution mechanisms had been exhausted as by law required, before this court's jurisdiction was invoked.

Flowing from the foregoing, it is discernible that the instant suit was instituted prematurely.

In the circumstances, the respondent's Notice of Preliminary Objection dated 29th July, 2025 has merit.

Consequently, the claimant's Memorandum of Claim dated 18th July, 2025 filed on 8th July, 2025 and the Notice of Motion of even date are hereby struck out with no Orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 2ND DAY OF OCTOBER, 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