



Kisii County Assembly Service Board & 2 others v Public Service Commission; Nyaoga (Interested Party) (Petition E006 of 2025) [2025] KEELRC 2778 (KLR) (14 October 2025) (Ruling)

Neutral citation: [2025] KEELRC 2778 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISII
PETITION E006 OF 2025
NZIOKI WA MAKAU, J
OCTOBER 14, 2025**

**IN THE MATTER OF ARTICLES 10, 21, 22, 23, 24, 25, 27, 28, 41,
43, 47, 48, 50 AND 232 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE LABOUR RELATIONS ACT AND THE
COUNTY GOVERNMENTS ACT; THE COUNTY ASSEMBLY
SERVICES ACT; THE COUNTY GOVERNMENT ACT, THE FAIR
ADMINISTRATIVE ACTIONS ACT, AND THE RULES OF NATURAL JUSTICE**

BETWEEN

**KISII COUNTY ASSEMBLY SERVICE BOARD 1ST PETITIONER
THE COUNTY ASSEMBLY OF KISII 2ND PETITIONER
JACOB MACHOGU ONKEO 3RD PETITIONER**

AND

PUBLIC SERVICE COMMISSION RESPONDENT

AND

JAMES OMARIBA NYAOGA INTERESTED PARTY

RULING

1. By a Petition dated 1st April 2025, the Petitioners moved this Court alleging numerous breaches of *the Constitution* by the Respondent. They contended that the Respondent acted illegally, unreasonably and irrationally by rendering a decision that had the effect of removing the 3rd Petitioner from office despite due procedure having been followed in his appointment. Contemporaneously, they filed an application of even date under certificate of urgency seeking conservatory orders suspending and staying the implementation of the impugned decision pending the hearing and determination of both



the application and the Petition. They also prayed for costs of the application and any other order the Court might deem fit.

2. In response, the Respondents filed a Preliminary Objection dated 17th April 2025 challenging both the Petition and the application. It contended that this Court lacked jurisdiction to entertain the matter by dint of section 87(2) of the [Public Service Commission Act](#). It was the Respondent's position that the Petition and application offended sections 87(2) and 88 of the Act as read with Regulation 24 of the Public Service Commission (County Appeals Procedures) Regulations, 2022, which mandate the exhaustion of the review mechanism before the Commission prior to approaching the Court. Additionally, the Respondent argued that, under section 88(4) of the Act, this Court lacks jurisdiction to stay the Commission's decision unless the review process has first been undertaken. The Respondent further asserted that the suit contravened the doctrine of exhaustion as prescribed under section 9(2) of the [Fair Administrative Action Act](#), noting that the Petitioners had not sought any exemption under section 9(4) thereof.
3. In compliance with the directions issued on 24th September 2025, both the Petitioners and the Respondents filed their written submissions. The Interested Party also filed submissions; however, these were in opposition to the application dated 1st April 2025 and were therefore not relevant to the Preliminary Objection under consideration.

Respondent's Submissions

4. The Respondent submitted that the Petition and the Notice of Motion were incompetent for failure to comply with the doctrine of exhaustion. It asserted that section 87(2) of the [Public Service Commission Act](#) expressly prohibited the filing of proceedings in court in respect of matters within the Commission's jurisdiction unless the prescribed procedures had first been exhausted. It pointed out that Part XV of the Act provides a two-tier process consisting of an appeal to the Commission and, depending on the outcome of the appeal where necessary, a party may apply for review under section 88. The Respondent maintained that a litigant could only approach the court after both stages had been concluded. In support of its position the Respondent cited the case of *Nyaoga v Kisii County Assembly Service Board & another* (Petition E035 of 2024) [2024] KEELRC 2385 (KLR), where the court declined jurisdiction on account of non-compliance with the procedure under the [Public Service Commission Act](#). The Respondent further emphasized that under section 88 of the [Public Service Commission Act](#), the right to apply for review is an integral component of the exhaustion requirement, and failure to invoke it renders proceedings premature.
5. To further buttress its position, the Respondent referred to section 9 of the [Fair Administrative Action Act](#) which requires litigants to pursue all internal appeal or review mechanisms before seeking judicial review. It cited the case of *Krystalline Salt Limited v Kenya Revenue Authority* [2019] eKLR, in which the court stressed that the word "shall" in section 9 of the [Fair Administrative Action Act](#) is mandatory and not permissive, and that exemption from exhaustion can only be granted in exceptional circumstances upon a formal application to court. Having neither exhausted the review process under section 88 of the [Public Service Commission Act](#) nor sought an exemption under section 9(4) of the Fair Administrative Actions Act, the Respondent submitted that the petition was premature and offended the doctrine of avoidance. It relied on the decision in *Jackson Maina Ngamau v Ethics and Anti-Corruption Commission & 3 others* [2015] eKLR, where the court held:

“The principle of ‘constitutional avoidance’ as discussed by the Supreme Court of Kenya in *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* [2014] eKLR that the Court will not determine a constitutional issue or question even where it is properly before it, if there is another basis upon which the case can be disposed of,



does not oust the jurisdiction of the Court but rather calls for judicial restraint in cases where there exists a statutory or other remedy. In addition, in accordance with the rule in *The Speaker of the National Assembly v Karume* [2008] eKLR, it is now accepted as a principle of constitutional adjudication that where *the constitution* or statute makes provision for the process for determination of a particular matter that procedure should be strictly followed.”

6. On the question of stay, the Respondent drew the Court’s attention to section 88(4) of the *Public Service Commission Act*, which stipulates that decisions of the Commission shall not be deferred or suspended pending the determination of an appeal or review. It asserted that the use of the word “shall” in this provision is likewise mandatory, and therefore this Court has no jurisdiction to stay the implementation of the Commission’s decision. In conclusion, the Respondent urged the Court to find that its jurisdiction had been improperly invoked, that the Applicants had failed to exhaust the mandatory internal remedies, and that the Petition and the accompanying application dated 1st April 2025 were incurably defective and bad in law. It prayed that both be struck out with costs.

Petitioners’ Submissions

7. Regarding the court’s jurisdiction the Petitioners submitted that this Court was properly vested with jurisdiction. They asserted that the dispute before the Court concerned a challenge to the validity and legality of actions taken by the Public Service Commission, a constitutional body, and the decision it rendered. Relying on Article 165(3)(d) of *the Constitution* they submitted that this Court has exclusive jurisdiction to determine whether any action taken under any law is consistent with *the Constitution*. The Petitioners maintained that the doctrine of exhaustion, was inapplicable in the present circumstances where they were directly challenging the Respondent’s decision on constitutional grounds.
8. In further opposition to the Preliminary Objection, the Petitioners stressed that they were aggrieved by the manner in which the Respondent discharged its constitutional mandate, resulting in the breach and curtailment of their fundamental rights and freedoms. Particularly, they submitted that the 3rd Petitioner’s right to a fair hearing and trial was violated when the Commission made an adverse decision without affording him the opportunity to be heard, contrary to Articles 10, 25, 27, 28, 47, 48, 50 and 232 of *the Constitution*, as read with the provisions of the *Fair Administrative Action Act*.
9. Regarding the contention that they ought to have pursued the review mechanisms under section 87(2) of the *Public Service Commission Act* and Regulation 24 of the Public Service Commission (County Appeals Procedures) Regulations before moving court, and the argument that it is procedurally provided for by law that a party dissatisfied with a decision of the Commission must first file an appeal and, if necessary, seek review pursuant to sections 87 and 88 of the Act, the Petitioners submitted that the review mechanism provided under the Act was limited in scope and did not oust the jurisdiction of the Court. They pointed out that section 88 only permits a review where there is discovery of fresh material facts that could not, with due diligence, have been presented earlier, or where there is an error apparent on the face of the record. They emphasized that in the present case, their grievance did not fall within either of these categories. Rather, their complaint was that the Commission misinterpreted and misapplied the law and improperly evaluated the facts, which are matters properly falling within the jurisdiction of this Court.
10. To fortify this position the Petitioners submitted that appeals were quite distinct from reviews. They referenced to the decision in the case of *Parliamentary Service Commission v Martin Nyaga Wambora*



& others [2018] eKLR, where the Supreme Court adopted the principles in *Mbogo & another v Shah* [1968] EA in the following terms:

- a. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court
- b. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
- c. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
- d. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.
- e. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
- f. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
 - g. as a result, a wrong decision was arrived at; or
 - h. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.”

11. They also cited the case of *National Bank of Kenya v Ndungu Njau* [1997] eKLR, where the Court of Appeal held that a review may only be granted to correct an apparent error or omission, which must be self-evident and not require elaborate argument. Further reliance was placed on *Republic v Advocates Disciplinary Tribunal ex parte Apollo Mboya* [2019] eKLR, where the Court outlined the principles governing applications for review, including that errors must be apparent on the face of the record and that subsequent events or divergent legal opinions do not constitute grounds for review.

12. The Petitioners also referred to the decision in the case of *Turbo Highway Eldoret Ltd v Synergy Industrial Credit Ltd* [2016] eKLR which in referring to the case of *Rose Kaiza v Angelo Mpanjuiza* [2009] eKLR, elaborated on the meaning of “discovery of fresh material facts” by holding that:

“Applications on this ground must be treated with great caution and as required by Rule 4(2)(b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”

13. To illustrate what an error apparent on the face of the record entailed the Petitioners relied on *Muyodi v Industrial and Commercial Development Corporation & another* [2006] 1 EA 243 and *Chandrakant*



Joshbhai Patel v R [2004] TLR 218, in which the common thread was that it must be an error easily discernible without a long drawn-out process of reasoning and interrogation of points.

14. On the basis of these authorities, the Petitioners submitted that the review mechanism under sections 87 and 88 of the Act was discretionary and limited, and did not in any way oust or defer the Court's jurisdiction. They asserted that the Respondent had disregarded the evidence and submissions before it, and made an adverse finding against the 3rd Petitioner without a hearing, thus justifying the Court's intervention.
15. With regard to the prayer for stay and conservatory orders, the Petitioners submitted that Article 23(3) of *the Constitution* empowers this Court to grant appropriate relief, including conservatory orders, where fundamental rights and freedoms are threatened. They asserted that section 88(4) of the *Public Service Commission Act* does not oust this jurisdiction, nor does it fetter the Court's discretion to grant conservatory relief. They maintained that the 3rd Petitioner had been condemned unheard, contrary to Articles 10, 25, 47 and 50 of *the Constitution*, which safeguard the right to a fair trial. In support of this position, they relied on *County Government of Mandera & another v Attorney General & another; Hussein Dayow Abdullahi & 3 others (Interested Parties)* [2020] eKLR, where the Court in holding that section 88(4) does not bar the Court from granting stay or conservatory orders, observed that a party aggrieved by the Public Service Commission's decision retains the discretion either to seek review before the Commission or to approach the Court, and that nothing in the Act ousts the Court's jurisdiction to determine questions of legality or constitutionality. In conclusion, the Petitioners urged the Court to find that it is properly seized of jurisdiction to hear and determine the Petition, to grant the interim conservatory orders sought, and to dismiss the Respondent's Notice of Preliminary Objection dated 17th April 2025 with costs.

Disposition

16. The preliminary objection raised goes to the root of the Petition. It has to be decided first as the question as to whether this Court has jurisdiction is paramount. The preliminary objection asserts that this Court lacks jurisdiction to entertain the matter by dint of section 87(2) of the *Public Service Commission Act*. The Interested Party agreed with surmise and supported the Respondent's position. The parties have articulated their respective cases with citation of a plethora of case law. The uncontested facts are that there was a removal of the Interested Party as Clerk and the imposition of the 3rd Petitioner as Clerk Kisii County Assembly as a consequence. The Respondent asserts this was unlawful as there was an appeal pending before it and that the Petitioners defied legal dictates in appointing the 3rd Petitioner as Clerk.
17. The Respondent and Interested Party argue that section 9 of the *Fair Administrative Action Act* is mandatory and not permissive, and that exemption from exhaustion can only be granted in exceptional circumstances upon a formal application to court. They assert that having neither exhausted the review process under section 88 of the *Public Service Commission Act* nor sought an exemption under section 9(4) of the *Fair Administrative Actions Act*, the objectors assert the Petition was premature and offended the doctrine of avoidance.
18. Instructive to the discourse is section 88 of the *Public Service Act*. The section provides as follows:-
 88. Procedure for review of a decision in respect of a county public service board
 - (1) A person who is dissatisfied or affected by a decision made by the Commission following an appeal under this section may apply for review and the Commission may admit the application if—



- (a) fresh material facts arise which with due diligence could not be presented when the decision was initially made; or
- (b) there is an error apparent on the record of the earlier decision.

[Emphasis supplied]

19. The case of Jackson Maina Ngamau v Ethics and Anti-Corruption Commission & 3 others (supra) held that:

“The principle of ‘constitutional avoidance’ as discussed by the Supreme Court of Kenya in Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others [2014] eKLR that the Court will not determine a constitutional issue or question even where it is properly before it, if there is another basis upon which the case can be disposed of, does not oust the jurisdiction of the Court but rather calls for judicial restraint in cases where there exists a statutory or other remedy. In addition, in accordance with the rule in The Speaker of the National Assembly v Karume [2008] eKLR, it is now accepted as a principle of constitutional adjudication that where the constitution or statute makes provision for the process for determination of a particular matter that procedure should be strictly followed.”

20. In various decisions of this Court, there has been deference to this principle which is the correct approach. That was the correct approach in those cases as the circumstances obtained in those cases. However, in the matter before me, the circumstances obtaining relate to a decision of the Respondent that has already been made. In addition, the words used in section 88 as can be seen from the excerpt cited above are “A person who is dissatisfied or affected by a decision made by the Commission following an appeal under this section may apply for review”. In this case the Petitioners did not apply for review as it is not compulsory as the word used is “may” and not “shall” which could make it compulsory to seek a review before coming to this Court. As there is no mandatory provisions to abide the approach to court, there is no ground to hold the Petition to be improperly before court.
21. The foregoing is ample evidence that the Petition before the Court is competently before it. There is nothing that bars this Court from hearing the matter at present as there is no proceeding pending before the Respondent for adjudication. As such, the preliminary objection fails and is dismissed albeit with no order as to costs. There will be directions as to the disposal of the Petition before me immediately upon delivery of this Ruling.

Orders accordingly.

DATED AND DELIVERED AT KISII THIS 14TH DAY OF OCTOBER 2025

NZIOKI WA MAKAU, MCIARB.

JUDGE

