



**Busia County Public Service Board & another v Public Service
Commission & another (Judicial Review Miscellaneous Application
E002 of 2025) [2025] KEELRC 3014 (KLR) (30 October 2025) (Ruling)**

Neutral citation: [2025] KEELRC 3014 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E002 OF 2025
DN NDERITU, J
OCTOBER 30, 2025**

BETWEEN

BUSIA COUNTY PUBLIC SERVICE BOARD 1ST APPLICANT

COUNTY GOVERNMENT OF BUSIA 2ND APPLICANT

AND

THE PUBLIC SERVICE COMMISSION 1ST RESPONDENT

PRISCAH ISEREN AMOIT 2ND RESPONDENT

RULING

I. Introduction

1. In a chamber summons (the application) dated 30th January 2025 filed through Amani, Wekesa & Associates Advocates the applicants are seeking for the following orders –
 1. That this application be certified urgent.
 2. That the applicants be granted leave to apply for: -
 - a. An order of Certiorari to remove and bring to this honourable court for purposes of quashing the decision by the Public Service Commission, (the respondent) delivered on 19th December, 2024.
 - b. An order of prohibition do issue prohibiting the 2nd respondent through her servants, agents, employees or directly from enforcing the 1st respondent’s decision delivered on 19th December, 2024.
 3. That the grant of leave do operate as stay of execution of the decision rendered by the 1st respondent on 19th December, 2024.



4. That this honourable court be pleased to grant any other further relief that it deem fit and just to grant in the circumstances.
5. That the costs of this application be provided for.
2. The application is expressed to be brought under Articles 159(2)(d) & 23(3) of *the Constitution*, Sections 1A, 1B, & 3A of the *Civil Procedure Act*, Sections 8, 9, & 10 of the *Law Reform Act*, & Order 53 Rules 1 & 2 of the Civil Procedure Rules, and all other enabling provisions of the law.
3. The application is based on the grounds stated on the face of it and supported with a statutory statement and the verifying affidavit of Truphena Akide, the secretary of the 1st applicant, sworn on 30th January 2025 with several annexures thereto. The affidavit is sworn for and on behalf of the two applicants.
4. The application was filed under a certificate of urgency and when the same came up in court on 3rd February 2025 for directions it was ordered and directed that the same be served upon the respondents.
5. Upon service of the application the 1st respondent (also referred to as the Commission) filed a notice of preliminary objection (PO) dated 5th February 2025 through Mr. Ogosso, the Assistant Director of Legal Services thereof. The 2nd respondent through M/s Otieno, Yogo, Ojuro & Company Advocates also filed a PO dated 20th February 2025. The two POs raised the same issue – that this court lacks the jurisdiction to hear and determine the application.
6. The 1st respondent’s PO stated as follows –
 1. By dint of Section 87(2) of the *Public Service Commission Act*, Cap. 185 of the laws of Kenya, this Honourable Court lacks jurisdiction in the first instance to hear and determine this application.
 2. Pursuant to Section 88 of the *Public Service Commission Act* as read together with Regulation 24 of the Public Service Commission (County Appeals Procedures) Regulations, 2022, the Applicant should first apply for review before the Commission before challenging the appeal decision.
 3. By virtue of Section 88(4) of the Public Service Commission Commission’s decision on an appeal cannot be stayed by this Honourable court unless and until the affected person exhausts the right to apply for a review of the said decision.
 4. In view of points 1 to 3 above, the instant application offends the doctrine of exhaustion of remedies as prescribed under Section 9(2) of the *Fair Administrative Action Act*, Cap. 7L of the laws of Kenya and the attendant rules.
 5. The Applicants have not sought to be exempted from the application of the doctrine of exhaustion as prescribed under Section 9(4) of the *Fair Administrative Action Act*.
 6. The Applicants’ Application is incurably defective and bad in law.
7. The PO by the 2nd respondent raised the following points –
 1. That this court has no jurisdiction at the first instance to hear and determine this matter by dint of Section 87(2) of The *Public Service Commission Act*, Cap 185.
 2. That by dint of Section 88 of the *Public Service Commission Act*, Cap 185 as read with Regulation 24 of The Public Service Commission (County Appeals Procedure) Regulations



2022 this court's jurisdiction has been invoked prematurely as the Applicants ought to first apply for review of the decision before proceeding to court.

3. That the decision of the Public Service Commission on appeal cannot be stayed by this court until the affected persons exhaust the rights of review before the commission by virtue of Section 88(4) of the Public Service Act.
 4. That the Applicants' have not adhered to the doctrine of Exhaustion as stipulated in Section 9(2) of the Fair Administration Act.
 5. That Applicants have not sought and obtained exemption as provided for under Section 9(4) of the Fair Administration Act.
8. By consent, it was agreed that the two POs be argued ahead of the application and be canvassed by way of written submissions. Mr. Ogosso for the 1st respondent filed written submissions dated 25th March 2025. Mr. Yogo for the 2nd respondent filed submissions dated 21st March 2025. Mr. Masiga for the applicants filed submissions dated 18th April 2025.

II. Submissions by Counsel

9. Counsel for the 1st respondent submitted that Section 87 of the *Public Service Commission Act* provides on the exhaustion of the appeal process of matters dealt with by a county public service board. It is submitted that a party dissatisfied with the decision of a county public service board shall first appeal the decision to the Commission and may thereafter apply for review before moving to court. It is submitted that unless a party has exhausted that process it is premature and an abuse of the court process for such a party to approach the court over the same subject matter.
10. Further, counsel cited Section 9 of the *Fair Administrative Action Act* to the effect that no matter for a review of administrative action shall be filed in court unless and until the internal and or alternative procedure provided for is exhausted. In this regard counsel cited *Krystilline Salt Limited V Kenya Revenue Authority (2019) eKLR* submitting that the procedure provided for must be compulsorily complied with before a party approaches a court for any further or other remedies. For a party to be exempted from the compulsory out-of-court procedure, such party shall apply to the court for such exemption.
11. It is submitted that the applicants herein have not exhausted the above process before approaching the court as they have not applied for a review of the decision of the Commission. It is submitted further that the applicants have not filed an application for exemption from the out-of-court process.
12. Further, counsel submitted that under Section 88(4) of the *Public Service Commission Act* the implementation of the decision of the Commission on appeal shall not be stayed pending the determination on review. It is submitted that for the foregoing reason(s) this court lacks jurisdiction to entertain the application herein and the same should thus be struck out with costs.
13. Counsel for the 2nd respondent joined the 1st respondent in raising the same or similar grounds and points in the preliminary objection as reproduced in the introductory part of this judgment.
14. It is submitted that the applicants decided to effectively terminate the services of the 2nd respondent, an employee of the 2nd applicant, without following the due process of the law. Pursuant to Section 77 of the *County Governments Act* the 2nd respondent appealed the termination to the 1st respondent and on 19th December 2024 the 1st respondent overturned the termination and ordered the reinstatement of the 2nd respondent to her employment.



15. It is submitted that instead of following the law and applying for review of the decision by the 1st respondent, the applicants have now approached the court with the instant application seeking for leave to file judicial review proceedings, seeking for the orders set out in the introductory part of this ruling.
16. It is submitted that this court lacks the jurisdiction to entertain the filed proceedings by virtual of Section 87(2) of the [Public Service Commission Act](#) as read alongside Section 77 of the [County Governments Act](#). It is further submitted that the two provisions cited above flow from Article 234(2) of [the Constitution](#).
17. It is reiterated that a party who is dissatisfied with the outcome of an appeal to the Commission shall seek a review of the decision by the Commission. It is submitted that unless and until a party complies with the foregoing, any proceedings filed in court, as filed by the applicants herein, are premature, null, and void.
18. It is further submitted that pursuant to Section 88(4) of the [Public Service Commission Act](#) an application for review of the appeal does not and cannot stay the implementation of the decision made on appeal.
19. It is submitted that the applicants failed to exhaust the out-of-court process before approaching the court. Further, it is submitted that the applicants did not seek exemption under Section 9(4) of the Fair Administration Action Act before approaching the court. It is further submitted that Section 9(2) of the Fair Administration Action Act and Article 159 of [the Constitution](#) provide for the doctrine of exhaustion and the applicants were completely out of order in approaching the court in the premature manner that they have done. It is submitted that the applicants have improperly attempted to invoke the jurisdiction of the court without due process. In support of the foregoing counsel cited Chrispine Omollo Owalla V County Attorney of Siaya County Government & 2 Others (2024) KEHC 3896 (KLR) and Robert Khamala Situma & 8 Others V Acting Clerk, Nairobi City County Assembly (2022).
20. It is further submitted that the POs herein raised by the respondents meet the threshold set out in Mukhisa Biscuits Manufacturing Co. Ltd V West End Distributors (1969) E.A 696.
21. On the other hand, counsel for the applicants submitted that the application is seeking to challenge the decision of the 1st respondent by way of judicial review. It is submitted that the impugned decision of the 1st respondent was illegal, irrational, and lacking in propriety.
22. Counsel identified the following issues for determination in the POs by the respondents –
 1. Whether the application 30th January, 2025 was filed prematurely and in contravention with section 88 of the [Public Service Commission Act](#), 2017 and Section 9 of the [Fair Administrative Action Act](#), 2015.
 2. Whether this Honourable Court lacks jurisdiction to entertain the Applicants' Application.
 3. What order(s) should the court grant.
23. On the first issue, it is submitted that the orders sought in the application may be granted by this court by virtue of Section 12 of the [Employment and Labour Relations Court Act](#) and Article 41 of [the Constitution](#). In that regard counsel cited Kenya Universities Staff Union V University Council of Masinde Muliro of Science and Technology (2018) eKLR.



24. It is submitted that there is nothing un-procedural or unlawful with the applicants seeking to challenge the decision of the 1st respondent by way of judicial review as the applicants herein have opted to do. It is further submitted that the word may as used in Section 88(1) of the *Public Service Commission Act* denotes discretionary, optional, and permissive decision on the part of a party dissatisfied with the outcome of an appeal to the Commission. Counsel cited Republic V Council of Legal Education & Another Ex-parte Sabiha Kassamia & Another (2018) eKLR on the use and implication of words may and shall in statutes.
25. It is submitted that in filing the application for judicial review the applicants are not bound to first file for review of the decision by the 1st respondent. It is submitted that, in any event, the grounds on which to file a review under Section 88(1) of the *Public Service Commission Act* are very different from the grounds for applying for judicial review. It is submitted that an application for review under Section 88(1) of the *Public Service Commission Act* above is confined to discovery of fresh evidence and or an error apparent on record.
26. It is submitted that the application for leave to apply for judicial review herein is clear that the intended judicial review proceedings are not based on either of the two conditions for a review by the Commission. It is submitted that the applicants thus had no grounds or need to file for a review with the 1st respondent. It is further submitted that the applicants have a right under Article 47 of *the Constitution* and Sections 4, 5, & 7 of the *Fair Administrative Action Act* to file the instant application.
27. It is submitted that while Section 88 of the *Public Service Commission Act* as read with Section 77 of the *County Governments Act* mandates a party dissatisfied with the decision of a county public service to file an appeal with the Commission, it is not mandatory that a party dissatisfied with the decision of the Commission shall file for review with the Commission. It is submitted that in that regard the doctrine of exhaustion does not apply. It is submitted that in the context of the above law a party dissatisfied with the decision of the Commission has the right to either apply for review or go directly to the court for appropriate remedy.
28. It is further submitted that courts of law shall always have residual power and cannot stand-by helplessly when asked to help a citizen who has been denied justice by a tribunal or any other authority, the 1st respondent included. Counsel cited Chief Justice & President of the Supreme Court of Kenya & Another V Bryan Mandilla Khaemba (2021) and Fleur Investments Ltd V Commissioner of Domestic Taxes & Another (2018) eKLR in support of the argument.
29. On the second issue, it is submitted that this court has jurisdiction over the subject matter of the application by virtue of Article 162(3) of *the Constitution* and Section 12 of the *Employment and Labour Relations Court Act*.
30. It is further argued that other than the notices of their respective POs the respondents have not filed any other responses to the application and hence the POs are unfounded on pleadings and ought to be dismissed with costs.

III. Issues for Determination

31. In the considered view of the court, there is only one main issue for determination in this application – Has this court the jurisdiction to hear and determine the application by the applicants for leave to apply for judicial review prerogative orders as set out in the introductory part of this ruling or should the court uphold the POs as raised by the respondents and strike out the application?
32. The two POs attacked the jurisdiction of this court to hear and determine the application. And since jurisdiction is everything, to the extent that a court that entertains a matter without jurisdiction labours



in vain – see Owners of Motor Vessel “Lilian S” V Caltex Oil Kenya Limited (1989) KLR – the court is obligated to first deal with and settle the issue of jurisdiction. If it is established and ruled that the court has no jurisdiction, the court has to down its tools right here and strike out the application at this juncture.

33. The background to this matter is rather straightforward and uncontested. The applicants herein decided to terminate the 2nd respondent in September 2022 and withheld her monthly salary. The 2nd respondent, the employee, appealed the termination to the 1st respondent on 1st December 2023 (a period of over one year after the termination) vide an appeal dated 29th November 2023. The appeal was purportedly filed pursuant to Section 77 of the *County Governments Act* as read alongside Sections 85, 86, 87, & 88 of the *Public Service Commission Act*.
34. In a ruling issued and delivered on 19th December 2024 the termination was set aside and the applicants effectively ordered to reinstate the 2nd respondent to her employment.
35. The applicants are unhappy and dissatisfied with the decision of the Commission on the main arguing that the appeal was filed way outside the limited time of 90 days after the termination. It is pleaded that the ruling on the appeal was thus incompetent, ineffectual, unlawful, illegal, null, and void.
36. The uncontested evidence on record is that prior to filing of the appeal with the Commission, the 2nd respondent had approached the court in Bungoma ELRC Petition No. E010 of 2023 but the same was struck out by the court for lack of jurisdiction. The ruling (Keli J) was dated and delivered on 28th September 2023.
37. As noted elsewhere in this ruling, the respondents did not respond to the factual depositions by the applicants but only filed the POs as summarized above. In the circumstances, the factual aspects of the application have not been responded to and or rebutted. The fact that it was by consent agreed and directed that the POs be heard and determined ahead of the substantive application did not in any way bar the respondents from filing their responses to the main application pending the hearing and determination of the POs.
38. Luckily for the respondents, the POs are purely and entirely based on matters or points of law. It is the respondents’ position that based on Section 77 of the *County Governments Act* and Sections 85 – 88 of the *Public Service Commission Act*, this court lacks the requisite jurisdiction to hear and determine the application and as such the same should be struck out without the necessity for a hearing of the application on its factual basis pleaded and deposed to by the applicants.
39. In this regard, it is the finding and holding of the court that the POs by the respondents are within the purview of a proper PO as set out in *Mukhisa Biscuits Manufacturing Ltd V West End Distributors Limited* (supra). The court shall thus proceed to consider the two POs on their merits as hereunder.
40. Section 77 of the *County Governments Act* provides as follows –

Appeals to the Public Service Commission

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. The Commission shall entertain appeals on any decision relating to employment of a 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;
 - (d) national values and principles of governance, under Article 10, and, values and principles of public service under Article 232 of *the Constitution*;
 - (e) retirement and other removal from service;
 - (f) pension benefits, gratuity and any other terminal benefits; or
 - (g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.
 3. An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of the Commission, the circumstances warrant it.
 4. The Commission shall not entertain an appeal more than once in respect to the same decision.
 5. Any person dissatisfied or affected by a decision made by the Commission on appeal in a decision made in a disciplinary case may apply for review and the Commission may admit the application if —
 - a. the Commission is satisfied that there appear in the application new and material facts which might have affected its earlier decision, and if adequate reasons for the non-disclosure of such facts at an earlier date are given; or
 - b. there is an error apparent on record of either decision.
 6. An application for review under subsection (5) shall be in writing and made within the time prescribed by the Commission in regulations governing disciplinary proceedings, but the commission may entertain an application for review later if, in the opinion of the Commission, the circumstances warrant it.
41. The word “may” as used and applied in Section 77(1) above has effectively been interpreted to imply to mean “shall”. For example, in *The clerk, Nakuru County Assembly & 3 others V Kenneth Odongo & 7 others (2023) KECA 427 (KLR)* the Court of Appeal held that all decisions made by a county public service board on matters in Section 77(2) of the Act shall and must be appealed to the Commission by any dissatisfied party.
42. Section 77 of the *County Governments Act* must be read and understood alongside Sections 85 – 88 of the *Public Service Commission Act*.



43. However, the real battleground in this matter is not whether the 2nd respondent ought to have appealed her termination to the 1st respondent because that she did. The contest is whether having succeeded in her appeal to the Commission the applicants were obligated to apply for a review of the decision by the Commission before coming to court with the instant application.
44. The applicable law, and it is from it that the contest in the POs arise, is Section 88(1) of the *Public Service Commission Act* which for emphasis and ease of reference provides as follows –
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 shall 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.
45. The applicants’ response to the respondents’ POs in this regard – that they ought to have applied for review of the Commission’s decision on the appeal – is that they did not apply for review as their displeasure and dissatisfaction with the outcome of the appeal is not based on either of the two grounds for review in Section 88(1) of the Public Service Commission cited above. In the statutory statement in support of the application the applicants stated that the decision of the Commission was not only unreasonable but also unlawful, null, and void in that the appeal was filed out of time – outside the 90 days provided for in Regulation 10(1) & (2) of the Public Service Commission (County Appeals Procedures) Regulations, 2022.
46. The court has perused the decision of the Commission on the appeal dated and delivered on 19th December 2024 and noted that the issue of the appeal being filed out of time was raised in a preliminary objection by the respondents during the hearing of the appeal.
47. In paragraph 22 of the decision, the Commission summarily dealt with the issue of the appeal being filed out of time as follows – “In line with the ELRC decision as read with Regulation 10 of the Public Service Commission (County Appeals Procedures) Regulations, the appeal was duly admitted having been properly lodged.”
48. In effect, what the Commission decided was that the time for filing the appeal did not run while the 2nd respondent’s Bungoma ELRC Petition No. E010 of 2023 was pending before the court. The ruling striking out this petition was delivered (Keli J) on 28th September 2023 and the appeal filed on 1st December 2023. The evidence on record is that the 2nd respondent was effectively terminated on 1st September 2022 when her salary was stopped.
49. From the foregoing, it is evidently clear that the appeal was filed over one year after the termination. The Commission, the 1st respondent, appears to take the position that time was not running during the period when the 2nd respondent’s petition was pending in court as stated above.
50. In my considered view, the Commission considered and pronounced itself on the issue of whether the appeal was filed within the time allowed and hence the Commission is functus officio on that issue. This issue clearly does not lie within the two grounds upon which a dissatisfied party may apply for review. It is neither new evidence nor an error apparent on the record as envisaged under Section 88(1) of the *Public Service Commission Act* reproduced above. An application for review on the same issue to the Commission shall amount to a second appeal which is clearly prohibited under Section 77(4) of the *County Governments Act*.



51. What the court is saying, in so many words, is that it is not every decision of the Commission on appeal that must be subjected to a review by a party dissatisfied with or affected by that decision. In my considered view, the issues and grounds upon which the applicants intend to challenge the decision of the Commission were mainly already raised and considered by the Commission and it shall not make any legal sense to raise the same issues with the Commission as that is not within the realm of Section 88(1) of the *Public Service Commission Act*.
52. In the circumstances, and in view of all the foregoing, the court finds and holds that the POs raised by the respondents lack merits and the same are hereby dismissed. The application shall proceed to be heard on merits.
53. None of the decisions cited by counsel for the parties address the issue in contention herein. And the issue is whether every decision of the Commission on appeal shall be challenged by way of a review before a dissatisfied or affected party approaches the court. In my considered view, a dissatisfied or affected party may only apply for review of the decision of the Commission on appeal on the two specific grounds stated in Section 88(1) of the *Public Service Commission Act* recited above for ease of reference.

IV. Orders

54. The court finds and holds that the two POs by the respondents as contained in the impugned notices lack merits and the court makes the following orders –
 - a. The preliminary objections by the respondents as per the impugned notices have no merits and the same are hereby dismissed.
 - b. The chamber summons application by the applicants dated 30th January 2025 shall proceed for consideration on merits.
 - c. Costs of the POs shall be in the cause.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 30TH DAY OF OCTOBER, 2025.

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DAVID NDERITU

JUDGE

