



**Momanyi v Owino (Miscellaneous Case E011 of 2025)
[2025] KEELRC 3100 (KLR) (10 November 2025) (Ruling)**

Neutral citation: [2025] KEELRC 3100 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISII
MISCELLANEOUS CASE E011 OF 2025**

JK GAKERI, J

NOVEMBER 10, 2025

BETWEEN

**DUNCAN OYUNGE MOMANYI, CHAIRMAN KENYA ENVIRONMENTAL
HEALTH AND PUBLIC HEALTH PRACTITIONERS UNION – SIAYA
COUNTY BRANCH APPLICANT**

AND

**OMONDI OWINO, CHIEF OFFICER OF HEALTH, DEPARTMENT OF
HEALTH, COUNTY GOVERNMENT OF SIAYA RESPONDENT**

RULING

1. The applicant filed the instant application on 24th June 2025 under Certificate of Urgency seeking various Orders, including a temporary injunction to restrain the respondents from implementing, or enforcing redeployment/posting Orders, among others.
2. When the matter came up on 1st July, 2025, the court did not certify it urgent but directed service and scheduled inter partes hearing on 23rd July 2025 on which date the respondents had not responded and were accorded a further 3 days at the instigation of Mr. Were Victor.
3. Directions on filing and exchange of submissions were issued on 28th July 2025 in the absence of the respondent’s counsel but who was present on 30th September 2025 and informed the court that the respondent had filed a Notice of Preliminary Objection dated 25th September 2025 and sought direction on its disposal as a matter of priority. Parties were accorded 14 days a piece to file and exchange submissions.
4. The respondent’s Notice of Preliminary Objection is challenging the court’s jurisdiction to entertain the Notice of Motion application and main suit on the premises that they offended Article 159(2) and 234(2)(1) of *the Constitution* of Kenya, Section 9(2) of the *Fair Administrative Action Act* and Section 77(2) of the *County Governments Act* and both ought to be struck out.



Respondent's submissions

5. As to whether the Notice of Preliminary Objection met the threshold of a Preliminary Objection, reliance was placed on the provisions of Section 77(2) of the *County Governments Act* and Section 85 of the *Public Service Commission Act* to urge that the applicant had not exhausted internal dispute resolution mechanisms.
6. Reliance was also placed on the sentiments of the court in *Geoffrey Muthinja & another V Samuel Muguna Henry & 1756 others* [2015] eKLR, *Speaker of the National Assembly V James Njenga Karume* [1992] eKLR, *Secretary County Public Service & another V Hulbhai Gedi Abdille* [2017] eKLR, *Martin Kabubii Mwangi V County Government of Laikipia* [2019] eKLR, *Samuel Otieno Omondi V County Government of Siaya* [2025] and *Antony Miano & Others V Attorney General & others* [2021] eKLR, to submit that the doctrine of exhaustion was so central that it had to be complied with in the instant case and the applicant had not shown whether internal dispute resolution mechanisms had been invoked in compliance with the law.
7. Finally, reliance was placed on the decision in *Ishmael Noo Onyango & another V Siaya County Public Service board and another* [2018] eKLR to urge that the applicant filed the instant suit prematurely and it ought to be dismissed.

Applicant's submissions

8. The applicant argued that the respondent's Notice of Preliminary Objection was a procedural red herring to distract the court from the respondent's misconduct and the case is a constitutional Petition challenging constructive dismissal in disguise-demotion in rank, status and authority effected without due process.
9. Counsel submitted that the Preliminary Objection was misconceived, legally untenable and based on a fundamental misapprehension.
10. According to the applicant, the respondent's Notice of Preliminary Objection did not meet the threshold in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd* [1969] EA 696 as it did not raise a pure point of law and could not challenge the existence of a constitutional claim by side lining them on the basis of procedural issues.
11. That the Public Service Commission's function was limited to review of decisions already made as opposed to determining original violations and it could not grant constitutional remedies such as declaration, certiorari, reinstatement and compensation which are exclusive to the constitutional court and the Preliminary Objection was impermissible.
12. Reliance was placed on the decisions in *Silvanus Lukoko Were V Ministry of Land & Physical Planning & others* Petition No. 4 of 2019 on Civil Service and *Koin V Governor of Kajiado County & another* [2024] KEELRC 289.
13. The applicant further submitted that a redeployment which altered the officer's organizational standing was disciplinary in nature.
14. According to the applicant, Section 77(2)(c) of the *County Governments Act* related to disciplinary control.
15. That the redeployment was a disguised disciplinary action as it was carried out without notice and the respondent neither complied with the Human Resources Policies and Procedures for Public



Service 2016 or Article 236(b) of *the Constitution* of Kenya nor Section 68(1) of the Public Service Commissioner Act.

16. It was the applicant's case that the Public Service Commission was not a neutral forum and the court had jurisdiction to enforce rights and fundamental freedoms under Article 162(2) of *the Constitution* of Kenya.
17. The decision in Samuel Kamau Macharia & another V Kenya Commercial Bank & others was cited on the source of a court's jurisdiction.
18. According to the applicant, the Court of Appeal decision in Secretary County Public Service & another V Hulbhai Gedi Abdille (supra) and Martin Kabubii Mwangi V County Government of Laikipia (supra) were distinguishable.
19. Reliance was also placed on Muthinja Kabiru & others V Muguna & others (supra) to urge that exhaustion cannot oust the court's jurisdiction where fundamental rights had been violated or available remedies were insufficient.
20. The applicant urged the court to find that the Preliminary objection was devoid of merit.

Analysis and determination

21. It is common ground that the applicant is an employee of the Siaya County Government and on 13th June 2025 and 20th June 2025 he and Geoffrey Odhiambo Kokonya were redeployed and posted respectively, which according to them reduced their rank and Mr. Duncan Onyonge Momanyi was on annual leave at the time.
22. The respondent's case was that the redeployment and posting did not reduce the ranks of the employees or affect their salaries.
23. As to whether the respondent's Notice of Preliminary Objection met the threshold, the applicant submitted that it did not as it did not raise a pure point of law and involved factual issues.
24. It requires no emphasis that the classical rendition of what constituted a Preliminary Objection are the sentiments of Law JA and Sir Charles Newbold P. in Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd (supra) as follows;

Law JA

“...A Preliminary Objection consists of a pure point of law which has been pleaded or which arises by clear implication out of the 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 the contract giving rise to the suit to refer the dispute to arbitration...”

25. In the words of Sir Charles Newbold stated:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is usually 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”.

26. Although the applicant submitted that the respondent's Preliminary Objection did not meet the threshold of a Preliminary Objection that it was not a pure point of law, he failed to demonstrate how



- the issues raised was not one of law or what fact, if any, was contested as to whether or not the grievant's had invoked the statutory prescribed internal dispute resolution mechanism.
27. In the court's view, to the extent that the respondent's Preliminary Objection implicated the court's jurisdiction to hear and determine the suit, it met the threshold of a Preliminary Objection as explained by Law JA in the Mukisa Biscuit Case (supra).
 28. It is discernible that the employees had not invoked the appellate mechanism prescribed by the County Governments Act, Public Service Commission Act and the Constitution of Kenya.
 29. The doctrine of exhaustion is a constitutional imperative and contrary to the appellant's submission that it was a procedural red herring, it is not. It has a constitutional underpinning under Article 234(i) and 159(2)(c) of the Constitution of Kenya.
 30. The latter provision, which is mandatory, enjoins courts and tribunals to promote alternative forms of dispute resolution subject to the provisions of Article 159(3) of the Constitution of Kenya.
 31. It is trite law that "jurisdiction is everything" as exquisitely captured by Nyarangi JA in Owners of Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd [1989] eKLR.
 32. Without jurisdiction, the court is obligated to down its tools.
 33. Regrettably, for the employees, the appellate process for persons dissatisfied or affected by decisions of the County Public Service is a constitutional imperative and unless the suit is adjudged as an exception to the doctrine of exhaustion, its course is clearly delineated.
 34. Contrary to the applicant's submission, the constitutional jurisdiction of this court has not been invoked as no violation of a right or fundamental freedom has been alleged.
 35. A redeployment or posting Order are typical human resource mandates and raise no constitutional issues which are not sufficiently captured by statute as such as Employment Act and the Employment and Labour Relations Act among others.
 36. This court has jurisdiction to enforce rights and fundamental freedoms by dint of the provisions of Article 162(2)(a) and 41 of the Constitution of Kenya, but only in matters germane to employment and labour relations as held in United States International University (ISIU) V Attorney General [2012] eKLR, Daniel Mugendi V Kenyatta University & 3 Others [2013] eKLR and Kenya Tea Growers Association & 2 Others V National Social Security Fund & 13 others [2023] KESC 63 (KLR) among others.
 37. The gravamen of the respondent's case is that this court has no jurisdiction to hear and determine this case because the applicant had not exhausted the mandatory internal dispute resolution mechanisms.
 38. Article 234(2)(i) of the Constitution of Kenya provides:

"The Commission shall bear and determine appeals in respect of County Government's Public Service".
 39. This provision mandates the Public Service Commission to hear and determine appeals on all matters relating to County Government's Public Service and is further amplified by the provisions of Section 77 of the County Governments Act and Section 85 and 87(2) of the Public Service Commission Act.

Section 77 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. 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) ...
 - (b) remuneration and terms and conditions of service;
 - (c) disciplinary control;
 - (d) ...
 - (e) ...
 - (f) ...
 - (g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.
40. 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— ...
41. This provision replicates the seven examples identified by Section 77(2) of the [County Governments Act](#).
42. Although Section 77(1) of the [County Governments Act](#) uses the term “may”, the provisions of Article 234(2)(i) of [the Constitution](#) and 85 of the Public Service Commission’s Act are expressed in mandatory tone and are not limited in the type of decision or dispute as long as it relates to employment in the County Public Service and in the considered view of this court, redeployments, posting, transfers are part of the terms and conditions of service and may also be effected as a disciplinary issue, a fact the applicant alludes to in his case.
- See James Tinai Murete & Others V County Government of Kajiado & another, Nailantei Supeyo & 19 others Interested Parties [2023] eKLR (Mumbi Ngugi) J (as she then was).
43. Finally, Section 87(2) of the [Public Service Commission Act](#) provides:
2. A person shall not file any legal proceedings in any court 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.
44. This provision requires that the appellate procedure prescribed by [the Constitution](#) must be complied with before the court’s jurisdiction is invoked otherwise than by exception.
45. These provisions demonstrate beyond peradventure that the Public Service Commission is the first port of call for any person dissatisfied or affected by any decisions in the County Governments Public Service on matters employment generally, unless it is demonstrated that the action fell within the exceptions to the principle of exhaustion.



46. In the instant case, the applicant has not demonstrated any exceptional circumstances in his case and in particular, why the constitutionally ordained dispute resolution was ignored.
47. Courts of law have been consistent on their approach to the principle of exhaustion.
48. In *NGO's Co-ordination Board V E.G. & 4 Others Katiba Institute Amicus Curie* [2023] KESC 17 KLR, the Supreme Court of Kenya held:
- ...Even when superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to the relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the disputes as provided for in the relevant parent statute...
49. 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 administrative remedies”.
50. The Court of Appeal expressed similar sentiments in *Geoffrey Muthinja Kabiru & 2 others V Samuel Murguna & 1750 other* (supra) as follows:
- It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the court is invoked. Courts ought to be a fora of last resort and not the first port of call the moment a storm brews...
- We find and hold that the exhaustion doctrine applies even where as was argued by the appellants herein what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed... and there was always the right acknowledged by the learned Judge of approaching the courts after exhaustion of the church mechanism.
- By failing to do so and quite apart from the force of their apprehension, the appellant’s effectively failed to exhaust their remedies and essentially short-circuited the process by filing suits prematurely”.
51. The foregoing sentiment apply with equal force to the facts of the instant case where the applicant submitted without any shred of evidence that the Public Service Commission was not a neutral forum. That it was a necessary party whose mandate was flouted.
52. It is unclear to the court how the mandate of the Public Service Commission was flouted.
53. Contrary to the applicant’s submission, non-compliance with the law or procedure does not render the action void or null. It renders it irregular or unlawful.
54. Only an adjudicative body can declare the effect of the irregularity unless the law provides otherwise.
55. Contrary to the applicant’s submission that there is no appealable decision in this case, there is and that explains why the applicant rushed to court to challenge the redeployment of Duncan Oyunge Momanyi and the posting of Geoffrey Odhiambo Kotonya.
56. These are decisions by the respondent the applicant is dissatisfied with and both fall within the ambit of Article 234(2)(i) of *the Constitution* of Kenya and Sections 77 of the *County Governments Act* and Sections 85 and 87(2) of the *Public Service Commission Act*.



57. Puzzlingly, the employees did not bother to engage the respondent on the issue or express their dissatisfaction before filing the instant suit. The employees ought to have been reported to the County Public Service Board for deliberation and decision before being escalated to the Public Service Commission.
58. Flowing from the foregoing it is discernible that the applicant's suit is unsustainable for having been filed before the constitutionally prescribed appellate process was complied with. The suit was filed prematurely.
59. The upshot of the foregoing is that the respondent's Notice of Preliminary Objection dated 25th September 2025 has merit and the instant suit is struck out with no Orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 10TH DAY OF NOVEMBER, 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

