



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISUMU

CAUSE NO. E082 OF 2024

KENNETH

OMONDI

OCHIENG.....**CLAIMANT/RESPONDENT**

VERSUS

COUNTY GOVERNMENT
OF HOMA
RESPONDENT/APPLICANT

BAY.....**1ST**

COUNTY PUBLIC SERVICE BOARD
HOMA
RESPONDENT/APPLICANT

BAY.....**2ND**

OFFICE OF THE GOVERNOR
HOMA BAY
RESPONDENT/APPLICANT

COUNTY.....**3RD**

RULING

1. The Application before the Court is dated 26th March 2025. In it, the Respondents are seeking the following orders:

(i) *Spent*

(ii) That this Honourable Court be pleased to stay the *ex parte* judgment dated 26th February 2025 and declare the entire suit together with the proceedings a nullity as the Court was not robed with jurisdiction as per section 87(2) of the Public Service Commission Act.

(iii) That the suit be struck out as the substratum on which it is premised is *ipso facto* incompetent and fatally defective.

2. The application is premised on the grounds apparent on its face and the sworn affidavit of Mr. Mboya Otieno, the Homa Bay Principal Legal Counsel. It is contended that the Claimant, being an employee of the Homa Bay County Government, instituted the suit in disregard of the statutory dispute resolution mechanisms prescribed by law. The Applicants further aver that they only became aware of the suit on 9th December 2024 when it was scheduled for formal proof, by which time they had been locked out of the

pleadings window under Rule 15(1)(3) of the Employment and Labour Relations Court (Procedure) Rules, 2024. Accordingly, they assert that their failure to participate in the proceedings was not deliberate.

3. The Applicants further depose that the Claimant effected service through the email addresses *homabaycountyattorney@gmail.com*, *governor@homabay.go.ke* and *county.psb@homabay.go.ke*, instead of the official service emails *legal@homabay.go.ke* or *county.attorney@homabay.go.ke*. It is thus contended that the alleged service was irregular and that the Applicants were genuinely unaware of the proceedings. In view of the foregoing, the Applicants urge that if the application is declined, an irregularly obtained judgment will be enforced, leading to the loss of public funds. They maintain that the application has been brought timeously, that they are ready and willing to defend the claim, and that no prejudice will be suffered by the Claimant if the orders sought are granted.

4. In opposition, the Respondent filed a replying affidavit sworn by Mr. Vincent Kisukwa the Claimant/Respondent's counsel

on record. He averred that the Court was properly clothed with jurisdiction to hear and determine the matter, and that the *ex parte* judgment was regularly obtained. Counsel asserted that the Applicants were duly served but failed to enter appearance or file a defence. It was his further deposition that on 9th December 2024, when the matter came up for formal proof, counsel for the Applicants logged into Court and attempted to address the Court despite not being formally on record. He averred that out of the Court's indulgence, Counsel was allowed to file written submissions after the formal proof but failed to do so. He therefore deposed that the present application is an afterthought calculated to deny the Claimant the fruits of his judgment and amounts to an abuse of the court process, warranting dismissal with costs.

5. Pursuant to directions issued on 15th May 2025, both parties filed written submissions in support of and in opposition to the application.

Respondents/Applicants' Submissions

6. The Applicants submitted that the default judgment should be set aside as they were never served with pleadings in this suit. They maintained that there was neither verification that the emails were delivered nor proof that summons were served upon the Applicants/Respondents. In support of their position, they highlighted the fact that the Respondent had affected service on the wrong emails. In further support of the application the Applicants submitted that the hearing of the matter without their involvement violated their rights to a fair hearing under Article 50 of the Constitution. To fortify this position, they relied on the cases of **Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR**, **Wachira Karani v Bildad Wachira [2016] eKLR** and **Republic v National Land Commission & 2 others Ex Parte Archdiocese of Nairobi Kenya Registered Trustee (St. Joseph Mukasa Catholic Church Kahawa West) [2018] eKLR**. The Respondents submitted that the Claimant's statement of claim was irregularly prosecuted, hence the Court should set aside the *ex-parte* orders issued on 9th December 2024 and grant them leave to file a response to the suit. Additionally, they assert that they are willing to

comply with any conditions or timelines imposed by the Court for filing their response.

7. On the issue of jurisdiction, the Applicants submitted that this Court lacked jurisdiction to entertain the suit due to the Claimant's failure to exhaust the dispute resolution mechanisms provided in law. They contended that the suit contravened Article 234(2)(i) of the Constitution, section 77 of the County Governments Act, and section 87(2) of the Public Service Commission Act, which require that grievances by county employees be ventilated before the relevant statutory bodies prior to invoking the Court's jurisdiction. Regarding the issue of prejudice, the Respondents submitted that none would be suffered by the Claimant not capable of compensation by costs. They submitted that it would be in the interest of justice if they are allowed their day in court and the suit is heard on its merits. They urged the Court to allow the application as it had been filed timeously.

Claimant/Respondent's Submissions

8. The Claimant/Respondent submitted that the Court was properly clothed with jurisdiction to hear and determine the matter. He relied on the case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR**, where it was held that “jurisdiction is everything,” and that without it, a court must down its tools. To buttress his position the Claimant submitted that section 87(2) of the Public Service Commission Act and section 77 of the County Governments Act only apply where a party is aggrieved by a decision of the County Public Service Board, which was not the case in this suit. He cited the decision in the case of **Abdikadir Suleiman v County Government of Isiolo & 2 others [2016] eKLR**, where the Court held that statutory provisions for alternative dispute resolution mechanisms do not extinguish a court’s jurisdiction but merely hold it in abeyance pending their pursuit. It was the Claimant/Respondent’s assertion that he had been interdicted on 23rd December 2022 but had never been invited to appear before the County Public Service Board or served with any decision following the alleged investigations. In view of the absence of a hearing and subsequent decision

to appeal from the Claimant maintained that section 77(3) of the County Government's Act was never came into play. Moreover, he maintained that in the absence of a decision capable of appeal, he was entitled to invoke the original jurisdiction of the Court under Article 162(2) of the Constitution and section 12(1) and (2) of the Employment and Labour Relations Court Act.

9. On the question of service, the Claimant reiterated that the Applicants were duly served through email addresses available on the County website and were therefore aware of the proceedings. He underscored that their Counsel participated in the formal proof proceedings on 9th December 2024 and was granted the indulgence to file submissions, which he failed to do. Again, relying on the decision in the case of the **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd** (*supra*), the Claimant submitted that a party who fails to raise the issue of jurisdiction at the earliest opportunity cannot be allowed to do so after judgment. The Claimant therefore urged that the application

is an abuse of the court process and ought to be dismissed with costs.

Disposition

10. The Court has considered the rival arguments, the cases cited and the law in coming to this decision. The Respondents have not demonstrated that they were not aware of the suit. The emails used are official emails and if the parties who are now before Court were desirous of defending the suit it would have quite easy to take action upon service through the emails displayed. The failure to participate in the suit resulted in a decision that is now challenged for the alleged failure to present an appeal to the Public Service Board. The decision of the Court was a valid one regularly obtained and therefore one capable of being enforced. The fact that public funds will be lost is neither here nor there as it was an inevitable consequence of failure to follow the law on the part of the Respondents. Having interdicted the Claimant on 23rd December 2022, the Respondents have never invited him to appear before the County Public Service Board. In my considered view, there was no decision capable of being appealed against in terms

of section 87(2) of the Public Service Commission Act. In order to invoke the section, there must be a decision that the employee or former employee can appeal to the Public Service Commission for redress. The foregoing is ample to show that the notice of motion application before me is completely devoid of merit. The application is hereby accordingly dismissed albeit with no order as to costs as the Claimant did not comply with orders of the Court issued on 21st October 2025 barring filing without leave of the Court.

Orders accordingly.

Dated and delivered at Kisumu this 12th day of

November 2025

Nzioki wa Makau, MCI Arb.

JUDGE