



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISUMU

MISCELLANEOUS APPLICATION NO. E068 OF 2025

BRIAN OCHIENG & 348 OTHERS.....

APPLICANTS

VERSUS

SIAYA COUNTY PUBLIC SERVICE BOARD.....**1ST**

RESPONDENT

COUNTY GOVERNMENT OF SIAYA.....**2ND**

RESPONDENT

COUNTY SECRETARY SIAYA COUNTY.....**3RD**

RESPONDENT

OFFICE OF THE GOVERNOR SIAYA.....**4TH**

RESPONDENT

CLERK SIAYA COUNTY ASSEMBLY.....**5TH**

RESPONDENT

RESPONDENT

RULING

1. The 349 Applicants were employed on permanent and pensionable basis to serve the 2nd Respondent as doctors, nurses, public health officers amongst other positions in its health sector. They assert that in December 2024 they were issued with deployment letters, and thereafter commenced duty at their respective workstations. They aver that however, by March 2025 three months into service they had not received any communication regarding their salaries or personal employment numbers. It is their case that on 13th May 2025 a memo was issued attributing the delay in salaries to non-disbursement of funds by the exchequer and that subsequently, a meeting was convened on 1st July 2025 to address the payment of salaries, confirmation of employment, and issuance of employment numbers, but no tangible outcome was achieved. They aver that thereafter on 14th August 2025, the Kenya Union of Clinical Officers issued a demand to the 2nd Respondent seeking, *inter alia*, payment of the Applicants' salaries and that this seems to have added

tinder to the already raging fire and on 11th September 2025 the Applicants were summarily dismissed from employment, despite having rendered diligent service for over eight months. They assert that to compound the alleged illegality, the 3rd Respondent, in what is said to be a usurpation of the 1st Respondent's statutory mandate, announced the termination of the Applicants' services at a public baraza. Despite repeated requests, no reasons for the dismissal were furnished.

2. According to the Applicants, their dismissal was actuated by malice and carried out in a manner wholly inconsistent with the provisions of the Employment Act. Aggrieved, they lodged an appeal before the County Public Service Board. In a bid to preserve the substratum of the appeal and to avert irreparable prejudice, the Applicants have now moved this Court by way of the application dated 30th September 2025 seeking, *inter alia*, orders restraining the Respondents from implementing the decision to terminate their employment pending the hearing and determination of the appeal, as well as orders for reinstatement and payment of their salaries up to September 2025 pending the determination of the appeal.

3. In response to the application the 1st-4th Respondents filed a replying affidavit dated 14th October 2025 as well as a notice of preliminary objection dated 6th October 2025. They contended that this court lacks jurisdiction by virtue of Articles 159(2)(c) and 234(2)(i) of the Constitution, sections 9(2) of the Fair Administrative Actions Act and section 77(2) (a), (d), (e) and (g) of the County Governments Act. They further asserted that injunctive reliefs cannot be granted through a miscellaneous application but only in a substantive suit. Additionally, they averred that the Applicants had failed to demonstrate irreparable harm incapable of compensation by an award of damages. They accordingly urged the Court to uphold the doctrine of exhaustion and dismiss the application with costs. Similarly, the 5th and 6th Respondents filed a replying affidavit dated 29th October 2025 and a notice of preliminary objection dated 23rd October 2025. They avowed that the application offends the exhaustion doctrine as set out in section 13 of the Public Service Commission (County Appeals Proceedings) Regulations, 2022. Additionally, they asserted that the application

offended section 77 of the County Government Act and section 85 of the Public Service Commission Act, which mandate that disputes arising from decisions of a County Public Service Board be appealed to the Public Service Commission. They also relied on section 87(2) of the Public Service Commission Act, which bars the institution of court proceedings prior to exhaustion of the prescribed dispute resolution mechanisms. They maintained that injunctive orders can only issue in a substantive suit and urged the Court to dismiss the application with costs.

4. In rejoinder the Applicants filed a supplementary affidavit sworn by the 1st Applicant on 15th October 2025. He deposed that the miscellaneous application was capable of sustaining the orders sought in the absence of a suit. He emphasized that the County Public Service did not have powers to issue the injunctive orders sought. In respect of the Respondents' assertion that they would not suffer irreparable harm; they contended that their economic rights had been irregularly curtailed hence damages alone could not sufficiently compensate them. They maintained that they had a *prima*

facie case as they were dismissed in total disregard of the law.

5. The Application and the preliminary objections were canvassed by way of written submissions.

Applicants' Submissions

6. The Applicants submit that the court was clothed with jurisdiction under Article 162(2)(a) of the Constitution and section 12 of the Employment and Labour Relations Act. They assert that the application merely seeks to stay enforcement of the 3rd Respondent's decision pending exhaustion of the internal dispute resolution mechanisms before the County Public Service Board. They maintain that the application did not give rise to a decision capable of appeal under section 77 of the County Governments Act. In further support of the application the Applicants submit that the Public Service Commission lacks the power to grant interim injunctive reliefs, thereby justifying recourse to this Court notwithstanding the exhaustion requirement under section 77 of the County Governments Act. They rely on the case of the **Speaker of the National Assembly v Njenga**

Karume [1992] KECA 42 (KLR), in which the Court of Appeal enumerated some of the exceptions to the exhaustion principle that may arise where the statutory mechanism is inadequate to grant appropriate relief. The Applicants further rely on **Kamba & 8 others v County Government of Machakos [2023] eKLR**, where the Court granted orders similar to those sought in the present application.

7. In respect of the preliminary objections, the Applicants submit that the Respondents were conflating an injunction with an order of stay of execution which they were essentially seeking. They assert that they have satisfied the threshold for grant of stay under Order 42 Rule 6(2) of the Civil Procedure Rules, contending that they stand to suffer substantial and irreparable loss and that the appeal would be rendered nugatory if the substratum is not preserved. They further submit that the amount in contention, estimated at Kshs. 180,000,000/-, is substantial. Additionally, they maintain that the appeal raises a *prima facie* case with a high probability of success, relying on **Mrao v First**

American Bank of Kenya Ltd & 2 others [2003] KLR

123. In conclusion they urge the court to dismiss the Preliminary Objections and allow the application with costs.

1st - 4th Respondents' Submissions

8. The 1st - 4th Respondents identify the issues for determination as whether the notice of preliminary objection dated 6th October 2025 is merited and whether the application herein is merited. On the first issue the 1st - 4th Respondent's submit the Applicants' noncompliance with the exhaustion doctrine which is availed under section 77(1) and (2) of the County Governments Act and section 85(c) of the Public Service Commission Act as the first port of call as opposed to the court for resolution of disputes involving recruitment, selection, appointment, qualifications and removal from service is the Public Service Commission. They further submit that section 77 of the County Governments Act is couched in mandatory terms and leaves no discretion to litigants to bypass the prescribed mechanism. They rely on the decisions in the cases of **Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2025] eKLR**, **Speaker of the National Assembly v James Njenga**

Karume [1992] eKLR, and Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017] eKLR, in which the common thread is that courts should only be invoked as fora of last resort where a clear statutory dispute resolution mechanism exists. They further submit that the Applicants' allegation of violation of the right to fair administrative action does not, of itself, exempt them from complying with the exhaustion requirement. Citing **Antony Miano & others v Attorney General & others [2021] eKLR**, the 1st - 4th Respondents assert that constitutional issues equally ought to await determination by the relevant statutory body unless exceptional circumstances are demonstrated, which is not the case in the present application.

9. Regarding the appeal before the County Public Service Board, the 1st - 4th Respondents submit that none is contemplated in law as appeals ordinarily lie to the Public Service Commission and not to the Board whose decision is being challenged. On that basis alone, they submit that the application is incompetent. On whether the application is

merited, the 1st - 4th Respondents submit that once termination has been effected, it extinguishes any subsisting contract capable of being stayed. They therefore contend that granting stay would amount to unlawful interference with managerial discretion. They cite the decision in **Joab Mehta Oudia v Coffee Development Board of Trustees [2014] eKLR** which held:

“The court cannot stay a termination as that would amount to the court unduly interfering with a decision already made by the management within its discretion.”

10. Regarding reinstatement, they submit that it is in the nature of a final order and cannot be granted at an interlocutory stage. They emphasize that section 49(3)(a) of the Employment Act permits reinstatement only after a full hearing on the merits. They rely on the Court of Appeal decision in **Kenya Airways Limited v Allied & Aviation Workers Union Kenya & 3 others [2014] eKLR**, where it was held that reinstatement should only be granted in exceptional circumstances where it is just and practicable.

Accordingly, they urge the Court to uphold their Preliminary Objection and dismiss the application with costs.

5th - 6th Respondents' Submissions

11. The 5th - 6th Respondents identify the issues for determination as whether their preliminary objection dated 23rd October 2023 is merited and whether the application is meritorious. On the first issue they submit that this court lacks jurisdiction to issue interim or injunctive orders in respect of a matter pending before the Commission. They assert that by rightfully filing their appeal before the Commission the Applicants clearly acknowledged this court's lack of jurisdiction. They rely on section 87(2) of the Public Service Commission Act, which bars the institution of court proceedings in matters within the Commission's appellate jurisdiction before exhaustion of the prescribed procedure. They further submit that the Commission is empowered by Regulation 13 of the Public Service Commission (County Appeals Procedures) Regulations to hear and determine interim applications. They thus assert that the Applicants' failure to invoke this rule constitutes a violation of the exhaustion doctrine under section 87(2) of the Public Service

Commission Act. They place reliance on the Court of Appeal decision in the case of **Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017] eKLR**, which affirmed that where a statute provides an adequate and specialized dispute resolution mechanism, parties must exhaust that mechanism before invoking the court process. They further submit that the Applicants have failed to demonstrate that their case falls within any of the recognized exceptions to the exhaustion doctrine as articulated in **Republic v Kenyatta University ex parte Ochieng Orwa Domnick & 7 others [2018] eKLR**, in the following terms:

“What emerges from our jurisprudence in these cases are at least two principles: - First, while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved - including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. The High Court may, in exceptional

circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. Indeed, in this case, no such argument was advanced before me nor can I discern any virgin argument touching on Constitutional interpretation. The second principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the Court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. The rationale behind this reasoning is that statutory provisions ousting Courts jurisdiction must be

construed restrictively. This argument was not advanced before me nor do I discern it from the facts of this case.”

12. On the merits of the application, the 5th and 6th Respondent submit that only a court clothed with jurisdiction can grant the orders sought. They maintain that this court lacks jurisdiction over matters pending before the Public Service Commissions and should therefore decline the invitation to grant interim orders. They rely on **Oliver Mukhebi & 28 others v County Public Service Board of Bungoma & another [2022] eKLR**, where the court held that it can only grant interim injunctive relief upon establishing a *prima facie* case in respect of a dispute over which it has jurisdiction. They submit that the principles in **Giella v Cassman Brown [1973] EA 358** can only be applied where the court is properly seized of the subject matter. They further assert that granting the orders sought would amount to interfering with the unfettered appellate jurisdiction of the Public Service Commission and would be an exercise in futility, as the Court cannot issue interim relief

in a matter over which it lacks jurisdiction. Consequently, they urge the court to dismiss the application with costs.

Disposition

13. The Court distils the only issues for determination to be (i) whether the court has jurisdiction in light of the exhaustion doctrine and (ii) whether the orders sought by the Applicants can be sustained in the absence of a suit.

14. The arguments made in the preliminary objections raised by the Respondents is that the Miscellaneous Application offends the exhaustion doctrine as set out in section 13 of the Public Service Commission (County Appeals Proceedings) Regulations, 2022. Additionally. The Respondents assert that this suit offends section 77 of the County Government Act and section 85 of the Public Service Commission Act which mandate that disputes arising from decisions of a County Public Service Board be appealed to the Public Service Commission. The Respondents further call in aid section 87(2) of the Public Service Commission Act which bars the institution of court proceedings prior to exhaustion of the

prescribed dispute resolution mechanisms under the Act. On this premise, the Respondents urge the Miscellaneous Application be dismissed with costs.

15. In response, the Applicants assert that their right to seek interim relief is covered by Article 162(2)(a) of the Constitution and section 12 of the Employment and Labour Relations Act. The Applicants assert the Miscellaneous Application seeks to stay the implementation of the decision of the 3rd Respondent.

16. In the case of **Secretary, County Public Service Board & another v Hulbhai Gedi Abdille** (*supra*) the Court held that where a statute provides an adequate and specialized dispute resolution mechanism, parties must exhaust that mechanism before invoking the court process. The exhaustion doctrine does not preclude the jurisdiction of the Court. As held in the case of **Republic v Kenyatta University ex parte Ochieng Orwa Domnick & 7 others** (*supra*) it was held that there are instances where the exhaustion doctrine is inapplicable. These exceptions include instances where the exhaustion requirement would not serve

the values enshrined in the Constitution or law and that this exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. A Court is required to undertake an analysis to determine whether the exemptions to the exhaustion doctrine arise. In this case, the Applicants themselves have indicated the Miscellaneous Application was initiated to avail of the interim relief of injunctioning the implementation of the decision of the 3rd Respondent. This does not, in my considered view fall within the exceptions to the exhaustion doctrine. I therefore would find the first issue is resolved in favour of the Respondents. The jurisdiction of the Court seems to be invoked prematurely.

17. On the second issue, it is argued by the Respondent that the Miscellaneous Application is the improper vehicle for the relief sought by the Applicants. The argument is that the injunctive orders sought cannot be granted in the absence of a substantive suit. The case of **Giella v Cassman Brown** (*supra*) is called in aid on the question of what qualifies as

matters falling within the realm of injunctive relief. Clearly, in order to anchor relief on injunctive nature, there ought to be a suit whether it be a petition, cause, judicial review or any other recognised form of instituting a suit such as originating summons or motion within which the injunctive relief may be sought. It is not within the province of Miscellaneous Applications for a party to seek injunctive relief within the application. The remit of miscellaneous application is limited to enforcement of a final order. They are hardly the place for the institution of the case. As such, I am persuaded the preliminary objections raised have merit and accordingly dismiss the Miscellaneous Application before me with costs to the 1st to 6th Respondents.

Orders accordingly.

Dated and delivered at Kisumu this 15th day of

December 2025

**Nzioki wa Makau, MCI Arb.
JUDGE**