



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISUMU

CAUSE NO. E088 OF 2025

JOHN APOLLO OLOO.....**CLAIMANT**

VERSUS

HOMA BAY COUNTY

GOVERNMENT.....**RESPONDENT**

RULING

1. The Claimant filed this suit via a memorandum of claim dated 26th September 2025 and filed in court on 3rd November 2025, alleging breach of contract and seeking payment of outstanding gratuity. In response, the Respondent filed a Notice of Preliminary Objection dated 4th

November 2025, challenging the competence of the suit on the following grounds:

(i) The Court has no jurisdiction to entertain the Applicant's Application.

(ii) That the Application is frivolous, an abuse of the court process, made in bad faith, against public interest and an attempt by the Claimants to bypass the set out procedure as set by the law.

(iii) That the orders sought cannot be granted as the Honourable Court lacks jurisdiction to issue the orders as per section 87(2) of the Public Service Commission Act which states that:

"(2) A person shall not file any legal proceedings in any court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from county government service unless the procedure provided under this part has been exhausted."

(iv) That the Memorandum of Claim dated 26th September, 2025 is an abuse of the court process and a waste of the court's time as there are statutory laws

laid out with regards to handling complains raised by an employee of the County Government, this is per Article 234(i) of the Constitution, section 87(2) of the Public Service Commission Act and section 77 of the County Governments Act.

(v) That the Respondent state that the dispute between the parties herein, is one that lies in the first instance to the Public Service Commissions and the Applicant has not led any evidence to show that he has attempted alternative dispute mechanism as provided for under the Constitution, County Government Act and the Public Service Commission Act, before invoking the jurisdiction of this Court.

(vi) That the substratum upon which the instant application is premised is *ipso facto* incompetent, fatally and hopelessly defective thus, both the application and the entire suit herein should be struck out with costs.

2. The preliminary objection was canvassed by way of written submissions.

Respondent's Submissions

3. In support of the preliminary objection the Respondent identifies the following issues for determination:

- (i) Whether this court has jurisdiction to hear and determine the suit;
- (ii) Whether the Claimant has exhausted the alternative dispute resolution mechanisms under the law; and
- (iii) Whether the Claimant will suffer prejudice.

4. On the first issue the Respondent submits that disputes arising from the county public service employment fall, in the first instance, within the mandate of the Public Service Commission pursuant to Article 234(2)(i) of the Constitution, section 77(1) of the County Governments Act and section 87(2) of the Public Service Commission Act. It submits that these provisions impose a mandatory obligation on aggrieved parties to lodge appeals before the Commission prior to approaching Court. On this basis, the Respondent urges this Court to decline jurisdiction, relying on **Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd**

[1989] KLR 1, which held that jurisdiction is everything, and without it a court has no power to make one more step.

5. On exhaustion the Respondent submits that the Claimant has not demonstrated evidence of filing an appeal neither has he disclosed its subject matter or status. It asserts that in the absence of this information, the court risks duplicating or conflicting with the Public Service Commission. It relies on **Geoffrey Muthinja Kabiru v Samuel Muguna Henry & 1756 others [2015] eKLR** and **Republic v NEMA [2011] eKLR**, both of which underscore that courts should act as a forum of last resort where a clear statutory dispute resolution mechanism exists outside court. The Respondent further submits that the Claimant neither invoked judicial review to compel the Commission to act nor demonstrated that the statutory mechanism for exhaustion was ineffective or unavailable. It also asserts that there is no indication that the Claimant took meaningful steps to inquire on the progress of the appeal. To buttress its point, it cites the case of **Mutanga Tea & Coffee Company Ltd v Shikara Ltd & another [2015] eKLR**. The Respondent therefore,

maintains that entertaining the suit at this stage is tantamount to usurping the mandate of the Public Service Commission.

6. On the third issue, the Respondent submits that the Claimant will not suffer any prejudice if the Court declines jurisdiction. It asserts that the exhaustion doctrine reflects a deliberate policy choice to entrust the PSC with primary responsibility over employment disputes in public service. In any case, the Respondent contends that if at all there is any prejudice, it is self-inflicted by the Claimant's failure to actively pursue the appeal before the PSC. The Respondent urges the Court to balance any alleged prejudice against the public interest in preserving the integrity of constitutional and statutory institutions, citing **Speaker of the National Assembly v Njenga Karume [1992] KLR**, which held that:

"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure must be strictly followed."

7. Consequently, the Respondent urges the court to uphold the Preliminary Objection and strike out the suit with costs.

Claimant's Submissions

8. In response, the Claimant identifies three issues for determination:

- (a) whether the Notice of Preliminary Objection is proper;
- (b) whether this Court has jurisdiction to hear and determine the suit; and
- (c) who should bear the costs.

9. On the propriety of the Preliminary Objection, the Claimant submits that it is improper and ought to be dismissed for being based on strange and misleading facts. He avows that the objection does not arise from the pleadings, as it seeks dismissal of a non-existent application. Further, the Appellant asserts that the Respondent's submissions introduce inconsistent and misleading facts, raise grounds not contained in the objection, and falsely allege that he filed an appeal before the Public Service Commission. The Claimant

maintains that no replying affidavit exists neither has he lodged an appeal before the PSC as alluded to in the submissions. In support of his position reliance is placed on **Nyagudi v Agricultural Finance Corporation & 2 others (2023) KEHC 1322 (KLR)**, which held that a preliminary objection must arise by clear implication from the pleadings, must be based on a pure point of law and proceed on the assumption that the facts pleaded are correct.

10. On the second issue the Claimant submits that this Court is properly seized of jurisdiction by virtue of Article 162(2)(a) of the Constitution and section 12 of the Employment and Labour Relations Court Act, which vest the Court with jurisdiction over disputes arising from employer-employee relationships. He emphasizes that the claim relates to non-payment of gratuity and reiterates that jurisdiction flows from the Constitution or statute and cannot be assumed otherwise, relying on **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & others [2012] eKLR**. Additionally, the Claimant submits that no decision capable of appeal to the PSC was made. He relies on section

77 of the County Government's Act that limits the jurisdiction of the PSC to appeals on a decision by either the County Public Service Board or any person exercising disciplinary control over a county public officer. He also invokes the Fair Administrative Action Act, which defines a "decision" as an administrative or quasi-judicial determination made, proposed to be made, or required to be made.

11. In the absence of a decision amenable to appeal, the Claimant contends that sections 85 to 89 of the Public Service Commission Act are inapplicable. He maintains that he approached the Court due to the Respondent's inaction and the imminent risk of limitation, and that dismissing the suit on exhaustion grounds would occasion a miscarriage of justice. On costs, the Claimant urges the Court to award them against the Respondent, asserting that the Preliminary Objection was intended to waste judicial time. He reiterates that costs follow the event and lie within the discretion of the Court. Ultimately, the Claimant prays that the Preliminary Objection be dismissed with costs for want of merit.

Disposition

12. The issues that fall for determination are aptly captured by the Respondent herein and these are:

- a. Whether this court has jurisdiction to hear and determine the suit;
- b. Whether the Claimant has exhausted the alternative dispute resolution mechanisms under the law; and
- c. Whether the Claimant will suffer prejudice.

13. The first question that arises for determination is: does this Court have jurisdiction to hear and determine the suit herein? The Respondent asserts that the Court lacks jurisdiction to issue the orders sought by the Claimant on account of section 87(2) of the Public Service Commission Act. The said section provides as follows:

"(2) A person shall not file any legal proceedings in any court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from county government service unless the procedure provided under this part has been exhausted."

14. The Court returns that it has jurisdiction to hear and determine the claim. That is to say that the section referred to above does not by any stretch of the imagination oust the jurisdiction of this Court granted in Article 162(2)(a) of the Constitution as read with section 12 of the Employment and Labour Relations Court Act.

15. The question of exhaustion is one that has plagued the courts since it was introduced. In the case of **Republic v Kenyatta University ex parte Ochieng Orwa Domnick & 7 others [2018] eKLR**, the Court held as follows:

“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. ...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."

16. Where the ouster of a Court's jurisdiction is at play, the interpretation of the provisions in question must be construed in the most restrictive manner possible. This is

because it is anathema to the administration of justice if the courts endowed with jurisdiction to handle a category of matters is deprived of that jurisdiction by a subordinate body. That can never be the intention of Parliament.

17. What is the fate of an employee who fails to trigger the appeal mechanism under the Public Service Commission? Does the Public Service Commission have the bandwidth to handle all appeals from disgruntled employees in the Counties? I hazard to state NO! In sum, the second reason for the failure of the success of the ouster clause holds sway for me in regard to the dispute before me. As the ouster clause in the case before me offends the tenets of justice as the jurisdiction of the Court on matters employment supersedes the Public Service Commission, I find that there is jurisdiction reposed in this Court to hear the claim on gratuity.

18. The second question is whether the Claimant has exhausted the alternative dispute resolution mechanisms under the law. The short answer to this is that it is apparent

the Claimant has not exhausted the alternative dispute mechanisms under the law. This does of itself deprive the Claimant of the right to approach the Court or conversely, strip the Court of jurisdiction to entertain the suit.

19. The final question posed by the Respondent is whether the Claimant will suffer prejudice. The answer to this is that it would be prejudicial to the Claimant if the issue he seeks to have resolved is not determined by a competent tribunal or court. It therefore means the Claimant would be prejudiced if the claim was not heard and determined. In giving this answer the Court is alive to the fact that the Claimant's claim cannot be presented to the Public Service Commission as the time to present it long lapsed.

20. The foregoing is sufficient to show that the preliminary objection fails and is accordingly dismissed, albeit with no order as to costs.

Orders accordingly.

Dated and delivered at Kisumu this 15th day of

December 2025

Nzioki wa Makau, MCIArb.

JUDGE

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