

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT NAIROBI

ELRC JUDICIAL REVIEW NO. E055 OF 2025

(Before Hon. Lady Justice Hellen Wasilwa, J)

HARVEY MULEI MBITHI.....
.....APPLICANT

VS

MAKUENI COUNTY PUBLIC SERVICE BOARD....1ST
RESPONDENT

THE PUBLIC SERVICE COMMISSION.....2ND
RESPONDENT

RULING

1 The Applicant filed a Notice of Motion dated 1st July 2025 seeking orders that: -

- 1) *Spent*
- 2) *Pending inter partes hearing and determination of this application, an order is hereby issued restraining the 1st Respondent from inviting, summoning, requesting convening and or compelling the Applicant to attend meeting(s), hearing(s) and or any gathering(s), to discuss and or deliberate on issues touching on the Applicant's employment status, whilst the same is pending before this Court.*
- 3) *Judicial Review orders are hereby granted, including;*

- a) an order of **certiorari** to bring to this Court and quash the Decision by the 2nd Respondent, dated 27th August 2025, to dismiss the Applicant's Review in County Review No. 007 of 2025 and uphold the Decision in County Appeal No. 043 of 2024.
- b) an order of **certiorari** to bring to this Court and quash the Decision by the 1st Respondent, vide the letter dated 25th March 2024, to deny the Applicant's request for leave of absence/ secondment.
- c) an order of **prohibition** restraining the 1st Respondent from unlawfully acting upon the decision(s) by the 2nd Respondent and or enforcing or continue to enforce or maintain the decision to deny the Applicant leave of absence/ secondment.
- 4) The costs of this application be provided for.

Applicant's Case

- 2 The Applicant avers that he is currently employed by the Government of Makueni County as the Chief Officer-Health, Human Resource Management and Administration, having previously served the County as a Senior Pharmacist from 2010.
- 3 The Applicant avers that vide a letter dated 20th March 2024, he requested the 1st Respondent to grant him leave of absence/ secondment to enable him take up the new role. This request was in line with the 1st Respondent's

prevailing human resource policy, principles and provisions of public service.

- 4 The Applicant avers that the 1st Respondent vide a letter date 25th March 2024, denied his request and informed him that its decision was based on discussions held by its board wherein they considered an advisory by the Council of Governors dated 29th July 2022 and its own resolution of 2022 regarding serving officers wishing to take up contractual jobs within the county public service.
- 5 The Applicant avers that he was a public officer serving the Government of Makueni County as a Senior Pharmacist, but nevertheless shortlisted and recommended him to the Governor for appointment as a Chief Officer, despite its alleged resolution and the advisory by the Council of Governors.
- 6 The Applicant avers that vide the appeal dated 28th May 2024, appealed to the 2nd Respondent, being County Appeal No. 043 of 2024, and sought to set aside the 1st Respondent's decision to deny him leave of absence.
- 7 In its response dated 18th June 2024, the 1st Respondent admitted that if the Applicant had secured such contractual position in a different administration, the 1st Respondent would not hesitate to release him as guided by the relevant statutes governing employment within the public service.

- 8 It is the Applicant's case that it was conclusive and apparent that the 1st Respondent acted maliciously, illegally and *ultra vires* its mandate, in denying the Applicant's request for leave of absence.
- 9 The Applicant avers that to date, the 1st Respondent has never supplied him with the resolution of 2022 regarding serving officers, the advisory by the Council of Governors and minutes of the board meeting that deliberated and denied his request and the legal instruments relied on in making the decision.
- 10 The Applicant avers that he filed an application for review dated 7th March 2025, being County Review No. 007 of 2025. The review was based on new information obtained by the Applicant was a letter dated 8th July 2024 where the 2nd Respondent had issued an advisory to the 1st Respondent and the County Secretary- Makueni County. Unfortunately, despite being aware and or seized with this letter, the Respondent did not file it as part of its documents in the appeal and or disclose the same to the Applicant and the 2nd Respondent.
- 11 It is the Applicant's case that the 2nd Respondent's advisory to the 1st Respondent stated as follows:
- i. The Advisory of the Council of Governors on resignation upon appointment on contractual terms lacks the support of the laws, policies and guidelines governing employment and terms and conditions of service in the public service;*

- ii. It is against human resource best practice to force serving officers appointed on contracts to serve for the tenure of the Governor to relinquish their permanent and pensionable status in the public service;*
- iii. Appointment of officers from within the County Public Service to take up higher positions that are contractual is not only important for the growth and development of the officers but also provides them with the much-needed opportunity to exercise leadership, a motivation to the others and enhances employees experience;*
- iv. The MCPSB [1st Respondent] to reconsider its stand on leave of absence, customize and align its human resource policies and practices with the Regulations that are obtaining in the National Government as this will ensure standardization and fairness in the service.*

12 The Applicant avers that in compliance with Regulation 18, 24(9) and 29(a) of the Public Service Commission (County Appeals Procedures) Regulations, he requested the 2nd Respondent vide a letter dated 16th June 2025, to provide directions on how the review will be disposed, that is, either by hearing or through written submissions.

13 The Applicant avers that by an email dated 18th June 2025, the 2nd Respondent informed him that upon processing the application, a decision would be communicated. The 2nd Respondent failed, ignored and or refused to advise and or

invite the Applicant for a hearing and or direct that he files written submissions.

- 14 It is the Applicant's case that he was not afforded an opportunity to be heard and or address the merits of his review, in line with the laid-out procedures. This omission by the 2nd Respondent infringed on his right to fair administrative action and to a fair hearing under Article 47(1) & 50(1) of the Constitution.
- 15 The Applicant avers that by an email dated 2nd September 2025, the 2nd Respondent communicated to him the 1st Respondent's decision dated 27th August 2025 in which it dismissed his application for review and upheld the decision it delivered in County Appeal No. 043 of 2024.
- 16 This was despite the 2nd Respondent's own advisory dated 8th July 2024 in which it admonished the 1st Respondent's approach to the Applicant's request for leave of absence/secondment. To cover up, the 2nd Respondent conceded that it was well aware of the advisory prior to making its decision on the County Appeal. However, in the entire decision dated 26th February 2025, the 2nd Respondent does not mention, refer to or acknowledge this advisory.
- 17 The Applicant avers that when he applied to be supplied with copies of all the documents filed in the County Appeal so that he could prepare the application for review, the advisory letter was not part of the documents that were supplied to the Applicant, from the 2nd Respondent's file.

- 18 It is the Applicant's case that if indeed the 1st Respondent supplied the 2nd Respondent with the advisory, the 2nd Respondent should have supplied, or directed the 1st Respondent to serve, the Applicant with the said advisory in furtherance of Article 35(1)(b) of the Constitution.
- 19 The Applicant avers that Article 234(2)(i) of the Constitution donates to the 2nd Respondent the power to hear and determine appeals in respect of county government's public service. Further, Section 74 & 75 of the Public Service Commission Act gives the 2nd Respondent the power, after considering an appeal or an application for review respectively, to among others, uphold the decision, set the decision aside, vary the decision, among other directions.
- 20 Despite this, the 2nd Respondent dismissed the Applicant's application for review on its unlawful and erroneous finding that it cannot compel the 1st Respondent to grant leave of absence, when it is vested with the power to set aside a decision made by the 1st Respondent and give appropriate directions with respect to that decision. Further, the 1st Respondent did not present any legislation to support its decision to deny the Applicant's request, as none exists.
- 21 The Applicant avers that the *1st Respondent relied on the Council of Governors advisory in denying his request. In its advisory of 8th July 2024, the 2nd Respondent noted that*

the Advisory of the Council of Governors on resignation upon appointment on contractual terms lacks the support of the laws, policies and guidelines governing employment and terms and conditions of service in the public service. However, the 2nd Respondent upheld the decision by the 1st Respondent.

- 22 It is the Applicant's case that the 1st and 2nd Respondents decisions dated 25th March 2024 and 27th August 2024, are unreasonable, irrational, illegal, *ultra vires*, unconstitutional as they abrogate every existing right to fair administrative action and to fair hearing, and are a manifest erroneous application of the law.
- 23 The Applicant avers that the 1st Respondent has invited him for a hearing on 8th September 2025, to deliberate on his employment status. This hearing is prejudicial to the Applicant, as he is yet to exhaust the available dispute resolution forums, and *sub judice* the instant motion. This Court has the jurisdiction to intervene and ensure that the Applicant's right under Article 50(1) of the Constitution is observed, protected and upheld.

1st Respondent's Case

- 24 In opposition to the application, the 1st Respondent filed a replying affidavit dated 28th October 2025, sworn by its Secretary/CEO, CS CHRP Redempta Kavindu.
- 25 The 1st Respondent avers that the Applicant is well aware that the tenure of office of the 1st Respondent is ending on

7th January, 2026 and therefore he has mastered delay tactics in an effort to actualize his personal interests that are not anchored in any regulation and or policy nor meant for the good of the county public service of Makueni County.

- 26 The 1st Respondent avers that the Applicant's indication that he could not file his submission on time as directed by the Court due to lack of minutes by the 1st Respondent is another tactic to further delay the determination of this matter. If indeed, the Applicant is sure that he is seeking from this Court what is genuinely right, he should present such facts and allow the Court make an informed determination on the matter.
- 27 The 1st Respondent avers that it has not failed, refused and or ignored to supply any information sought by the Applicant if indeed he has ever sought any such information. The Applicant's Supporting Affidavit bears witness that the email was send on 11th April, 2024 and that was before the impugned decision was made and therefore it is misleading for the Applicant to attempt to mislead the Court that since filing of the present matter he has sought and be denied of any information.
- 28 It avers that its the decision and/resolution was made in exercise of its Statutory mandate and details of the same are matters of public records which are always available to any member of the public upon request.

- 29 The 1st Respondent denies the averment that it holds undisclosed records concerning county staff or Board Members on leave of absence; this claim is without foundation. It avers that there are no officers, whether Board Members or otherwise, currently or during the relevant period, on leave of absence within the county public service.
- 30 The 1st Respondent avers that the other officers who were appointed to serve as Chief Officers tendered their resignation pursuant to its Advisory dated 19th December 2022.
- 31 It is the 1st Respondent's case that being an ardent observer of the human resource regulations and policies, has not issued any leave of absence to serving officers within the County Public Service nor is there any member of the Board who is serving under such secondment.
- 32 The 1st Respondent avers that leave of absence for contractual appointments is a discretionary provision under the law, contingent on specific conditions which do not apply to the Applicant's circumstances. The 1st Respondent's decision not to grant such leave was a proper and lawful exercise of its discretion.
- 33 The 1st Respondent avers that the Applicant's pursuit of leave of absence lacks merit, a fact underscored by the dismissal of similar requests on two prior occasions by the 2nd Respondent.

34 It avers that in a demonstration of good faith, it provided the Applicant with the option to choose one position and relinquish the other, allowing for a competitive and transparent filling process. The responsibility for this choice rests solely with the Applicant.

35 The 1st Respondent avers that it acted within its powers in reaching the determination that it shall not grant leave of absence to serving officers. Section 59 of the County Governments Act, 2012 has been amended by insertion of new Section on independence of the County Public Service Board as follows:

“In the performance of its functions under this Act, the county public service board shall: (a) be independent and shall not be subject to the direction or control of any other person or authority; and (b) adhere to the Constitution, this Act and any other relevant law.”

36 It is the 1st Respondent’s case that the Applicant was, or ought to have been, aware that accepting the Chief Officer position would necessitate resignation from his substantive post. His failure to do so, and his subsequent litigation, suggests an attempt to use this Court for a purpose for which it was not intended, thereby offending the principle of clean hands.

2nd Respondent’s Case

- 37 The 2nd Respondent avers that it is established under Article 233(1) of the Constitution. Under Article 234 (2)(i) it is bestowed the mandate to hear and determine appeals in respect of county governments' public service.
- 38 The 2nd Respondent avers that it considered the Applicant's Appeal dated 28th May, 2024 in line with the Public Service Commission (County Appeals Procedures) Regulations, 2022 and communicated its decision, delivered on 26th February, 2025, vide a letter dated 27th February, 2025.
- 39 Aggrieved, the Applicant filed an application for review dated 7th March, 2025 at the Commission on 10th March, 2025. The 1st Respondent was to file a response by 24th March, 2025 and did not do so.
- 40 The 2nd Respondent avers that pursuant to Regulation 24(7), it determined that there was no need for the parties to the appeal to file written representations and proceeded to determine the application for review on its merit.
- 41 The 2nd Respondent avers that the Applicant was afforded an opportunity to be heard as the Commission considered his application for review on its merit. The Public Service Commission (County Appeals Procedures) Regulations, 2022 allows the Commission to proceed and determine a matter without a hearing or written representation where it determines that the information provided is sufficient.

- 42 The 2nd Respondent avers that the Commission issues advisories to County Governments, upon request. The advisories outline the best practices in the National Government, and the Commission advises the County Government to align its policies if they find it fit.
- 43 It is the 2nd Respondent's case its advisories are not based on an appeal and if the county does not align its policies as advised, the Commission considers the appeal within the County's existing policies and as it cannot force the county to implement national government laws, regulations and policies.
- 44 The 2nd Respondent avers that it has no record of the Applicant applying to be supplied with copies of documents filed in the County Appeal and the advisory referred to did not form part of the County Appeal matter as it was prepared and dispatched under file Ref. No. PSC/EMCS/29/XIII/(29) while the County Appeal file was Ref. No. PSC/CAP/17/043/2024.
- 45 It avers that the 1st Respondent's letter Ref. No. MCPSB/PSC/62/SEPT/2024 dated 23rd September, 2024 brought the Commission's attention to the advisory states that on the same date that the advisory was issued, directions on filing of submissions had been given. This clearly illustrates that the advisory did not form part of the County Appeal file.

- 46 The 2nd Respondent avers that it considered the Applicant's Appeal and application for review in line with the Respondent's existing policy on leave of absence. And the Applicant afforded was afforded an opportunity to be heard and exercised its constitutional and statutory powers accordingly.
- 47 The 2nd Respondent avers that in arriving at its decision, it considered the powers and functions of the 1st Respondent as set out under Article 235 of the Constitution and Section 59 of the County Government Act.
- 48 It is the 2nd Respondent's case that the commission in exercise of its powers under Article 234(2)(i) of the Constitution and Part XV of the Public Service Commission Act as read together with the Public Service Commission (County Appeals Procedures) Regulations, 2022 is guided by existing Laws, Regulations and Policies governing the County Government Public Service against which the Appeal has been filed.
- 49 The 2nd Respondent avers that its decision was reasonable, rational, legal and constitutional as it complied with the Constitution, the Public Service Commission Act and the Public Service Commission (County Appeals Procedures) Regulations, 2022.

Applicant's Submissions

- 50 The Applicant submitted on two issues: whether the 1st and 2nd Respondents, in declining to grant the Applicant leave of absence and in rendering the impugned decisions, acted ultra vires, unreasonable and violated the Applicant's legitimate expectation; and whether the Applicant has satisfied the legal threshold for the grant of judicial review remedies.
- 51 On the first issue, the Applicant submitted that the 1st Respondent's recruitment advertisement for the position of Chief Officer, Human Resource and Administration contained no requirement that serving public officers must resign from their substantive posts prior to appointment. Having fully satisfied all qualifications, the Applicant was shortlisted, vetted, and duly appointed by the competent authorities. It is therefore unlawful for the 1st Respondent to retroactively introduce a resignation requirement that was never part of the recruitment criteria.
- 52 The Applicant submitted that was duly appointed as Chief Officer, Human Resource and Administration, pursuant to Article 235(1) of the Constitution of Kenya, the County Governments Act, and Section 11(2) of the Public Appointments (County Assemblies Approval) Act. He was subsequently designated as an Accounting Officer in charge of Human Resource in the Health Services Department, which appointment he duly accepted. The appointment followed a transparent and lawful process that included shortlisting, recommendation by the 1st

Respondent, gubernatorial nomination, vetting by the County Assembly, and formal approval. The County Assembly's report confirms that the Applicant's appointment was procedurally regular and valid.

53 The Applicant submitted that the 1st Respondent has sought to frustrate the Applicant's appointment by invoking a purported policy requiring resignation that is non-existent in law or practice. The 2nd Respondent, in turn, relied on this same non-existent policy to uphold the 1st Respondent's unlawful decision. Notably, the 1st Respondent has no legal or regulatory framework to justify the denial of the Applicant's request for leave of absence and could only be guided by Regulation 38 of the Public Service Commission Regulations, 2020, which expressly entitles public officers to apply for and be granted leave of absence.

54 It is the Applicant's submissions that the 1st and 2nd Respondents' decision was *ultra vires*, irrational, and unreasonable, having been made in disregard of the applicable statutory framework and the Public Service Commission's Advisory dated 8th July 2024, which expressly stated that:

"The Advisory of the Council of Governors on resignation upon appointment on contractual terms lacks support of the laws, policies, and guidelines governing employment and terms and conditions of service in the public service."

- 55 The Applicant submitted that the County Assembly of Makueni, through its Advisory dated 6th May 2024, expressly affirmed that the governing legal framework on matters of leave of absence for the County Public Service is Regulation 38 of the Public Service Commission Regulations, 2020, which entitles public officers to leave of absence for the purpose of taking up contractual appointments within a public body.
- 56 The Applicant submitted that by failing to adhere to the statutory and policy framework governing leave of absence for public officers, the 1st Respondent acted beyond its scope of lawful authority and in contravention of the principles of fair administrative action under Article 47 of the Constitution and Section 4 of the Fair Administrative Action Act, 2015.
- 57 It is the Applicant's submission that if the 2nd Respondent found the advisory by the Council of Governors to be without legal basis and thus a nullity in law, it remains inexplicable why the 2nd Respondent failed to subject the 1st Respondent's decision, which was wholly premised on that very illegal Council of Governor's advisory to the same fate, given that the 1st Respondent relied entirely on the impugned advisory to deny the Applicant's request for leave of absence. This inconsistency renders both decisions *ultra vires*, irrational, and unreasonable, warranting their quashing by an order of certiorari.

58 The Applicant cited ***Macfoy v United Africa Co. Ltd [1961] 3 All E.R. 1169*** that:

“if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

59 It is the Applicant’s submission that consequently, the 1st Respondent’s decision dated 25th March 2024 cannot stand as lawful, automatically rendering all subsequent proceedings and decisions, including the 2nd Respondent’s decision dated 27th August 2025, null and void.

60 The Applicant submitted that his legitimate expectation was violated. This expectation arose from the prevailing statutory framework, long-established public service practice, and the express advisory issued by the Public Service Commission. The Applicant had a legitimate expectation that his application for leave of absence would be considered and determined lawfully, fairly, and in accordance with due process.

61 The Applicant submitted that the 1st Respondent, in its Replying Affidavit sworn on 28th October 2025, has admitted, albeit indirectly, that there are Chief Officers

presently serving and who have not resigned from their substantive positions. The Applicant had a legitimate expectation that he would be accorded similar treatment as those officers. However, he was instead subjected to discrimination and victimization, frustrating and defeating that expectation in its entirety.

- 62 The Applicant submitted in ***Wangari v National Police Service & 2 others (Petition E049 of 2025) [2025] KEELRC 2139 (KLR) (21 July 2025) (Judgment)*** agreed with the Petitioner's argument that selective treatment amounts to discrimination, contrary to Article 27 of the Constitution of Kenya, which guarantees equality and freedom from discrimination. Similarly, in the present case, the 1st Respondent has selectively denied the Applicant leave of absence, while other officers in comparable circumstances have been granted such leave.
- 63 The Applicant submitted that the 1st Respondent's failure to produce minutes of deliberations, records of previous leave applications, or any policy on leave of absence further underscores its arbitrary conduct. The decisions to deny the Applicant's request and appeal, were made in a policy vacuum and without evidential basis, offending the principle of reasoned and transparent decision-making under Article 47 of the Constitution. In ***Metropolis Star Lab Kenya Ltd v Kioko & another (Civil Appeal E1140 of 2024) [2025] KEHC 8211 (KLR) (Civ) (12 June 2025) (Judgment)*** the Court reiterated that administrative decisions must comply with the

constitutional standards of being lawful, reasonable, and procedurally fair, as envisaged under Article 47 of the Constitution.

- 64 It is the Applicant's submission that the impugned decisions of the 1st and 2nd Respondents, being contrary to the County Assembly of Makueni and the 2nd Respondent's Advisory, devoid of lawful authority and legal basis, and made in breach of the Applicant's legitimate expectation, were *ultra vires*, unreasonable, and procedurally unfair, and therefore ought to be quashed.
- 65 On the second issue, the Applicant submitted that the threshold for the grant of judicial review remedies of certiorari and prohibition have been met. Judicial review is not concerned with the merits of the decision itself but with the decision-making process. It exists to ensure that public authorities act within the bounds of their lawful mandate and in accordance with the principles of fairness, legality, and reasonableness.
- 66 The Applicant submitted that he has demonstrated that the impugned decisions were *ultra vires*, irrational, and procedurally unfair, having been made in disregard of the applicable constitutional, statutory and regulatory provisions governing his appointment as a Chief Officer and request for leave of absence. The Respondents' actions violated the Applicant's legitimate expectation and the requirement for equal treatment, fair administrative action and freedom from discrimination guaranteed under

Article 27, 47 and 236 of the Constitution and the Fair Administrative Action Act.

- 67 The Applicant cited ***Abdi Ahmed Abdi v Cabinet Secretary for Interior and Co-ordination of National Government & 7 others [2017] KEHC 3302 (KLR)*** held:

“administrative decision can be challenged for illegality, irrationality and procedural impropriety. A close look at the material presented before me demonstrates absence of adherence to the law. The decision is illegal or ultra vires. Thus, there is a basis for granting the judicial review orders sought.... The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought.”

- 68 The Applicant submitted that he has fully satisfied the legal threshold for the grant of judicial review remedies. The Respondents’ conduct- characterized by disregard of due process, legal and regulatory provisions; breach of legitimate expectation and manifest administrative unfairness- renders their decisions amenable to being quashed by an order of certiorari.

- 69 The Applicant submitted that to forestall the continued perpetuation of illegality and unfair administrative action, an order of prohibition ought to issue restraining the 1st

Respondent from implementing or in any way relying upon the impugned decisions.

- 70 It is the Applicant's submission that being a court of equity and discretion, is therefore urged to exercise its jurisdiction in favour of the Applicant in order to uphold the rule of law and to prevent continued violation of his constitutional, employment and administrative rights.

1st Respondent's Submissions

- 71 The 1st Respondent submitted on three issues: what is the ambit of the Court's jurisdiction in determining Appeals from the Public Service Commission under section 88 of the Public Service Commission Act; whether the Applicant has a valid contract of employment with the Makueni County Public Service Board; and whether public officers serving in the County Public Service are entitled to leave of absence upon getting contractual appointments in the public service
- 72 On the first issue, the 1st Respondent submitted that the Court is confined to supervisory review which examines legality, procedural fairness, rationality/reasonableness and, where drawn, proportionality of the impugned decision. The Court does not rehear evidence, reassess credibility or substitute its view on the merits for that of the PSC.

- 73 On legality, the 1st Respondent submitted that the Court must examine whether the PSC acted within the powers conferred by the Constitution and statute, and whether it committed jurisdictional error, including acting ultra vires, deciding issues not properly before it, or failing to decide matters that statute required it to decide. Where jurisdictional error is established, certiorari is available.
- 74 The 1st Respondent submitted that the court must determine whether the appellant and other affected persons were afforded the opportunity to be heard, whether material evidence and documents were considered or wrongly excluded, and whether adequate reasons were given for the PSC's decision failure on any of these grounds justifies intervention.
- 75 On rationality and proportionality, the 1st Respondent submitted that the court must decide if the PSC's decision was so unreasonable that no reasonable decision-maker, properly directing itself to the evidence, could have reached it. The Court will not interfere merely because it would have reached a different conclusion. Under Article 47 and related principles, the court may assess whether the impugned decision was proportionate to the legitimate aim pursued, especially where fundamental rights or severe sanctions are at stake.
- 76 The 1st Respondent submitted that the court must not conduct a re-hearing on the merits; it must not evaluate witness credibility, re-weigh evidence, or substitute its

own conclusions for those reached by the PSC on disputed factual matters. Doing so violates the supervisory nature of judicial review.

77 The 1st Respondent cited the Supreme Court in ***Saisi & 7 others v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment)*** where the Apex Court at paragraph 76 postulated that:

“Be that as it may, it is the Court’s firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review Court into an appellate Court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a Court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to so. Second, the Courts are limited in the nature of reliefs that they may grant to those set out in section 11(1) and (2) of the Fair Administrative Actions Act. Third, the Court may not substitute the decision it is reviewing with one of its own. The Court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in section 11(1)(e) and (h) of the Fair Administrative Action Act. The merits of a case are

best analysed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this Court held in the case of Kenya Vision 2030 Delivery Board v Commission on Administrative Justice, Attorney General and Eng. Judah Abekah, SC Petition 42 of 2019; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised.”

- 78 The 1st Respondent submitted that the Court’s remit when adjudicating an application under Section 88 of the Public Service Commission Act and Regulation 24 of the of the PSC (County Appeals Procedure) Regulations, 2022 is narrowly supervisory; it is limited to legality, procedural fairness, rationality and proportionality and the court must avoid usurping the PSC’s function by re-hearing the substantive appeal.
- 79 On the second issue, the 1st Respondent submitted that the main reason the Board declined the Applicant’s request was that it was based on its earlier resolution made pursuant to its mandates under Section 59 (1)(h) of the County Governments Act. Further, in the Advisory dated 19th December 2022, the 1st Respondent had directed that any serving officer wishing to take up contractual positions within the County Government must resign from their substantive permanent and pensionable

positions before assumption of office. This was the official position with respect to serving officers wishing to take up contractual appointment with the county government and seeking leave of absence/secondment from the 1st Respondent.

- 80 The 1st Respondent submitted that the letter dated 11th March, 2024 by the Governor of Makueni County appointing the Applicant to be a Chief officer of the County Government of the Makueni County provides that:

“Upon acceptance, of this appointment, you shall be required to sign a contract of employment with Makueni County Public Service Board, stipulating the terms of service and employment”.

The Applicant duly accepted the appointment letter by signing on the letter on 13th January, 2025 despite the fact that the letter was issued on 11th March, 2024.

- 81 The 1st Respondent submitted that as the employer body for Makueni County Government whose functions are enshrined under Section 59 of the County Governments Act, the Applicant is not the duly appointed Chief Officer-Health, Human Resource Management and Administration. The Applicant is not legally in office and that his appointment to the office has never crystalized due to the fact that he has never executed any contract of employment as a Chief Officer with the 1st Respondent as provided for in his appointment letter.

- 82 The 1st Respondent submitted that the Applicant has deliberately concealed from this court that he has never executed any contract of employment with the 1st Respondent as the Chief Officer as alleged. He has not presented before this Court in any of his bulky bundles of documents, any contract of employment entered between him and the 1st Respondent to enable him lay claim or assert that he is indeed a Chief Officer within the County Government of Makeni.
- 83 The 1st Respondent submitted that to date, the Applicant is still its employee as a Senior Pharmacist and continues to draw the salary of a Senior Pharmacist Job Grade "N" not the salary of a Chief Officer since the process of his employment as a Chief Officer has never been completed or crystalized and the same shall only be completed upon him executing an employment contract with the 1st Respondent in accordance with the express terms of his letter of appointment dated 11th March, 2024.
- 84 The 1st Respondent submitted that one of the terms of employment prescribed by the 1st Respondent on any serving officer wishing to take up contractual positions within the County Government must resign from their substantive permanent and pensionable positions before assumption of office. This was the official position taken by the 1st Respondent pursuant to its statutory mandate under Section 59 (1)(a) & (b) of the County Governments Act as communicated in its Advisory dated 19th December 2022.

- 85 It is the 1st Respondent's submission that its decision declining to grant the Applicant a leave of absence was not *ultra vires* given that it was issued by the Board pursuant to its statutory mandate as the employer body. Further, its decision was not unreasonable and a violation of his legitimate expectation since the Applicant when signing the acceptance to his letter of appointment, was fully aware that his letter of appointment was not final and that the same was subject to him signing a contract of employment with the Board stipulating the terms of service and employment one of which was resigning from his substantive permanent and pensionable positions before assumption of office.
- 86 On the final issue, the 1st Respondent submitted that Makueni County Public Service Board does not have a statutory and/or legal framework or policy authorizing grant of leave of absence to public officers serving in the county public service upon getting contractual appointment in the public service. The 1st Respondent, pursuant to its statutory mandate under Section 59 (1)(a) (b)&(h) of the County Governments Act had earlier communicated this policy position to the County Executive through its Advisory dated 19th December 2022 that was issued prior to the advertisement, nomination and vetting of appointees to the Office of Chief Officers directing that any serving officer wishing to take up contractual positions within the County Government must resign from their

substantive permanent and pensionable positions before assumption of office.

87 The 1st Respondent submitted that the Human Resource Manual for Makueni County Government does not have a provision authorizing grant of leave of absence to public officers serving in the county public service upon getting contractual appointment in the public service. The Applicant who is an employee of Makueni County Public Service has not submitted before the Court a copy of the Manual containing a provision authorizing grant of leave of absence to public officers serving in the county public service upon getting contractual appointment in the public service.

88 The 1st Respondent submitted that under Section 59A of the County Governments Act, a County Public Service Board is an independent statutory body and not subject to direction from any person or authority. Consequently, absence of a statutory legal framework for grant of leave of absence, its decision refusing leave of absence was made lawfully, reasonably, and within its constitutional and statutory mandate.

89 The 1st Respondent submitted that Regulation 38 of the Public Service Commission, Regulations, 2020, does not apply to County Public Service Boards in Kenya. County Public Service Boards are creatures of Article 234 of the Constitution that applies exclusively to county governments and the county governments are established

and derive their statutory authority from an Act of Parliament specially prescribing uniform norms and standards applicable to county governments. Article 234 (3) (d) expressly excludes the application of the provisions of Clause (1) and (2) [Powers and Functions of PSC] not to apply inter alia to an office in the service of a county government, except as contemplated in clause (2)(i) [hear and determine appeals in respect of county governments' public service].

90 The 1st Respondent submitted that the present controversy is not new to this Court. The question on the applicability of Regulation 38 of the Public Service Commission, Regulations, 2020 to devolved units and whether the said Regulation permits County Public Service Board to grant of leave of absence to public officers serving in the county public service upon getting contractual appointment in the public service was recently determined.

91 The 1st Respondent cited ***Miriti v Governor, Meru County & another (Petition E002 of 2024)[2024] KEELRC 2564 (KLR) (24 October 2024) (Judgment)*** where the Court held that:

“.....As the law stands now, public officers serving in the county public service are not entitled to leave of absence upon getting contractual appointments in the public service, public entities or at all, unlike their counterparts in the national government.”

I say so because there is no legal or regulatory framework to govern the said benefit in the devolved units. Until such framework is established, the said status quo shall remain unless the respective HR Policy and Procedures Manuals permit leave of absence to a category of officer or if a request for such leave is discussed and recommended by the CHRAC and approved by the County Public Service Board.

The foregoing leaves the concerned employee with the option of either resigning from the public service or the contract appointment if the leave of absence is declined. The Court has not been told whether the said chief officer and the County Executive Committee member sought their leave of absence in the same manner as the petitioner. Consequently, there is no sufficient grounds upon which to conclude that the petitioner was discriminated against since there is nothing to prove deferential treatment contrary to Article 27 of the Constitution and section 5 of the Employment Act.”

- 92 The 1st Respondent submitted that this court dismisses the present Judicial Review Application and uphold the Decisions of the 1st and 2nd Respondent on the ground that there is no legal or regulatory framework to govern the to grant of leave of absence to public officers serving in the county public service upon getting contractual appointment. The only available option for the Applicant is

to resign from his permanent and pensionable employment from public service if he so wishes to take up the contract of employment as a Chief Officer which he has fervently demonstrated in these proceedings and in the proceedings before the 2nd Respondent.

2nd Respondent's Submissions

93 The 2nd Respondent submitted that the legal thresholds upon which a court can review administrative decisions were discussed in the Ugandan case of ***Pastoli v Kabale District Local Government Council & others (2008), E.A. 300*** where it was held that: -

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the

process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice to act or to act with procedural fairness towards one to be affected by the decision - it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehidswi v Secretary of State for the Housing Department (1990) AC 876.)"

- 94 The 2nd Respondent submitted on two issues: whether the decision of the Public Service Commission delivered on 27th August, 2025 was fair in substance and procedure; and whether the Applicant is entitled to the relief sought.
- 95 On the first issue, the 2nd Respondent submitted that Article 234(2)(i) of the Constitution and Section 85 of the Public Service Commission Act gives the 2nd Respondent the mandate to hear and determine appeals in respect to the County Government's Public service.
- 96 The 2nd Respondent submitted that the Public Service Commission (County Appeals Procedures) Regulations 2022, clearly set out the procedure to be followed in hearing and determining an appeal filed before it. It asserts that it duly followed the procedure before making its final decision.

- 97 The 2nd Respondent submitted that it gave the Applicant an opportunity to be heard and therefore the Applicant cannot succeed in this matter as set out in the case of ***Pastoli v Kabale District Local Government Council & others (2008), E.A. 300.***
- 98 The 2nd Respondent submitted that before it was an application for review seeking to set aside the findings of the Commission that: The Public Service Commission Act does not apply to County Governments' Public Service save for the provision that provides for hearing and determining appeals; The Public Service Commission Regulations, 2020 do not apply to County Governments' Public Service and specifically Regulation 38 that provides for leave of absence; It is the power of the 1st Respondent pursuant to Section 59 of the County Government's Act to consider requests from staff of the County and make decisions on such request.
- 99 It is the 2nd Respondent's submission that its decision dated 27th August, 2025 was lawful and the same should be adopted as a judgment of this Honorable Court. Reliance was placed in ***Republic v Public Service Commission & another; Kirinyaga County Public Service Board (Exparte Applicant) (Judicial Review E003 of 2023) [2024] KEELRC 2129 (KLR) (9 August 2024) (Judgment).***
- 100 On the final issue, the 2nd Respondent submitted that the Applicant is not entitled to the orders sought in the notice

of motion dated 4th September, 2025 as the decision of the 2nd Respondent was lawful, legal and rational. The 2nd Respondent exercised its mandate pursuant to Article 234(2)(i) of the constitution, Section 85 of the Public Service Commission Act, Section 77 of the County Government Act and guided by the Public Service Commission (County Appeals Procedures) Regulations, 2022 at arriving at its decision of 27th August, 2025.

101 I have examined all evidence and submissions of the parties herein. The applicant sought orders to bar the respondents from discussing matters touching on his employment pending determination of this application. The applicant raised matters relating to the exhaustion of the matters in relation to his employment which touches on the fact that the respondents did not give him a chance to be heard and also allow him to submit relevant information before the 2nd respondents. He contends that the 2nd respondents made a decision against him without hearing him nor considering his submissions of an advisory on the matter from the Council of Governors and therefore he sought a review of the said decision which was determined without examination of evidence and the laws available.

102 From the foregoing chronology of events, the action by the 1st respondent was appealed to the 2nd respondent and it was determined accordingly. What was remaining was

basically a decision and discussion to be made by the 1st respondent in relation to the employment of the applicant.

103 Courts have always pronounced themselves on the fact that they would not normally interfere with internal administrative issues of an employer unless the same is flawed. The applicant has not demonstrated that there was any flawed process against him. The decision by the 1st respondent to discuss the employment status of the applicant is therefore within the law and which in this court's finding should proceed so a decision is made.

104 In the circumstances of this application I find the applicant's application to deny the respondents an opportunity to discuss and deliberate on issues touching on applicants employment status not merited and is declined.

105 As concerns the decision of the 2nd respondent in appeal NO 043/24, the applicant seeks this courts orders to quash the same and also a decision by the 1st respondent denying him leave of absence/secondment.

106 This court has jurisdiction to hear appeals made from the decision of the PSC under section 88 of the PSC Act. The PSC in determining the appeal against the decision of County Public Service Board declining to grant the applicant leave of absence noted that the applicant is a public officer and entitled to fair labour practices under article 41 of the Constitution. The PSC also noted that

regulation 38 of the PSC regulations 2020 realize and grant the right to leave of absence to all public officers. The PSC however cited section 232(2) 1 of the Constitution wrongly averring that it provides that *“the commission shall hear and determine appeals in respect of County governments public service”*. The correct citation of the Constitution is in article 234(2)(i) which indeed provides that *“the PSC shall hear and determine appeals in respect of County Governments Public Service.”*

107 The law is therefore clear that the PSC can hear and determine appeals in respect of decisions made by the County Public Service Board. The PSC declined the appeal on the ground that the PSC regulations 2020 do not apply to County Governments Public Service and that regulation 38 of the PSC regulations 2020 on leave of absence do not apply. The PSC observed that the PS regulation 2020 and circulars issued from time to time by the Commission can only apply to County Government Public Service if adopted and approved by the CPSB.

108 It is apparent that the 1st respondent had issued a circular to the county public service that these offices wishing to take up contractual positions must resign from their substantive positions. I have been referred to the PSC’s own advisory on this matter by the applicant where the PSC observed that the circular by the county public service board does not have any force of law, policies and guidelines governing employment and terms and conditions of service in the Public Service. The PSC

pointed out that the circular is against HR best practice to force serving officers appointed on contracts to serve for the tenure of the Governor to relinquish their permanent and pensionable status in the public service.

109 The PSC also noted that appointments of officers from within the County Public Service to take up higher positions that are contractual is not only important for the growth and development of the officers but also provides them with the much needed opportunity to exercise leadership and a motivation to others and enhance employees experience. They then advised the County Public Service Board to reconsider their stand on leave of absence and customize and align its HR policies and practices with regulations obtaining in the national government.

110 The PSC did not submit on their own advisory above but made a finding that the County Public Service Board made a correct finding. The law is clear on what the PSC should have done on hearing the appeal so filed. The PSC has cited **Pastoli vs Kabale** (Uganda case) where the court held that JR application can succeed if faulted with illegality, irrationality and procedural impropriety. There is no illegality in the decision made by the County Public Service Board. The County Public Service Board made a decision as a body which they thought was in order and based on their mandate.

111 It is however irrational that the PSC would give an advisory against the decision of the County Public Service Board and at the same time dismiss an appeal against the said decision. This in my view is tainted with irrationality and is a defiance of logic and acceptable standards which the PSC should uphold in the entire Public Service.

112 In the circumstances of the case and based on the PSC's own regulation and its mandate to hear appeals for the CPSB, and therefore correct errors, the decision of the PSC was not fair in the circumstances.

(a) I allow the application for judicial review and grant orders of

certiorari to bring to this court and quash the decision by the 2nd respondent dated 27th August 2025 to dismiss the applicant's review in County Review No 007/25 and uphold the decision of the County Appeal No 043 of 2024.

(b) An order of certiorari to bring to this court and quash the decision of the 1st respondent vide letter dated 25/3/24 to deny the applicant's request for leave of absence/secondment.

(c) An order of prohibition restraining the 1st respondent from unlawfully acting upon the decision of the 2nd respondent and/ or enforcing or continue to enforce or maintain the decision to deny the applicant leave of absence/secondment.

(d) There shall be no order of costs.

**Dated, Signed and Delivered Virtually at Nairobi
this 15th Day of January, 2026.**

**HELLEN WASILWA
JUDGE**

ORIGINAL