

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT AT KISUMU**

**JUDICIAL REVIEW NO. E013 OF 2025**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**JAMES**

**OYENGO**

**ATANDI.....APPLICANT**

**VERSUS**

**COUNTY GOVERNMENT OF KISII.....**

**RESPONDENT**

**RULING**

Before the Court for determination is the *Ex Parte* Applicant's Notice of Motion dated 6<sup>th</sup> October 2025 seeking Orders that:

- 1. An Order of mandamus be issued against the respondents compelling them to pay the ex parte applicant salary and arrears of Kshs.1,284,960.00 and to forthwith adjust the applicant's salary to reflect his pay grade of Job Group P.*
- 2. An Order of prohibition directed at the respondents prohibiting them from further withholding the ex parte applicant's salaries and allowances .*

3. Any other relief the Honourable Court may deem fit to grant.

By Chamber Summons dated 30<sup>th</sup> June 2025, the *ex parte* sought and was granted leave to file a substantive motion on 29<sup>th</sup> September 2025.

The motion was expressed under Sections 8 and 9 of the Law Reform Act and Order 53 Rule 3 of the Civil Procedure Rules.

The *ex parte* applicant's case is that he was employed by the 1<sup>st</sup> respondent on permanent and pensionable terms as a Ward Administrator but was promoted by the Kisii County Public Service Board to the position of Assistant Director Administration Job Group P effective 1<sup>st</sup> July 2022 and redeployed and his salary rose from Kshs.59,120.00 to 87,360 and house allowance and commuter allowance increased to Kshs.28,000 and Kshs.12,000 respectively and the County Public Service Board directed the 2<sup>nd</sup> respondent to effect the promotion but the 2<sup>nd</sup> respondent did not thereby denying the *ex parte* applicant the salary increment and infringing on his rights to fair labour practices and was in breach of the provisions of the Employment Act.

## **Respondent's case**

The County Secretary, Mr. Earnest Osoro Rachami vide a Replying Affidavit sworn on 29<sup>th</sup> October 2025 deponed that the *ex parte* applicant was an employee of the 1<sup>st</sup> respondent, but as regards the promotions in question, deponed that they were never effected and were subsequently set aside by the County Pubic Service Board and the *ex parte* applicant had no arrears to claim. That the promotions were found to have been irregular and the process had commenced a fresh and members of the County Public Service Board (hereinafter CPSB) were removed from office on 25<sup>th</sup> April 2023 for various reasons including the promotions.

The County Secretary was notified of the removal and attempts by the members to challenge the removal was unsuccessful and a new board was inaugurated on 15<sup>th</sup> November 2023 and revoked the promotions, the subject matter of this application.

The affiant deposed that the CPSB promotions of staff was ongoing.

That the previous CPSB breached the Public Finance Management Act on the Wage Bill.

The affiant further deposed that invocation the Judicial Review mechanism by the *ex parte* applicant was improper as the claim had not been adjudicated and the promotions were set aside, no demand had been made and the *ex parte* applicant was aware of the status of the promotions and had not exhausted other dispute resolution mechanisms.

The Director Human Resource Management Mr. Goerge Mativo deponed that the applicant reported on duty on 1<sup>st</sup> September 2020 and on 11<sup>th</sup> November 2021 he was deployed to the position of Principal Administrative Officer and confirmed on 12<sup>th</sup> July 2022 and was subsequently irregularly promoted and re-designated on 4<sup>th</sup> August 2022 as Assistant Director of Administration but had no qualification for the position as the degree certificate was presented after the promotion and had not attained 3 years in Job Group “N” for promotion.

Mr. Alfred Moreka, the Acting County Secretary deponed that a motion for a removal of members of the CPSB was filed in March 2023 and they were removed for breaching

and circumventing employment law in promoting employees in July 2021, December and 2022 and the Board meeting held on 26<sup>th</sup> March 2024 revoked the promotions by invoking Section 75 of the County Governments Act and the process had to start a fresh and the Board was considering promotions for all cadres above Job Group “G”.

### **Applicant’s submissions**

Reliance was placed on the provisions of Section 7 of the Fair Administrative Action Act to submit that the 2<sup>nd</sup> respondent acted in violation of the Act by refusing to adjust the applicant’s salary, abused its discretion, acted unfairly, provided no explanation and acted with ulterior motives.

As to whether the order of *mandamus* should issue, counsel submitted the respondent’s decision to withhold the applicant’s salary was irregular citing the sentiments of the court in **Republic V Kenya National Examination Counsel Ex Parte Geoffrey Gathenji & 9 others** Civil Appeal No. 266 of 1996 on the nature of the Order of *mandamus* as well as those in **Republic V**

**Town Clerk Kisumu Municipality Ex Parte East African Engineering Consultants [2007] 2EA 441.**

Further reliance was placed on the decision in **Republic V Ministry of Planning & another Ex Parte Professor Mwangi Kimenyi** Nairobi HC MISC APP No. 1769 of 2003 on how to address unreasonable conduct or acts of a party, to urge that non-payment of the applicant's salary after promotion was unfair.

As to whether the respondent's conduct was irregular, reliance was placed on the Court of Appeal decision in **Kenya National Examinations Council V Republic Ex Parte Geoffrey Gathenji Njoroge** (supra) on the order or prohibition as were the sentiments of the court in **Republic V Principal Kadhi Mombasa ex parte Alibhai Adamali Dar & 2 others ; Murtaza Thrabali Patel (Interested Party [2022] eKLR** to highlight the circumstances in which a prohibition may be issued and urge that a case for its grant had been made in this case.

**Respondent's submissions**

On whether applicant had complied with the doctrine of exhaustion, counsel cited the provisions of Section 77 of the County Governments Act and section 87(2) of the

Public Service Commission Act, the decision in **Secretary County Public Service Board & another V Hulbhai Gedi Abdulle** [2017] eKLR to submit that the appeal to the Public Service Commission was not optional.

Sentiments of the court in **Geoffrey Muthinja & another V Samuel Muguna Henry & 1756 others** [2015] eKLR, were also cited to buttress the submission.

On invocation of Judicial Review, reliance was placed on the sentiments of the court in **Municipal Council of Mombasa V Republic Umoja Consultants Ltd** [2002] eKLR and **Pastoli V Kabale District Local Government Canal & others** [2008] 2 EA 300 on the elements of Judicial Review to submit that the applicant ought to have filed a cause before the court as opposed to Judicial Review.

As to whether the applicant had made a case for *mandamus* and prohibition, counsel, placed reliance on the decisions in **Kenya National Examination Council V Republic Ex Parte Geoffrey Gathenji & 9 others** Appeal No. 266 of 1996, **Dr. Magare Gikenyi & 2 others V Attorney General & 4 others** and **Wachira Njeri Mwangi & 226 Other Interested Parties** ELRC

Pet. No. E202 of 2024 **Macfoy V United Africa Ltd** [1961] 3 ALLER 1169 and **Republic V County Council of Kwale & another ex parte Kondo & 57 others** [1998] eKLR, to urge that the alleged promotion process of the applicant and others was irregular and was a nullity for failure to observe provisions of the Constitution and the County Governments Act, specifically Section 65 of the latter and the County Public Service Board took corrective action.

On reliefs, counsel urged the court to rely on the sentiments of the Court of Appeal in **Republic V Kenya National Examination Council** (supra) on the scope of the order of *mandamus*.

Counsel urged the court to dismiss the application for lack of merit.

### **Analysis**

It is common ground that the *ex parte* was and remains an employee of the 1<sup>st</sup> respondent effective 1<sup>st</sup> September 2020. Documents on record revealed that the *ex parte* applicant was promoted from Ward Administrator Job Group “N” Assistant Director Administration Job Group “P” effective 1<sup>st</sup> July 2022 vide letter dated 7<sup>th</sup> July 2022

and his salary rose to Kshs.87,360 and reported on 5<sup>th</sup> August 2022, was deployed to the Directorate of Social Programs on 9<sup>th</sup> November 2023 and reported on 17<sup>th</sup> November 2023.

Worthy of note, the applicants promotion from Ward Administrator to Assistant Director Administration Job Group “P” was effected in less than 2 years.

It is also notable that the promotion was effected barely one (1) month prior to the General election in August 2022 which partly explained the delay in effecting the promotion.

From the documentary evidence on record, it is discernible that the applicants promotion, which must have been among others was not implemented, a fact the applicant must have been aware of but failed to disclose to the court for purposes of contextualising the dispute.

Evidence revealed that a Petition filed by one Benson Atika to the Kisii County Assembly in early March 2023 seeking the removal of all members of the CPSB on grounds of numerous irregularities and contravention of law and policies culminated in the removal of the entire

CPSB by the Kisii County Assembly on 25<sup>th</sup> April 2023 and a new CPSB appointed which Mr. Alfred Moreka deponed that resolved to revoke the promotions.

It is trite law that the County Public Service Board of a County is empowered to revoke its decisions under Section 75 of the County Governments Act which provides:

If it comes to the attention of the County Public Service Board that there is reason to believe that any process or decision under this Part may have occurred in an irregular or fraudulent manner, the County Public Service Board shall investigate the matter and, if satisfied that the irregularity or fraud has occurred, the County Public Service Board may—

- (a) revoke the decision;
- (b) direct the concerned head of department or lawful authority to commence the process afresh; or
- (c) take any corrective action including disciplinary action.

Regrettably, the 1<sup>st</sup> respondent did not avail or furnish a copy of the investigation report by the County Public Service Board or any record of there having been an investigation on the alleged irregularities and contraventions of law by the for CPSB.

In a similar vein, no resolution of the alleged revocation was availed as evidence of the action by the CPSB. The fact the evidence was uncontroverted notwithstanding.

However, Mr. Alfred Moreka deponed that the CPSB resolved to start the process a fresh and provided evidence of promotion of medical officers, health personnel and others effected in 2024 and deponed that the process was on going.

The various lists of promoted staff show that the CPSB has been promoting staff as deserved and perhaps avoiding the breaches the former CPSB was accused of.

Relatedly, the 1<sup>st</sup> respondent availed documentary evidence to show that the removal of members of the CPSB was challenged in Kisumu ELRC JR No. E013 of 2023 **Republic V Clerk Kisii County Assembly & 2 others Nyamwange & 4 Others** [2023] KEELRC 2710 (KLR) which was unsuccessful.

Similarly, documentary evidence revealed that the Auditor General's reports for the year ended 2023 and 2024 faulted the County generally for utilising the bulk of

its resources on personal emoluments of employees as opposed to development which suggested over-employment and/or promotion of staff or both without taking into consideration the available resources.

Strangely, although the application sought information from the Director Human Resource Management vide letters dated 28<sup>th</sup> December 2022 and 2<sup>nd</sup> February 2023, the Director did not respond. However, no demand letter for the amount sought in the instant application was availed.

From the evidence on record, it is discernible that the applicant's promotion, whose basis was not explained or demonstrated fell under the category of acts and decisions of the former CPSB, which the 1<sup>st</sup> respondent considered irregular or non-compliant with the law and policies and which *inter alia* culminated in the removal of the CPSB by the County Assembly and irregular promotions was part of the charges against the CPSB.

Be that as it may, a pertinent issue raised by the respondents and on which this case turns is whether the applicant had exhausted other forms of other dispute

resolution mechanisms open to him before invoking the jurisdiction of this court.

The applicant adduced no evidence of having lodged an appeal with the Public Service Commission prior to the institution of this suit.

Needless to belabour, the doctrine of exhaustion is part of Kenya's litigation jurisprudence and predates the Constitution of Kenya 2010 and the Fair Administrative Action Act 2015.

It is trite law that Article 159(2) of the Constitution of Kenya enjoin courts and tribunals to promote other dispute resolution mechanisms and approaches to dispute resolution including alternative justice systems.

In **Speaker of National Assembly V Karume** [1992] KECA 42 (KLR) the Court of Appeal stated:

*"In our view, there is considerable merit in the submissions that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or Act of Parliament that procedure should be strictly followed".*

Similarly, in **NGO'S Co-ordination Board V E. G. & 4 others Katiba Institute Amicus Curie** [2023] KESC 17 (KLR), the Supreme Court of Kenya held

*"... Even when superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to the relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the disputes as provided for in the relevant parent statute..."*

*It is now firmly established that in cases where there is an alternative dispute resolution mechanism established by legislation, the courts must exercise restraint in exercising their jurisdiction and accord deference to such dispute resolution bodies under the doctrine of exhaustion.*

*This court in its previous decisions has settled the jurisprudence regarding the doctrine of exhaustion of administrative remedies".*

See also in this regard **Geoffrey Muthinja Kabiru & 2 others V Samuel Muguna & 1756 others** [2017] eKLR, **Republic V Commissioner General Kenya Revenue Authority Ex Parte Sanofi Aventis Ltd** [2019] eKLR, **Secretary County Public Service Board & another V Hulbhai Gedi Abdille** [2017] eKLR, **Albert**

**Chaurembo Mumba & 7 others V Maurice Munyao & 148 others** [2019] eKLR, **William Odhiambo Ramogi & 3 Others V Attorney General & 4 others: Muslim for Human Rights & 2 Others; Interested Parties** [2020] eKLR and **Dhow House Ltd V Kenya Powere & Lighting Co. Ltd** [2022] KEHC 11840 (KLR).

It requires no gainsaying that the Constitution of Kenya, County Governments Act and the Public Service Commission Act contain elaborate provisions on the doctrine of exhaustion and in particular as regards resolution of grievances between the County public officers and their employers.

Article 234(2)(i) of the Constitution of Kenya provides: The Commission (PSC) shall hear and determine appeals in respect of County Governments Public Service...”

This article confer upon the Public Service Commission jurisdiction to hear and determine appeals on matters relating to County Governments Public Service and is further implied by the provisions of Section 77 of the County Governments Act as well as those of the Public Service Commission Act.

Indeed, Section 87 of the Public Service Commission Act is explicit that

- (1) The Commission may in hearing and determining appeals from the County Governments' public service, co-opt relevant experts depending on the nature of the appeal.**
- (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 public service unless the procedure provided for under this Part has been exhausted.**

This provision is couched in mandatory tone to underline the essence of the doctrine of exhaustion where an employment matter relating to the County Government Public Service is conceived.

Section 85 of the Public Service Commission Act provides that:

**The Commission shall, in order to discharge its mandate under Article 234(2)(i) of the Constitution, hear and determine appeals in**

**respect of any decision relating to engagement of any person in a County Government, including a decision in respect of—**

- (a) ...
- (b) **remuneration and terms and conditions of service;**
- (c) ...
- (d) ...
- (e) ...
- (f) ...
- (g) **any other decision the Commission considers to fall within its constitutional competence to hear and determine an appeal in that regard.**

Finally, Section 77 of the County Governments Act states

- (1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any County Public Officer may appeal to the Public Service Commission (in this part referred to as “Commission”) against the decision.**
- (2) The Commission shall entertain appeals on any decision relating to employment of a**

**person in a County Government including a decision in respect of-**

The totality of the foregoing provisions is that any person aggrieved or affected by a decision made by the County Government on matters relating to employment must appeal to the Public Service Commission in the first instance.

The fact the Section 77(1) of the County Governments Act uses the term “may” cannot avail an employee who invokes the court’s jurisdiction unless an exception to the doctrine of exhaustion is demonstrated and the court is satisfied that it is justifiable in the circumstances.

The foregoing is fortified by the decision of **Mumbi Ngugi J (as she then was) in James Tinai Murete & Others V County Government of Kajiado & another; Nailantei Supeyo & 19 others Interested Parties** [2023] eKLR where the Judge held:

*“...The Petitioners were dissatisfied with the decision of the respondents with regard to recruitment to various positions within the County and they cannot argue in the face of clear provisions of Section 77 of the County*

*Governments Act, that they can bypass legislation and come to this court by way of a constitutional provision... Aside from the views expressed in the two decisions set out above, I take this view for two additional reasons. First, it is my view that the legislature could not intend to establish a dispute resolution mechanism, and then render it redundant by giving parties the option to choose whether to follow it or not. Read as a whole Section 77 of the County Governments Act evince an intention to have all disputes arising out of appointments by County Service Boards dealt with by the Public Service Commission hence its grant to the Commission the mandate in mandatory terms that the Commission*

*“...Shall entertain appeals in respect of recruitments, selection appointment and qualification attached to any office”. There is no option given to a party to choose whether or not to file grievances with the Commission...”.*

These sentiments apply on fours to the circumstances of the instant case for the simple reason that the applicant's grievance relates to salary arrears pursuant to a promotion, which the 1<sup>st</sup> respondent did not implement.

The Public Service Commission has jurisdiction to hear and determine the applicant's grievance and ought to have been the first port of call as by law required.

The instant application was made before the applicant invoked and exhausted internal dispute resolution mechanisms prescribed by the Constitution of Kenya and other Acts of Parliament.

The upshot of the foregoing is that the motion dated 6<sup>th</sup> October 2025 is unsustainable and it is accordingly struck out for having been filed prematurely.

Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT  
KISUMU ON THIS 18<sup>TH</sup> DAY OF FEBRUARY, 2026**

**DR. JACOB GAKERI  
JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on

15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**  
**JUDGE**