

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

ELRC PETITION NO. E014 OF 2025
(Before Hon. Lady Justice Anna Ngibuini Mwaure)

SAIBALA CHEPKEMOI MAUREEN

AND 24TH OTHERS

.....PETITIONERS/APPLICANTS

VERSUS

COUNTY GOVERNMENT OF NAKURU.....1ST
RESPONDENT

THE COUNTY SECRETARY

COUNTY GOVERNMENT OF NAKURU..... 2ND
RESPONDENT

PUBLIC SERVICE BOARD

COUNTY GOVERNMENT OF NAKURU.....3RD
RESPONDENT

COUNTY EXECUTIVE COMMITTEE

IN-CHARGE OF PUBLIC SERVICE

MANAGEMENT, COUNTY GOVERNMENT

OF NAKURU..... 4TH
RESPONDENT

CHIEF OFFICER IN CHARGE OF

PUBLIC SERVICE MANAGEMENT,

COUNTY GOVERNMENT OF NAKURU..... 5TH
RESPONDENT

RULING

Introduction

1. The Respondents filed a Notice of Preliminary Objection dated 28th October 2025 on the following grounds that:

1. ***This Honourable Court has no jurisdiction in this matter in view of the mandatory provisions of Article 234(2)(i) of the 2010 Constitution of Kenya that vests the Public Service Commission with the authority to hear and determine Appeals in respect of county governments' public service;***
2. ***This Honourable Court has no jurisdiction in this matter in view of the mandatory provisions of Section 77 of the County Governments Act Chapter 256 Laws of Kenya that provides that 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 the "Commission") against the decision.***

- 3. This Honourable Court has no jurisdiction in this matter in view of the mandatory provisions of Section 87(2) of the Public Service Commission Act Chapter 185 Laws of Kenya that provides that 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.**
- 4. The Petitioner is yet to exhaust the existing equally efficacious dispute resolution mechanism provided by the law and specifically Sections 87(2) of the Public Service Commission Act, Section 77 of the County Governments Act, Chapter 256 and Article 234(2)(i) of the 2010 Constitution of Kenya.**
- 5. The doctrine of exhaustion has not been exercised in this particular matter as upheld in the matter of Anthony Miano & others V Attorney General & Others [2021] eKLR, where it was held that:-**

“33. The doctrine of constitutional avoidance, therefore, deals with instances where a Constitutional Court will decline to deal with a matter because there exists another remedy provided in law which the aggrieved party is yet to utilize. That is also referred to as the doctrine of exhaustion.”

6. In the premises, this Honourable Court herein lacks jurisdiction as the Application and Petition are premature, misconceived, vexatious, frivolous, scandalous and a blatant abuse of due process of the court and as such, the same ought to be dismissed with costs.

7. Parties canvassed the preliminary objection by way of written submissions.

Respondents written submissions

8. The Respondents submitted that this court(ELRC) lacks jurisdiction because **Article 234(2)(i) of the Constitution** vests the Public Service Commission (PSC) with authority to hear appeals from county public service decisions. **Section 77 of the County**

Governments Act (Cap 256) requires dissatisfied officers to appeal to the PSC, and **section 87(2) of the Public Service Commission Act (Cap 185)** bars filing court proceedings before exhausting PSC remedies. The Respondents relied on cases including **Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017] KECA 643 (KLR)** and **Republic v Migori County Secretary & Another [2022] KEELRC 13209**, which affirmed that PSC is the first port of call for grievances such as termination or removal from county service. The Supreme Court in **Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] KESC 8 (KLR)** further emphasized that jurisdiction flows only from the Constitution or statute. Since the Petitioners did not demonstrate that they sought redress before the PSC, the Respondents argue the Petition is premature, and the Court must “down its tools” and direct them to the appropriate forum.

9. The Respondents contend that the Petition is premature because the Petitioners failed to exhaust the statutory remedies available under **section 77 of the County Governments Act (Cap 256)** and **section 87(2) of the Public Service**

Commission Act (Cap 185), which require appeals against decisions of the County Public Service Board to be lodged first with the Public Service Commission. They argue that this court therefore lacks jurisdiction to grant the reliefs sought. The Respondent relied on the case of **Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425**, where the Court of Appeal stated as follows:

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

10. This position has been reinforced in **Agava v Otiichlo & 2 others [2023] KEELRC 1099 (KLR)**, **Alumasa v County Government of Vihiga & another [2025] KEELRC 2667 (KLR)**, **James Tinai Murete v County Government of Kajiado [2023] eKLR**, and **Koech v County Government of Kericho & another [2024] KEELRC 841 (KLR)**, all of which held that failure to pursue PSC remedies amounts to abuse of process.

11. The Respondents submitted that both the High Court and Court of Appeal have consistently held that where a statute provides a clear remedy, courts must exercise restraint and allow the relevant statutory bodies to address the dispute first. In ***Anthony Miano & others v Attorney General & others [2021] KEHC 12687 (KLR)***, the court held as follows:

“33. The doctrine of constitutional avoidance, therefore, deals with instances where a Constitutional Court will decline to deal with a matter because there exists another remedy provided in law which the aggrieved party is yet to utilize. That is also referred to as the doctrine of exhaustion.”

12. In ***Muthinja & another v Henry & 1756 others [2015] KECA 304 (KLR)***, the Court of Appeal stated as follows:

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews.”

13. The Respondents submitted that courts must caution Petitioners that not every alleged or perceived violation of the law amounts to a constitutional issue. As emphasized in the case of ***Bernard Murage V Fineserve Africa Limited & 3 Others [2015] eKLR***, the Court held that:

“56. I am bound to follow that principle of law since it flows from the other important principle that not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.”

14. On this basis, the Respondents urged dismissal of the Petition with costs.

Petitioners written submissions

15. The Petitioners submitted that this Court does have jurisdiction to hear the matter, despite the Respondents' preliminary objection. They relied on ***Article 162(2)(a) of the Constitution*** and ***section 12(1)(a) of the Employment and Labour Relations Court Act (Cap 8E)***, which confer exclusive jurisdiction on the ELRC to

determine disputes arising out of employment between employers and employees. While acknowledging the existence of statutory mechanisms under **section 77 of the County Governments Act** and **section 87(2) of the Public Service Commission Act**, the Petitioners submitted that these bodies cannot adequately address violations of fundamental rights guaranteed under the Constitution.

16. The Petitioners relied on the Court of Appeal case of **Owners of Motor Vessel “Lillian S” V Caltex Oil (Kenya)**

Limited [1989] KECA 48 KLR, where Nyarangi JA, held that:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity, and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A

court of law down tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.”

17. In ***Macharia & Another v Kenya Commercial Bank Ltd & 2 Others [2012] KESC 8 (KLR)*** the Supreme Court stated as follows:

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law”.

18. The Petitioners emphasized the importance of jurisdiction in the above mentioned case, but argued that where constitutional rights are implicated, redress lies in the courts under ***Articles 22(1), 23(1) and 23 (3) of the Constitution***. The Petitioners further relied on ***Kabui v Teacher Service Commission & 2 others [2025] KEHC 18026 (KLR)***, where the High Court held that courts must examine the nature of the case and reliefs sought to determine if statutory mechanisms provide sufficient redress.

19. Accordingly, the Petitioners submitted that the ELRC, being a court with the status of the High Court, has the mandate to hear and determine constitutional petitions involving employment disputes and grant the remedies sought.
20. The Petitioners argue that while the doctrine of constitutional avoidance generally requires courts to decline constitutional questions where alternative remedies exist, this case falls within the recognized exceptions. The Black's Law Dictionary defines "constitutional avoidance" is defined as ***"the doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion"***.
21. In ***Faraj & 3 Others v Police & 2 Others [2022] KEHC 287 (KLR)***, the court observed as follows:
"Constitutional avoidance has been defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved. As a principle, constitutional avoidance has been linked to the doctrine of justiciability. In broad terms, justiciability governs the limitations on the constitutional arguments"

that the courts will entertain. It encompasses three main principles, which are standing, ripeness and mootness. The doctrine of avoidance was fortified in *Sports and Recreation Commission v Sagittarius Wrestling Club and another* in which Ebrahim JA said the following: -... Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights...”

22. The Supreme Court decision in ***Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others*** [2014] KESC 53 (KLR) explains that constitutional avoidance applies only where statutory or other remedies can adequately resolve the dispute.
23. Justice Mativo in ***Faraj & 3 Others v Police & 2 Others(supra)*** emphasized that constitutional issues should only be determined when they are the

only viable path to relief, with exceptions being clear constitutional violations, absence of alternative remedies, or futility of non-constitutional processes.

24. The Petitioners submit that the alleged breaches of their rights under **Articles 10, 27, 35, 41, 47, 50, 232, and 236 of the Constitution** cannot be sufficiently remedied through mechanisms under **the County Governments Act** or **Public Service Commission Act**, and therefore the matter properly falls within the jurisdiction of the Employment and Labour Relations Court under **Articles 22(1), 23(1) & (3), 258, and 162(2)(a) of the Constitution**, read with **section 12(1)(a) of the ELRC Act (Cap 8E)**. The Petitioners contend that only this Court can grant the remedies sought for the infringement of their fundamental rights and freedoms.

25. The Petitioners submitted that the Respondents' preliminary objection is improperly being used as a technical tool to dismiss the case rather than allowing it to be resolved on its merits. The Petitioners relied on the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors**

Ltd (1969) EA 696, which defines a true preliminary objection as follows:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which, if argued as a preliminary point, may dispose of the suit... It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

26. In the Supreme Court’s case in **Independent Electoral & Boundaries Commission v Cheperenger & 2 Others [2015] KESC 2 (KLR)**, the court held as follows:

“A true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection, against profligate deployment of time and other resources. And secondly, it serves the public cause of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to

the preliminary objection as a sword for winning a case otherwise destined to be resolved judicially, and on the merits.”

27. The Petitioners argued that the Respondents’ reliance solely on the objection, without filing a substantive response, contravenes **Article 159(2) (d) of the Constitution**, which requires justice to be administered without undue regard to technicalities, and undermines their right of access to justice under **Article 48 of the Constitution**. The Petitioners contend that the Judiciary, as part of the State under **Article 260 of the Constitution**, has a duty to protect this right, and therefore, the preliminary objection should be dismissed with costs for attempting to defeat justice through procedural technicalities.
28. In conclusion, the Petitioners submitted that the Respondents’ preliminary objection is portrayed as an attempt to obstruct justice, relying on a flawed interpretation of the law and contrary to the overriding objectives of the court. The Petitioners urged the court to find that the preliminary objection is without merit and should be dismissed with costs, allowing the Court to hear and determine the Application and Petition in favour of

the Petitioners, who would otherwise suffer irreparable harm, loss of livelihood, and a grave miscarriage of justice in violation of the Constitution.

Analysis and determination

29. The court has considered the preliminary objection together with the rival submissions on record; the issue for determination is whether the preliminary objection is merited.

30. The court reiterates the cases of ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (supra)*** and ***Independent Electoral & Boundaries Commission v Cheperenger & 2 others (Supra)*** as referenced in the earlier part of this ruling, as a preliminary objection deals primarily with pure points of law.

31. ***Section 77 of the County Governments Act*** provides that anyone dissatisfied with a decision of the County Public Service Board, or with disciplinary action against a county public officer, may appeal to the Public Service Commission. The Commission hears appeals on matters such as recruitment, appointment, qualifications, remuneration, disciplinary control, values of governance, retirement, pensions, and other employment-related

decisions. Appeals must be filed in writing within ninety days, though late appeals may be accepted if justified, and only one appeal is allowed per decision. Additionally, a party may apply for review of the Commission's decision in disciplinary cases if new material facts emerge or if there is an error on record. Such reviews must also be filed in writing within the time set by Commission regulations, though late applications may be admitted if circumstances warrant.

32. **Section 87(2) of the Public Service**

Commission Act provides as follows:

“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) Recruitment, selection, appointment and qualifications attached to any office;***
- (b) Remuneration and terms and conditions of service***
- (c) Disciplinary control.”***

33. In **Secretary, County Public Service Board & Another v Hulbhai Gedi Abdille(supra)** the Court of Appeal stated as follows:

“There is no doubt that the respondent initiated the judicial review proceedings in utter disregard of the dispute resolution mechanism availed by Section 77 of the Act. The section provides not only a forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one, specifically tailored by the legislators to meet needs such as the respondent’s. In our view, the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance. In terms of Republic v National Environment Management Authority (supra), we discern no exceptional circumstances in this appeal that would have warranted the bypassing of the statutory appellate process by the respondent. Her contention that she disregarded the appeal because it could not afford her an opportunity to question the

procedure followed by the appellant is, in our view, without basis because Section 77 has placed no fetter on the jurisdiction of the Public Service Commission. There is no requirement, for instance, that reasons for the decision be availed to an aggrieved party before he can prosecute an appeal before it.”

34. In ***Republic v National Environmental Management Authority [2011] KECA 412 (KLR)***, the Court of Appeal held as follows:

“Where there was an alternative remedy and especially where Parliament had provided a statutory appeal process it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the real issue is to be determined and whether the statutory appeal procedure was suitable to

determine it...The learned judge, in our respectful view, considered these strictures and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute.”

35. In this instant case, the Petitioners, employed by the 1st Respondent since January 2014 as clerical officers, were confirmed as permanent and pensionable employees in May 2015 after a proper recruitment and vetting process. They served in various departments, attended training, and later took part in suitability interviews for promotions. However, in July 2025, they were unexpectedly directed to collect new appointment letters despite the fact that they were never dismissed or subjected to disciplinary proceedings. Seeking clarity, they consulted legal counsel, who requested information from the Respondents but received no formal reply. Instead, the Respondents informally disclosed that about thirty clerical officers had been terminated and twenty reappointed based on qualifications, though this was never officially communicated. A leaked letter dated 20th August

2025 revealed that only one officer accepted reappointment, with some Petitioners excluded. Despite continuing to work and receive salaries, the Petitioners were warned that failure to sign the new letters by September 2025 would lead to removal from the payroll and termination.

36. The court is mandated to uphold the **Constitution of Kenya. Article 234(2)(a)(1) and (b)** speak on some of the roles of the Public Service Commission. Section 234(2) (1) states:

The Commission shall—

(a) subject to this Constitution and legislation

—

(i) establish and abolish offices in the public service; and

(ii) appoint persons to hold or act in those offices, and to confirm appointments;

Section 234(2) (b) provides: -

The Commission shall—

(b) exercise disciplinary control over and remove persons holding or acting in those offices;

37. The application provides that the Petitioners were to utilize the internal dispute resolution mechanisms provided under **section 77 of the County**

Government Act, which require dissatisfied parties to appeal to the Public Service Commission as earlier cited. Furthermore, **section 87(2) of the Public Service Commission Act** provides aggrieved persons to exhaust such mechanisms before approaching the courts. **Sections 87(2) of the Public Service Commission Act** provides:

“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.”

38. The court has considered the case of **SPEAKER OF THE NATIONAL ASSEMBLY -VS JAMES NJENGA KARUME** (*Supra*) where the court held:

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot

oust clear constitutional and statutory provisions.”

39. Similarly, in the case of ***REPUBLIC -VS- KAKAMEGA COUNTY ASSEMBLY SERVICE BOARD AND EXPARTE APPLICANTS JOHN SIMWA & PASCAL WERE JR 005 OF 2022*** the court held:

“The Application is premature and violates the established principle under the Constitution, various statutes and the Human Resource Policies and Procedures Manual for the Public Service applicable to the Ex-parte Applicants and which was enunciated by the Court of Appeal in the case of Secretary, County Service Board & Another -VS- Hulbhai Gedi

Abdille(2017)eKLR which determined that:-

“...where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other

regime...in our view, the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance."

40. The Petitioners were to utilise the internal dispute resolution mechanisms provided under Sections 77 of the County Government Act which require dissatisfied parties to appeal to the Public Service Commission. Section 87(2) of the Public Service Commission Act make it mandatory for Public officers aggrieved to exhaust such mechanisms before approaching the court. This is as well echoed in the earlier cited case of ***Secretary, County Public Service Board & Another VS Hulbhai Gedi Abdille[2017] eKLR*** which states that appropriate recourse for the Respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance.

41. The court will therefore hold that this case should have been heard by the appropriate body provided by legislation being the Public Service Commission instead of using the court as the first port of

calling. The court therefore upholds the Preliminary objection by the Applicant dated 28th October 2025 and orders the petition dated 13th October 2025 be struck out accordingly.

42. This being a court which seeks to dispense justice without undue technicalities, **articles 159(2)(D)** of the **Constitution** will give the Petitioners leave even though 90 days have expired in accordance to Section 86(2) of the Public Service Commission Act to file their petition before the Public Service Commission right away.

43. The court orders each party to meet their costs of the application and of the petition.

It is so ordered.

**Dated, Signed and Delivered virtually at Nakuru
this 20th Day of
February, 2026.**

**ANNA NGIBUINI MWAURE
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 15th March 2020 and subsequent directions of

21st 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE
JUDGE