

**IN THE COURT OF APPEAL  
AT NYERI  
(CORAM: W. KARANJA, JAMILA MOHAMMED & MUCHELULE, JJ.A.)  
CIVIL APPEAL NO. 305 OF 2019**

**BETWEEN**

**DAVID BAARIU MWIRABUA.....1<sup>ST</sup>  
APPELLANT  
MOSES MURIANKI NABEA .....2<sup>ND</sup>  
APPELLANT**

**AND**

**GOVERNOR OF MERU COUNTY.....1<sup>ST</sup>  
RESPONDENT MERU COUNTY GOVERNMENT.  
.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya  
at Meru (Nzioki wa Makau, J.) dated 7<sup>th</sup> February, 2019*

*in*

***ELRC Case No. 49 of 2018  
Consolidated with ELRC Case No. 48 & 60 of  
2018)***

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**JUDGMENT OF THE COURT**

**Background**

- 1) **David Baariu Mwirabua** and **Moses Murianki Nabea** (the appellants), being aggrieved by the judgment of the Employment and Labour Relations Court (ELRC) at Meru (**Nzioki wa Makau, J.**)

delivered on 7<sup>th</sup> February 2019 have preferred this appeal. In the impugned decision, the ELRC dismissed the appellants' consolidated claims on the ground that

the same were filed prematurely and in contravention of **Section 77** of the **County Governments Act** (the Act).

**The Governor Meru County** and **The Meru County Government** are the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively.

- 2) The appellants, together with **Martin Gikunda**, had instituted three distinct claims before the ELRC which were later consolidated. They were former employees of the 2<sup>nd</sup> respondent, having been engaged as Chief Officers under contracts allegedly running for five (5) years commencing on 1<sup>st</sup> October 2013 and ending on 1<sup>st</sup> October 2018, as per the letters of appointment dated 25<sup>th</sup> September 2013.
- 3) The appellants contended that their employment terms, as reflected in their pay slips, provided for a five-year tenure, with a monthly salary of Kshs.260,660, and a gratuity benefit of 31% of the basic salary per year. By June 2017, the gratuity had allegedly accrued to Kshs.1,888,288.97. However, by a letter dated 21<sup>st</sup> August 2017, the 1<sup>st</sup> respondent compelled them to proceed on indefinite leave purportedly to await the completion of special financial and human resource audits. During this period, their positions were advertised and subsequently filled, which the appellants claimed amounted to constructive termination in breach of their contracts and in violation of their rights under Sections 43 and 45 of the Employment Act, and Articles 41(1) and 47(1) & (2) of the Constitution of

Kenya. Their salaries were paid up to January 2018, after which payment ceased without notice or explanation.

4) Accordingly, the appellants sought the following reliefs before the ELRC:

- (a) A declaration that the respondents' actions compelling them to proceed on indefinite leave and subsequently replacing them amounted to a breach of their contracts of employment and constructive termination, contrary to the right to fair labour practices under Sections 43 and 45 of the Employment Act and Articles 41(1) and 47(1) & (2) of the Constitution, and were therefore unconstitutional, unlawful, null and void;
- (b) A declaration that the appellants were entitled to payment of their monthly salary, leave allowance, all emoluments, and pension benefits for the entire contractual period of five (5) years;
- (c) An award of punitive and exemplary damages for breach of contract and unfair termination, to be assessed based on each appellant's portfolio, responsibilities, and salary;
- (d) An order directing the respondents to issue each appellant with a certificate of service; and
- (e) Costs and interest.

5) The respondents in their defence, averred that the appellants were appointed as Chief Officers from 1<sup>st</sup> October 2013 and were to serve until the end of the term of the erstwhile Governor of Meru County. They denied the existence of a five-year contractual term or any gratuity scheme. It was their position that the appellants' tenure was tied to the term of the appointing Governor, and upon the expiry

thereof, the

appellants' service came to an end. The respondents further asserted that the appellants received one month's salary in lieu of notice and continued to serve only on a transitional basis to ensure continuity pending recruitment of new officers. They contended that the claims were motivated by malice and political animus and, therefore, fit for dismissal.

6) Upon consideration of the pleadings, evidence, and submissions, the ELRC found that the appellants, being county public officers, were obligated to comply with Section 77 of the Act by appealing to the Public Service Commission before moving the court. The court relied on the decision in **Shem Okora Onywea v Kisii County Government & Another [2018] eKLR**, emphasizing the need to exhaust statutory dispute resolution mechanisms. Consequently, the ELRC held that the suits were filed prematurely and dismissed them, ordering each party to bear its own costs.

7) Dissatisfied with the said judgment, the appellants filed the instant appeal, raising five (5) grounds summarized as that the ELRC:

- (a) erred in holding that Section 77 of the Act applied to their case, despite their claim being one for breach of contract and unfair termination, not a disciplinary appeal;
- (b) erred in failing to find that the appellants' contracts were for a five-year term, as evidenced in the pay slips, and that they

continued to serve after the exit of the former Governor until January 2018;

- (c) failed to appreciate that the appellants' indefinite compulsory leave amounted to constructive termination; and
- (d) failed to find that the appellants had proved their case and were entitled to the reliefs sought.

8) The appellants prayed that the appeal be allowed and the impugned judgment be set aside; the appellants' claims as pleaded in their statements of claim dated 8<sup>th</sup> June 2018 be allowed in full; and costs of the appeal and the suit be awarded to them.

### **Submissions by Counsel**

- 9) The appeal was disposed of by way of written submissions with brief oral highlights. Learned counsel **Mr. Carlpeters Mbaabu** appeared for the appellants while **Mr. Ken Muriuki** represented the respondents.
- 10) **Mr. Mbaabu** submitted that Section 77 of the Act did not apply to the appellants since their claim was for breach of contract and unfair termination under Section 43 of the Employment Act and Articles 41 and 47 of the Constitution. It was contended that there was no decision by the County Public Service Board that would warrant an appeal to the Public Service Commission under Section 77 of the Act. Counsel asserted that their compulsory leave was not a disciplinary action within the meaning of that section, and no disciplinary proceedings were ever initiated.

**11)** Relying on **Kisumu County Public Service Board & Another v Samuel Okuro & 7 Others [2018] eKLR**, counsel submitted that the power to dismiss county chief officers lies with the County Public Service Board, not the Governor. Counsel asserted that the 1<sup>st</sup> respondent therefore, acted *ultra vires* in sending the appellants on leave and replacing them. Counsel urged us to allow the appeal with costs.

**12)** In response, **Mr. Muriuki** opposed the appeal and submitted that the appellants' grievances fell squarely within the ambit of Section 77 of the Act, which provides a mandatory appellate procedure to the Public Service Commission. Counsel relied on the decision of **The Secretary,**

**County Public Service Board & Another v Hulbhai Gedi Abdille**

**[2017] eKLR**, where this Court held that litigants must exhaust statutory mechanisms before invoking the jurisdiction of the courts. Counsel asserted that the appellants ought to have exhausted the appellate procedure provided by statute before filing the claim in court. Counsel urged this Court to dismiss the appeal with costs.

### **Determination**

**13)** As a first appellate court, our duty is to re-evaluate and re-analyze the evidence on record, bearing in mind that we neither saw nor

heard the witnesses. This duty is anchored in Rule 31(1) of the Court of Appeal Rules, 2022 and has been affirmed in **Gitobu Imanyara & 2 Others v**

**Attorney General [2016] eKLR** and **Selle & Another v Associated**

**Motor Boat Co. Ltd & Others [1968] EA 123.** We are also guided by the

principle stated in **Peters v Sunday Post Ltd [1958] EA 424**, that an

appellate court will not lightly differ from the findings of a trial court on questions of fact unless it is evident that the findings are based on no evidence or are plainly wrong.

14) Having considered the record, the submissions, the authorities cited and the law, we discern that the following issues arise for determination:

- (a) Whether the appellants' claims were premature for failure to comply with Section 77 of the Act; and
- (b) Whether the appellants' termination was unlawful and what remedies, if any, they are entitled to.

15) **Section 77** of the **Act** provides as follows:

**“77. Appeals to the Public Service Commission**

**(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 the “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—**

**(a) recruitment, selection, appointment and qualifications attached to any office;**

**(b) remuneration and terms and conditions of service;**

**(c) disciplinary control;**

**(d) national values and principles of governance under Article 10, and values and principles of public service under Article 232 of the Constitution;**

**(e) retirement and other removal from service;**

**(f) pension benefits, gratuity and any other terminal benefits; or**

**(g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.**

16) The appellants' argument is that the applicability of section 77 of the Act falls only to decisions by the County Public Service Board or any person in exercise or purported exercise of disciplinary control against any public officers and not the appellants' claim for breach of contract and damages for unfair termination. On the other hand, the respondent submitted that the appellants' reliefs sought in their pleadings revolved around their appointment and removal from office which fell within the ambit of section 77 of the Act hence the suit was premature for failure to exhaust the appellate procedure under the statute.

17) Section 77 of the Act establishes a comprehensive appellate mechanism to the Public Service Commission for any person dissatisfied or affected by a decision relating to employment in a County Government. The provision expressly covers decisions on

appointment, terms and

conditions of service, disciplinary control, removal from service, and terminal benefits.

18) The appellants' claims before the ELRC were anchored on their appointment as Chief Officers, the terms of their service, and their alleged removal from office. These matters fall squarely within the ambit of Section 77 of the Act.

**19)** This Court has consistently held that where a statute provides a clear and efficacious dispute resolution mechanism, that mechanism must be exhausted before recourse is had to the courts. This Court was faced with similar issues in the case of **Secretary, County Public Service Board**

**& another v Hulbhai Gedi Abdille [2017] KECA 643 KLR**, affirmed the

doctrine of exhaustion and underscored that courts should decline jurisdiction where statutory remedies have not been pursued, unless exceptional circumstances are demonstrated. This Court pronounced itself in the following terms:

***“Time and again, it has been said 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 ...” (See Speaker of National Assembly v James Njenga Karume (1992) eKLR;***

***Republic v National Environment***

**Management Authority exparte Sound Equipment Ltd  
(2011) eKLR.”**

20) In the absence of any demonstrated exceptional circumstances, we are satisfied that the ELRC did not err in holding that it lacked jurisdiction to entertain the appellants’ claims for failure to exhaust the statutory appellate procedure under Section 77 of the Act.

21) Accordingly, we find no merit in the appeal and dismiss it with costs to the respondents.

22) Orders accordingly.

**Dated and delivered at Nyeri this 27<sup>th</sup> day of February, 2026.**

**W. KARANJA**

.....  
**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

.....  
**JUDGE OF APPEAL**

**A.O. MUCHELULE**

.....  
**JUDGE OF APPEAL**

*I certify that this is  
a True copy of the  
original*

*Signed*  
**DEPUTY REGISTRAR**