

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
PETITION NO. E093 OF 2026

(Before Hon. Justice Dr. Jacob Gakeri)

MARTIN LUTHER BWANGA..... PETITIONER
VERSUS
ANTI-COUNTERFEIT AUTHORITY..... RESPONDENT

RULING

Before the court for determination is the applicant’s notice of motion dated 18th March, 2026 filed under certificate of urgency seeking orders that:

1. Spent.
2. Spent.
3. Preservation order be granted staying the Respondent’s letter of 24th February 2026 and 17th March, 2026 pending the hearing and determination of this claim.
4. Costs be provided for.

The application is expressed under Rules 45 (3) and 47 of the Employment and Labour Relations Court (Procedure) Rules and is based on the grounds outlined on its face and the supporting affidavit of the Applicant sworn on an unidentified date.

The applicant's case is that he attended a National Government officer's meeting at Embu on 2nd and 3rd March, 2026 and was issued with a notice to show cause.

The applicant avers that he was being victimized for having attended the meeting contrary to the provisions of section 236 of the Constitution of Kenya.

Finally, the applicant is also contesting the Respondents Human Resource Policy and procedures manual 2021 contending that they were not part of his contract of service as they were not incorporated therein.

After filing its Notice of Appointment dated 23rd March 2026 on 26th March 2026, the Respondent simultaneously filed a Notice of Preliminary Objection contending that the application and Petition were premature and the Court had no jurisdiction to entertain the same because the applicant had not appealed the Respondent's action to the Public Service Commission under Section 74 of the Public Service Commission Act and Regulation 68 of the Public Service Commission Regulations as that the Respondent's Human Resource instruments were approved by the Public Service Commission for continued use for 6 months from the date of the letter and the disciplinary process commenced against the Applicant was lawful.

Both parties filed and exchanged submission which I have considered.

The singular issue for determination is whether the Respondent's Notice of Preliminary Objection is merited.

In determining the foregoing issue, the Court is enjoined to apply the principles enunciated by the predecessor of the Court of Appeal in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696** where Law JA stated:

"...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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

Sir Charles Newbold on the other hand added;

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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."

Since the Respondent is challenging the court's jurisdiction to hear and determine the suit at this stage, the court is satisfied that that the Notice of Preliminary Objection on

record meets the test in **Mukisa Biscuit Manufacturing Co. Ltd v West and Distributors Ltd (Supra)**.

The gravamen of the Respondent's Objections that the ant suit is premature on account of non-compliance with the provisions of section 74 of the Public Service Commission Act and the Regulations made thereunder. In sum, the Respondent's case is grounded on the doctrine of exhaustion of internal dispute resolution mechanisms or administrative remedies.

In **Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others**, the Supreme Court held:

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

The Court re-stated the principle in **Benjamin v Attorney General (2026) KESC 5 (KLR)**. In this case, the Respondent relies on the provision of Section 74 of the Public Service Commission Act which provides.

- (1) Any person who is dissatisfied or affected by a decision made by an authorised officer or other authority in exercise or purported exercise of

disciplinary control against any public officer under this Act may appeal to the commission.

Clearly, the foregoing provision is not couched in mandatory tone to require all dissatisfied public officers or other persons affected by the impugned decision to lodge an appeal with the Public Service Commission.

No doubt the provisions of the Public Service Commission Act apply to employees of the Respondent by dint of Section 2 and 3 of the Act which define the phrase ‘Public affair’ and scope of application of the legislation respectively.

Unlike the provisions of Article 234 (2) (i) of the Constitution of Kenya, Section 77 of the County Governments Act and Sections 85 and 87(2) of the Public Service Commission Act which read together make it obligatory for persons dissatisfied or affected by a decision relating to county government public service to lodge an appeal with the Public Service Commission, Section 74 (1) of the Public Service Commission Act does not make the lodgement of an appeal with the commission by other public officers mandatory before instituting judicial proceedings and they seldom do so.

It requires no emphasis that public officers routinely file and prosecute matters in courts of law without offending to the Public Service Commission Act for the simple

reason that neither the people of Kenya nor the National Assembly deemed it necessary.

In the court's view, nothing prevented the Petitioner from instituting the instant suit, and referring the dispute to the Public Service Commission at this stage would be inconsistent with the emerging jurisprudence of the Employment and Labour Relations Court on public officers other than those in the County Public Service.

Clearly, the Respondents Notice of Preliminary Objection dated 26th March, 2026 lacks merit and it is accordingly dismissed with no orders as to costs.

Granted that counsels agreed on 24th March, 2026 that the status quo be maintained, the application dated 18th March, 2026 is deemed spent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS
23rd DAY OF APRIL, 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 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.

**DR. JACOB GAKERI
JUDGE**