



**County Secretary and Head of County Public Service County Government of Vihiga & another v Mbiti (Appeal E021 of 2025) [2026] KEELRC 1202 (KLR) (5 May 2026) (Ruling)**

Neutral citation: [2026] KEELRC 1202 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
APPEAL E021 OF 2025**

**DN NDERITU, J**

**MAY 5, 2026**

**IN THE MATTER OF APPEAL OF UNDER SECTION 79G OF THE CIVIL PROCEDURE ACT AND SECTION 12 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT**

**BETWEEN**

**THE COUNTY SECRETARY AND HEAD OF COUNTY PUBLIC SERVICE  
COUNTY GOVERNMENT OF VIHIGA ..... 1<sup>ST</sup> APPELLANT**

**THE VIHIGA COUNTY PUBLIC SERVICE BOARD ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MARY JEMAIYO MBITI ..... RESPONDENT**

*(Being an appeal from the orders of Hon. J. J. Masiga (Principal Magistrate) issued on 14th August 2025 in Kakamega Chief Magistrate's Court MCELRC Misc. No. E001 of 2025)*

**RULING**

**I. Introduction**

1. The Respondent filed Misc. Application No. E001 of 2025 in the Chief Magistrate's Court at Kakamega seeking for the following orders –
  1. For purposes of the record this application be certified urgent and be heard forthwith and ex-parte in the first instance.
  2. A temporary injunction do issue directed at the respondent, their employees, workers, agents and/or whomsoever jointly and severally restraining them from filling, recruiting, advertising the vacant position of Chief Officer in charge of gender, culture and social services or removing the applicant from the payroll of the County Government of Vihiga pending the hearing and determination of this application.



3. A temporary injunction do issue directed at the respondents, their employees, workers, agents and/or whomsoever jointly and severally restraining them from filling, recruiting, advertising the vacant position of Chief Officer in charge of gender, culture and social services or removing the applicant from the payroll of the County Government of Vihiga pending the hearing and determination of the public service commission appeal No.202 of 2025 filed by the applicant against the respondents.
4. The costs of this application be provided for.
2. Upon considering the said application, which was unopposed, on 14th August 2025 the lower court issued the following orders –
  1. That the application is hereby certified as urgent;
  2. That a temporary injunction is hereby issued directing the Respondents, their employees, workers, agents and/or whomsoever, jointly and severally restraining them from filling, recruiting, advertising the vacant position of Chief Officer in charge of Gender, Culture and Social Services or removing the Applicant from the payroll of the County Government of Vihiga pending the hearing and determination of this application;
  3. That the application be heard on 28<sup>th</sup> August, 2025. Applicant to serve the Respondents with the application.
3. It is the above orders that are now appealed by the Appellants through the County Attorney, based on the following grounds of appeal –
  1. The Honorable Learned Principal Magistrate erred in law by assuming a jurisdiction which he did not have and born out of judicial craft and innovations namely injunction pending hearing of appeal the Public Service Commission.
  2. The Learned Principal Magistrate erred in law by usurping, albeit wrongly, the jurisdiction of the Public Service Commission in the matters at hand to hear and determine appeals arising from county public service as provided in Article 234(2)(i) of Constitution of Kenya 2010, Section 77 of the [County Governments Act](#) and Sections 86 & 87 of the [Public Service Commission Act](#) including any interlocutory applications filed therein as provided in Regulation 13 of the Public Service Commission(County Appeals Procedures) Regulations 2022.
  3. The Learned Principal Magistrate grossly erred in law in purporting to entertain and even issue orders in a matter of which his jurisdiction is expressly prohibited by the exhaustion principle which is mandatory as provided in Section 87(2) of the [Public Service Commission Act](#).
  4. The Learned Principal Magistrate erred in law and in fact in introducing a strange and legally unsustainable approach not envisaged by [the Constitution](#) and legislation in the management of appeals to Public Service Commission from the County Public service by purporting to grant injunctions pending hearing of the appeal at the Commission in exercise of a jurisdiction not conferred on him by any law.
  5. The interim orders of injunction issued by the Learned Principal Magistrate went against the rules of natural justice.
  6. The Learned Principal Magistrate exceeded his lawful mandate.



7. The orders of injunction issued by the Learned Principal Magistrate violated Order 29 Rule 2(2) of the Civil Procedure Rules which prohibits orders of injunction against a government.
  8. In all aspects of the case, the Learned Principal Magistrate failed to be properly guided on the correct principles of the law governing injunctions as a result of which gross injustice has been occasioned and continue to occasion.
4. The Appellants are seeking and praying for the following orders –
- a. The appeal be allowed.
  - b. The offending orders of temporary injunction issued the Honorable Principal Magistrate be recalled and vacated and or set aside.
  - c. The application before the subordinate be called to this Honorable court in its supervisory jurisdiction conferred by Article 162(2)(a) of *the Constitution* and Section 12 of the *Employment and Labour Relations Court Act* and upon being called and taken up by the Honorable court, the same be struck out for want of jurisdiction on the part of the court.
  - d. Costs arising from and incidental to this appeal and of the subordinate court be paid by the Respondent.
  - e. Any other relief not disadvantageous to the Appellant aiming at meeting the ends of justice to issue.
5. Pending the hearing and determination of the appeal, the Appellants filed a notice of motion (the application) dated 1st September 2025 seeking for the following orders –
1. This application be and is hereby certified urgent for hearing on priority basis and without delay.
  2. The application be heard during the vacation.
  3. The order sought in paragraph 4 of this application be granted ex parte as the requirement for service is temporarily waived.
  4. That pending inter parties hearing, the implementation of the orders of Hon. J. J. Masiga Principal Magistrate issued in Kakamega MCELRC Case No E001 of 2025 Between Mary Jemaiyo Mbiti – V – The County Secretary and Head of County Public Service County Government of Vihiga and Vihiga Vihiga County Public Service Board dated on the 14<sup>th</sup> August 2025 and issued the same date be stayed.
  5. The order of stay of execution granted under paragraph 4, be extended upon inter parties hearing and or remain in force until the final disposition of the appeal herein.
  6. Costs of this application be recovered from the Respondent.
6. The application is expressed to be brought under Articles 50(1) & 159(2)(d) of *the Constitution*, Section 12 of the *Employment and Labour Relations Court Act*, Rule 8 of the Employment and Labour Relations Court (Procedure Rules) and, Sections 1A & B, 3 & 63 of the *Civil Procedure Act*, Order 42 Rule 6 of the Civil Procedure Rules, and all other enabling provisions of the law.
7. The application is based on the grounds stated on its face and supported with the affidavit of Vincent Mwamiri Chanzu, the County Secretary and Head of County Public Service Board, the 2nd Appellant.



8. Upon service, the Respondent, through Bruce Odeny & Company Advocates, filed a replying affidavit sworn by herself on 15th September 2025 with several annexures thereto.
9. On 23rd September 2025 the court, with the consent of counsel for the parties, directed that the application be canvassed by way of written submissions.
10. Counsel for the Appellants Miss Aresa filed written submissions dated 24th November 2025 but no written submissions were received from Miss Akinyi for the Respondent.

## **II. The Evidence**

11. In the supporting affidavit, it is deposed that the Respondent was until 28th July 2025 an employee of the 1st Appellant as the Chief Officer in the Department of Gender, Culture and, Social Services. It is further stated that the Respondent was dismissed for gross misconduct after a fair hearing as per the letter of dismissal dated 28th July 2025.
12. It is deposed that upon dismissal the Respondent's name was removed from the payroll as she could not be paid for services not rendered and, in any event, she was no longer an employee of the 1st Respondent.
13. It is further deposed that as at the time the order by the lower court dated 14th August 2025 was served upon the Respondents on 15th August 2015, the Respondent had already been removed from the payroll.
14. It is deposed that the lower court issued the impugned orders without jurisdiction as the matter arose within Vihiga County wherein there are situate Magistrates' Courts in Hamisi and Vihiga who would have dealt with the matter rather than the same being filed in Kakamega.
15. It is further deposed that if the Respondent was dissatisfied with the decision of her dismissal, the right and proper channel was for her to appeal to the Public Service Commission in accordance with the [Public Service Commission Act](#) together with the Rules and Regulations thereunder. It is further stated that the Respondent had no right to approach a court before exhausting the appeal process with the Commission.
16. In the replying affidavit by the Respondent, it is deposed that the application in the lower court was allowed after the Appellants failed to respond to the same, notwithstanding proper service. It is further deposed that the lower court had jurisdiction over the subject matter.

## **III. Submissions**

17. Counsel for the Appellants submitted on the following issues –
  - i. Whether the lower court had jurisdiction to entertain this case at the lower court and grant the injunctive relief?
  - ii. Whether the suit before the subordinate court was fatally defective for failure to exhaust the statutory dispute resolution mechanisms.
  - iii. Whether the impugned orders are illegal, unprocedural, and prejudicial to the Appellant.
  - iv. Whether the Appellants are deserving of the stay orders.
18. On the first issue, it is submitted that after dismissal the Respondent could only exclusively appeal to the Public Service Commission. It is further submitted that the lower court lacked both substantive and territorial jurisdiction over the subject matter. It is submitted that there is no reason given as to



why the Respondent did not file the matter at Hamisi or Vihiga Magistrates' Courts and instead filed the same in Kakamega. It is submitted that the filing of the matter as such offended Section 15 of the *Civil Procedure Act*.

19. On the second issue, it is submitted that the lower court had no jurisdiction over the subject matter as Regulation 13 of the Public Service Commission (County Appeals Procedures) Regulations allows parties to apply for interlocutory applications with the Commission for interim reliefs. It is thus submitted that the Respondent abused the doctrine of exhaustion for failing to make her application with the Commission before approaching the court. It is submitted that the Respondent after the dismissal filed Appeal No. 202 of 2025 with the Commission. It is further submitted that while the appeal was still pending the Respondent unlawfully and un-procedurally approached the court for the interim orders.
20. It is submitted that by filing an application in the lower court while the appeal was pending before the Commission, the Respondent violated Section 87(2) of the *Public Service Commission Act*. It is further submitted that the Respondent thus abused the doctrine of exhaustion. In support of that argument counsel cited *William Odhiambo Ramogi & 3 Others V Attorney General & 4 Others (2020) eKLR*.
21. On the third issue, it is submitted that the orders by the lower court are void ab initio and of no legal consequence. It is submitted that the said orders violated Order 29 Rule 2(2)(d) of the Civil Procedure Rules as an injunction should not issue against a government.
22. On the fourth issue, it is submitted that the challenged orders are oppressive and unlawful and unenforceable. It is submitted that considering the entire circumstances of this matter, the balance of convenience is in favour of staying and or setting aside the said orders. It is further submitted that public interest is in favour of setting aside of the orders as the Appellants shall suffer irreparable damage. It is submitted that the order if effected shall entitle the Respondent to payment of a salary without her offering any services and also prejudice the appeal that is pending with the Public Service Commission.

#### **IV. Issues For Determination**

23. The factual background of this matter has been set out by the parties as per the summary in the preceding part of this ruling. In my considered view, the only issue for determination is – Whether the application by the Appellants has merits.
24. The appeal by the Appellants raises a variety of issues. Firstly, there is the argument that the lower court lacked both substantive and territorial jurisdiction. It is pleaded and submitted that the Respondent has an appeal pending before the Public Service Commission (the Commission) that she filed after her dismissal being Appeal No. 202 of 2025. It is the Appellants' position that the Respondent had the opportunity to seek the interlocutory reliefs before the Commission based on Regulation 13 of the Public Service Commission (County Appeals Procedures) Regulations.
25. It is also the Appellants' position that Section 87(2) of the *Public Service Commission Act* prohibits a party from approaching a court on matters that are specifically assigned to the Commission by law.
26. The Appellants also raised the issue of territorial jurisdiction of the lower trial court that issued the order. That court is based in Kakamega yet there are two courts of the same rank in Hamisi and Vihiga within Vihiga County where the dispute arose and where the Respondents reside.
27. Flowing from all the above, it is this court's finding and holding that the appeal herein prima facie raises serious and fundamental issues that deserve a hearing and determination. The issues raised on jurisdiction and abuse of the doctrine of exhaustion call for serious consideration and determination.



There is also no explanation coming from the Respondent as to why the matter was filed in Kakamega and not at Vihiga or Hamisi Law Courts.

28. In the circumstances, the application by the Appellants is allowed in terms of prayer 5.

**VI. Orders**

- i. The application by the Appellants dated 1st September 2025 is allowed in terms of prayer 5 in that – pending the hearing and determination of the appeal the orders issued by Hon. J. J. Masiga (PM) issued in Kakamega CMELRC Misc. Application No. E001 of 2025 dated 14th August 2025 are hereby stayed.
- ii. Costs of the application shall be in the appeal.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 5<sup>TH</sup> DAY OF MAY 2026.**

.....

**DAVID NDERITU**  
**JUDGE**

