

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS

ELRC PET NO. E007 OF 2025

IN THE MATTER OF THE CONSTITUTION OF KENYA UNDER ARTICLES  
1,2,3,10,22,23,41,47,73,232,258,50

AND

IN THE MATTER OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT NO. 20  
OF 2011

AND

IN THE MATTER OF THE FAIR ADMINISTRATION ACT NO. 4 OF 2015

AND

IN THE MATTER OF SECTION 25 OF THE URBAN AREAS AND CITIES ACT NO. 13 OF 2011

AND

IN THE MATTER OF AN APPLICATION FOR CONSERVATORY ORDERS TO HALT THE  
INSTALLATION OF NEW MEMBERS TO THE MAVOKO MUNICIPAL BOARD

BETWEEN

MAVOKO MUNICIPAL BOARD ..... PETITIONER

-VERSUS-

THE COUNTY PUBLIC SERVICE BOARD MACHAKOS COUNTY .....1ST RESPONDENT

THE COUNTY ASSEMBLY OF MACHAKOS ..... 2ND RESPONDENT

THE GOVERNOR COUNTY GOVERNMENT OF MACHAKOS ..... 3RD RESPONDENT

THE CLERK TO THE COUNTY ASSEMBLY OF MACHAKOS .....4TH RESPONDENT

THE SPEAKER COUNTY ASSEMBLY OF MACHAKOS ..... 5TH RESPONDENT

THE COUNTY EXECUTIVE COMMITTEE MEMBER  
LANDS, HOUSING, URBAN DEVELOPMENT AND  
ENERGY COUNTY GOVERNMENT OF MACHAKOS ..... 6TH  
RESPONDENT

THE HON. ATTORNEY GENERAL .....7TH  
RESPONDENT

THE COUNTY ATTORNEY MACHAKOS COUNTY ..... 8TH  
RESPONDENT

CORAM

Before Lady Justice Jemimah Keli

C/A Otieno

RULING

1. The petitioner was the Mavoko Municipal Board whose members were appointed to the Board on 23rd October 2020. The petitioner, vide its petition and Notice of Motion Application, both dated 25th July 2025, claims that its members were not paid by the Respondents their sitting allowances amounting to Kshs. 1,600,000/=. Further, the petitioner claims that the 2nd, 4th and 5th Respondents began the recruitment process of new members to the Mavoko Municipal Board yet the petitioner’s tenure had not ended. The petitioner sought for the following orders —

- (a) A declaration issue that the Respondents have violated the petitioner’s rights under Articles 10,27,41,47,50,73,201 and 232 of the Constitution;
- (b) An order of certiorari quash any ongoing or concluded process for vetting or appointment of a new Municipal Board for Mavoko;
- (c) An order of mandamus compel the Respondents to pay the petitioner the outstanding allowances amounting to Kshs. 1,610,000/= with interest;

- (d) An order of prohibition restrain the Respondents from conducting or implementing any new vetting or appointment process in respect of the Mavoko Municipal Board until the expiry of the current Board's term;
  - (e) A conservatory order suspend the notice of the County Assembly Clerk regarding the vetting of new Board nominees, pending the hearing and determination of the Petition;
  - (f) General damages be awarded for violation of constitutional rights;
  - (g) Costs of petition; and
  - (h) Any other or further relief deemed appropriate.
2. Upon service of the petition, the 2nd, 4th and 5th Respondents objected to the hearing and determination of the petitioner's petition dated 25th July 2025 vide Notice of preliminary objection dated 4<sup>th</sup> November 2025 on the grounds—
- i. THAT this Honorable court lacks jurisdiction to hear and determine the petition due to section 77 of the County Government's Act No. 17 of 2012; and
  - ii. THAT the petition has been overtaken by events.
3. The Court directed that the preliminary objection be canvassed by way of written submissions.
4. Only the respondents filed submissions.
5. The respondent addressed 2 issues-
- I. Whether this Honorable court lacks jurisdiction to hear and determine the petition.
  - II. Whether the determination of the petition would be in vain.

6. The respondent relied on the decision of the court of Appeal in Owners of Motor Vessel “Lillian S” –vs-Caltex Oil Kenya Limited [1998] eKLR and submitted as follows- The jurisdiction of the court must be addressed on priority basis when challenged. The Respondents submit that the court lacks jurisdiction to entertain the petition as the Public Service Commission (“PSC”) which sits as a quasi-judicial body, is duly vested with the mandate to hear and determine the issues raised in the petition. That the issues therein form subject of an appeal before the PSC pursuant to the provisions of Sections 77 of the County Governments Act 2012. Section 77 of the County Governments Act, 2012 (“CGA”) is a first window for recourse in employment matters and relations in the public service. It provides that those aggrieved by decisions in terms of their employment ought to resort to the PSC as a first point of call. Specifically section 77 states— “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...” The Respondents submit that the issues raised in the petition form the subject of an

appeal to the PSC because— a. The petitioner is a county public officer affected or dissatisfied with the decision of the employer that is the county government. i. Section 59(1)(b) of the CGA gives one of the functions and powers of a County Public Service Board (“CPSB”) “to appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments.” In subsection (c) of the same section, the CPSB has the function to “exercise disciplinary control over, and remove persons holding or acting in those offices.” Therefore the petitioner is employed by the CPSB and the CPSB exercises disciplinary control over the petitioner. ii. The petitioner is made of county public officers even though their appointment may have come in a different way from other county public officers. This was also considered in the case of Laban –vs- Machakos County Assembly Service Board & 2 others (Petition E004 of 2023) [2025] where the ELRC Court sitting in Machakos held— “Although the County Assembly Service Board and the County Public Service Board play distinct roles of hiring personnel for the two distinct arms of a County Government, this does not mean that the persons who are so hired fall under two distinct categories of County public servants. If the definitions I have alluded to earlier in this decision are to offer any guidance on the matter, these officers, by dint of being part of the collectivity of all individuals, other than State officers, who perform functions within State organs, fall in the general pool of public service. And personnel in the County Governments who fall in this category of public servants are amenable to the appeal mechanism under section 77 of the County Governments Act as read with sections 85 to 87 of the Public Service Commission Act.” b. The scope of application of the Public Service Commission Act Cap 185 (“the PSC Act”) and CGA apply directly to the petitioner and the CPSB as the employer. i. The CGA states under mandatory terms in section 77 that the PSC shall entertain appeals on any decision relating to employment of the petitioner in the county government including a

decision in respect of recruitment, remuneration and terms and conditions of service. ii. Section 3 of the PSC Act provides that the Act shall apply to all public bodies and persons holding office in public service and the petitioner is by virtue of this section not exempted from application of the Act's provisions. c. The matters raised in the petition relate to matters under the jurisdiction of the PSC whereby the PSC has power to grant the prayers and orders sought by the petitioner i. Section 5 of the PSC Act gives PSC the power to do or perform all such other things or acts for the proper discharge of its functions under the Constitution and any other laws, as may be necessary to perform its functions like any other corporate body. ii. Section 87(2) of the PSC Act 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". Thus from these provisions and justifications, the issues raised in the petition are appealable to the PSC on the first instance. The doctrine of exhaustion has been supported by jurisprudence flowing from Kenyan courts including in the case of Muthinja & another –vs- Henry & 1756 others [2015] KECA 304 (KLR) where the Court of Appeal held that— "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 the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution. We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is

sought to be challenged is the very authority of the organs before whom the dispute was to be placed.” The petitioner was mandated to file a review with the PSC relating to the issues raised in the petition. Consequently, the court’s jurisdiction was invoked prematurely. This court is bound by the principle of exhaustion that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue and not invoke the court process if the dispute can effectively be dealt with in that other forum. The Respondents similarly submit that the appointment of new members to form the Mavoko Municipality Board was kick-started and concluded vide a report that was tabled in the 2nd Respondent. The vetting exercise required to be done by the 2nd Respondents culminated in a report dated 5th August 2025 that was approved by the House. Therefore, a new Board was inaugurated on 5th December 2025. The petitioner’s petition has thus been overtaken by events since the installation of a new Board is complete and it would be unfair to interfere with that process merely because of unpaid allowances. The claim for monies due to the petitioner ought not to prevent the enjoyment of the citizenry of the right to good governance. As was done in the case of Omoit –vs- County Secretary, Busia County Government & 3 others [2023] KEELRC 2233 (KLR) where the Respondents sustained a similar preliminary objection to the instant case, that objection was upheld by the High Court. The Respondents herein pray that this Honorable Court uphold their notice of preliminary objection dated 4th November 2025, and dismiss the Notice of Motion application and petition dated 25th July 2025 for lack of first instance jurisdiction.

7. The preliminary objection was unopposed

#### Decision

8. The court finds that the only relevant issue proper for disposal under Notice of Preliminary Objection is the issue of jurisdiction. The petitioner is the Mavoko Municipal Board. The Petition was supported by the affidavit of one Shadrack Mbuta who alleged to be the current chairman yet in the main petition at paragraph 20 the Board Chairman is stated to be Antony Ngunga and the name of the deponent is not mentioned. The name of the deponent was seen in the annexures as having been appointed as a member. That settled the issue. The court found the actual cause of action was the non-payment of dues to the members of the board. There was no constitutional issue disclosed. At best, it was a case of contractual breach by non-payment of dues. The court agreed that the members of the Mavoko Municipal Board are under the Machakos County Public Service Board. That brought them under section 77 of the County Government Act to wit –‘Section 77 of the [County Government Act](#) provides that:-

“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. ....”

9. The cause of action is about remuneration of the board members. That falls under the constitutional jurisdiction of the Public Service Commission as stated in the Public Service Commission Act section 85 and 86, to wit:-

‘85.Appeal from County Government public service:-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;

(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 forms of removal from the public 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 an appeal in that regard.

86.Procedure for appeal (1) Any person who is dissatisfied or affected by a decision made by any authority or person in respect of a County Government public service may appeal to the Commission against the decision.’’

10. To bastion the mandatory nature of appeal process before the Public Service Commission is section 87(2) of the *Public Service Commission Act* which reads:-‘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.’’ In Omoit v County Secretary, Busia County Government & 3 others; Public Service Commission (Interested Party) [2023] KEELRC 2233 (KLR) I upheld the jurisdiction of Public Service Commission as follows-‘In the upshot, considering that the issues raised by the Petitioner relate to her terms of service, recruitment and remuneration, the said issues fall within the mandate of the County Public Service Board and are therefore pursuant to Section 77 of the *County Governments Act* appealable to the Public Service Commission as the first instance forum. The Petitioner was mandated to file a review with the Public Service Commission relating to the issues raised in the application and Petition. Consequently, the court’s jurisdiction was invoked prematurely. The court upholds the Notice of Preliminary Objection dated 15<sup>th</sup> June 2023 by the 1<sup>st</sup>,2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents and the Notice of Motion application and Petition dated 6<sup>th</sup> June 2023 are hereby dismissed for lack of first instance jurisdiction by the court.’

11. Before the court was a constitutional petition, but the same did not disclose any constitutional violations. At best, the cause of action was non-payment of dues to the petitioner’s board members. The foregoing position was similar to the case in Professor Daniel N. Mugendi V Kenyatta University & 3 Others [2011] KEHC 57 (KLR) where the High Court made the following observation of which I upheld to apply in the instant case- ‘**16.** *The view that this court takes of the matter is that the resolution of such disputes must take place in the forums and through the processes set out under those laws the enactment of which is provided for in the constitution for*

dealing with the different classes of rights. Only where such forums and processes deal with disputes in a manner that violates the fundamental rights of a party, such as, for instance, by a failure to observe the rules of natural justice or by treating a party in a discriminatory manner, should recourse be had to a constitutional court for protection of the aggrieved party's fundamental rights.

As the High Court observed in the case of **Alphonse Mwangemi Munga & 10 Others v African Safari Club Limited (2008) e KLR**:

*“The Constitution is the Supreme Law of the land but it has to be read together with other laws made by Parliament and should not be construed as to be disruptive of other laws in the administration of justice...”*

The court in this case went on to emphasise that:-

*“.....parties should make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the constitutional court and making constitutional issues of what is not.”*

16. In my view, the case before this court is on all fours with the **Alphonse Mwangemi Munga** case. The Petitioner's claim against the Respondents is based on his contract of employment with the 1<sup>st</sup> Respondent. The Constitution has by Article 162 (2) (a) expressly removed jurisdiction to hear disputes arising from industrial/employment relations from the High Court and placed such jurisdiction with the Industrial Court. There is already a functioning industrial court. In addition, there are internal procedures under the Kenyatta University Act for the resolution of disputes between parties in the position of the Petitioner and the 1<sup>st</sup> Respondent. From the pleadings before the court, there is nothing to suggest that the Petitioner's constitutional rights were violated in the process of adjudication of his

*employment/contractual rights in the forum and through the process provided for in the relevant laws. If anything, from the evidence before the court, the Petitioner chose not to avail himself of these processes by declining to appear before the Special Committee of the General Purposes Committee of the 1<sup>st</sup> Respondent when given an opportunity to do so on two occasions and electing instead to file this Petition. Had there been evidence of violation of the Petitioner's constitutional rights, the court would have been properly able to address itself to those violations and make appropriate orders. What has been placed before this court, however, shows only alleged breaches of employment/contractual rights.'* Likewise, in the instant case, the dispute arose out of an employment relationship, and the petitioner alleged issues related to contract breach. I find the authority relevant and hold the forum for the resolution of the employment dispute is the Public Service Commission pursuant to section 77 of the County Government Act.

12. The court finds there exists a comprehensive sufficient remedy for the grievance before the court. The court upheld the classic decision on the exhaustion in *Speaker of the National Assembly v Karume* [1992] KECA 42 (KLR) where the court of appeal stated-“ 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.”

The court consequently finds that it lacks jurisdiction to hear and determine the petition at the first instance. The court also found the petition did not disclose a constitutional issue as the grievance was on terms of service, specifically claim for dues related to dues to board members. The notice of preliminary objection dated 4<sup>th</sup> November 2025 by the 2<sup>nd</sup>, 4<sup>th</sup> and

5<sup>th</sup> respondents is upheld. The court invokes the provisions of Rule 56(5)(c) of its rules that –‘c)a suit filed prior to exhaustion of such alternative dispute resolution mechanisms may be stayed and not struck out on account of such exhaustion.’ and orders the petitioner to first exhaust the process under section 77 of the County Government Act as the cause of action is recruitment which falls under jurisdiction of the Public Service Commission. The petition is stayed pending the outcome of the Commission's mechanism.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS ON THE 8<sup>TH</sup> MAY, 2026.

JEMIMAH KELI

JUDGE

IN THE PRESENCE OF;

C/A Otieno

Petitioner- absent

2, 4<sup>th</sup> and 5<sup>th</sup> Respondents - absent

7<sup>th</sup> Respondent- Kuria h/b Mumo