

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS

PETITION NO. E017 OF 2025

IN THE MATTER OF ARTICLES 20,21,22,23,41 AND 259 OF THE CONSTITUTION OF KENYA 2010 AND IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER THE BILL OF RIGHTS AND IN THE MATTER OF SECTION 17 AND 35(5) OF THE EMPLOYMENT ACT, CAP 226 LAWS OF KENYA

BETWEEN

PHILIP MUTINDA MUMO.....PETITIONER

AND

THE COUNTY GOVERNMENT OF KITUI.....RESPONDENT

CORAM

Before Lady Justice Jemimah Keli

C/A Otieno

RULING

1. The Petitioner instituted a Petition against the respondent seeking the following orders against the Respondent for alleged breach of terms of employment and/or violation of fundamental rights;

- a) A declaration that the act of the Respondent in withholding the Petitioner's salary for the period from September 2020 to August 2022 is a breach to the Petitioner's constitutional rights under Article 41 of the Constitution.
- b) Special damages of Kshs 6,886,675/ under Article 23 (3) of the Constitution being compensation in respect of:
  - i. Withheld salary in the sum of Kshs.6,237,000/=
  - ii. Gratuity pay in the sum of Kshs.649,675/=
- c) General damages under Article 23 (3) of the constitution being compensation for violation of the Petitioner's rights
- d) Interest on (a) (b) and (c) above in court rates from the date of filing this petition until payment in full
- e) Cost of the petition

2. In opposition to the petition, the Respondent raised a Notice of Preliminary Objection on the following grounds: Article 234 of the Constitution of Kenya sets out the functions and powers of the Public Service Commission; Article 234(2) (i) particularly provides as follows: (2) The commission shall - Hear and determine appeals in respect of County Government Public Service Section 77(i) of the County Government Act gives effect to Article 234(2) supra as it provides as follows; (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 officers may appeal to the Public Service Commission (in this part referred to as the "Commission") against the decision.

Section 77(2) of the County Government Act further clarifies the instances where a person may appeal to the Public Service Commission and it reads as follows; (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 Section 85 of the Public Service Act further and in support of Article 234 (2) of the Constitution of Kenya enumerates the instances within which the powers of the Public Service Commission may be invoked; a) Recruitment, selection, appointment and qualifications attached to any office; b) Remuneration and terms and conditions of service; Section 87(2) of the Public Service Act states as follows; (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. Additionally, Section 13 A(1) of the Government proceedings Act provides as follows; 1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing in the prescribed form have been served on the Government in relation to those proceedings. From the foregoing provisions of the Law, the Respondent contends that the Petitioner has approached this Honorable Court prematurely as the channels provided for the dispute resolution between the parties have not been fully exhausted.

3. The court directed that the Notice of preliminary objection be canvassed first by way of written submissions.

Respondent's submissions on their Notice of Preliminary Objection

4. The Respondent submitted that the Petitioner’s claim falls within the mandate of the Public Service Commission and the Commission is clothed with the powers to hear and determine the Petitioner’s Claim as provided under Section 77(2) of the County Government Act and section 85 of the Public Service Act. In the Case of Kamba & 8 others vs County Public Service Board, Machakos County Government & 2 others (Employment and Labour Relations Cause E099 of 2023) [2023] the court observed as follows; “I agree with the position expressed by the Respondents that where the law provides for an alternative mechanism for resolving a dispute, parties should pursue that mechanism before invoking the court’s Jurisdiction.” Additionally, in the case of Kamba & 8 others vs County Public Service Board supra the court cited the case of; Republic Vs National Environmental Management Authority (2011) KRL with approval as follows; “The principle running through these cases is where there was an alternative remedy and especially where parliament had provided statutory appeal procedure, 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 statutory powers, was the real issue to be determined and whether the statutory appeal was suitable to determine it”. In the case of Republic V Migori County Secretary & another Migori County Public Service Board (interested party) Ngwala & others Judicial Review Application No. E013 OF 2022; the court observed as follows; “In terms of Article 234 (2)(i) of the constitution as read with section 77(2) of the County Governments Act and section 87 (2) of the Public Service Commission Act the ex-parte applicants first part of call should have been through an appeal to the Public Service Commission. The Jurisdiction of this court is therefore deferred until the Public Service

Commission considers and determines such an appeal. Decisions from the Court of Appeal and the Supreme Court are clear that in these types of cases, the alternative Jurisdiction should be invoked before a party approaches the court unless there are exceptional circumstances.” From the foregoing decision the courts require the parties to subject themselves through the statutory appeal processes and exhaust the same before invoking the Jurisdiction of the courts.” In the case of National Assembly VS James Njenga Karume Civil Application No.92 of 1992 the court held as follows; “In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of parliament, the procedure should be strictly followed...” Additionally, in the case of Secretary, County Public Service Board & The Secretary, Wajir County Government and Hulbhai Gedi Abdille another Vs Hulbhai Gedi Abdille (2017) KECA 643(KLR) The court of appeal observed as follows; “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. Such party ought to seek redress under the other regime”. Similarly, in the case of Professor Daniel N. Mugendi Vs Kenyatta University & 3 others Constitutional Reference Number 142 of 2011 the court cited with approval the case of Alphonse Mwangemi Munga & others Vs African safari Club Limited (2008) eKLR, the learned Judge was persuaded that the constitution had to be read together with other laws made by parliament .It should not be construed as to be disruptive of other laws in the administration of Justice and that accordingly 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 with all the

foregoing, the learned Judge concluded that the claim placed before her by the appellant was based on employment, a matter that should have instead been taken to the Industrial court which has constitutional and statutory Jurisdiction over such matters and not the High Court in the form of Constitutional reference”. The Respondent submit that the dispute between the parties is fundamentally an employer-employee dispute and not a constitutional issue as the same is founded on alleged breach of terms of contract of employment and the same cannot be disguised as a constitutional petition. In light of foregoing, it is the Respondent’s submission that the Petitioner has approached this Honourable Court prematurely by failing to adequately exhaust all other avenues of dispute resolution as enumerated hereinabove. It is the Respondents' humble prayer that the Petition be struck out with costs.

#### Petitioner's Submissions

5. The petitioner opposed the Notice of Preliminary Objection and submitted that a plain reading of the above-cited provisions of law shows that the Public Service Commission is clothed with jurisdiction to determine employment disputes relating to employment in the County Public Service. However, Section 77 (1) of the County Governments Act uses the phrase "may appeal" to the Public Service Commission, which denotes choice. This allows an aggrieved person to move the Court appropriately, if they consider the Court the best forum to ventilate their grievances. Furthermore, the Public Service Commission mechanism is inadequate to address constitutional violations such as blatant disregard of the right to fair labour practices, as the Commission lacks the power to make the appropriate remedial orders of compensation for violation of rights. Section 86 (4) of the Public Service Commission Act only provides for limited reliefs that the Commission may grant on an appeal. It states: (4) After considering an appeal under this section the Commission may- (a)

uphold the decision; (b) set the decision aside; (c) vary the decision as it considers to be just; or (d) give such directions as it may consider appropriate with respect to the decision. The Court in *Leleruk & 41 others v Isiolo County Government & 2 others* (Employment and Labour Relations Petition E010 of 2023) [2025] KEELRC 98 (KLR) (24 January 2025) (Judgment) stated as follows with regard to the inadequacy of the Public Service Commission mechanism to address constitutional violations: 'Lam not convinced that the PSC can grant sufficient remedy to the petitioners grievances in this case, which include declaration conversion of the terms and conditions of service, and compensating constitutional violations. Having considered the facts of this case I am satisfied that this court is better placed to determine the dispute than the PSC under section 37 of the Employment Act and Article 23 of the Constitution. The remedies that the Petitioner is seeking in this Petition lie in Article 23 (3) of the Constitution which provides: "In any proceedings brought under Article 22, a court may grant appropriate relief, including- (a) a declaration of rights; (b) an injunction; (c) a conservatory order; (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; (e) an order for compensation; and (f) an order of judicial review." It is only the Court that has the power to grant the reliefs contemplated in Article 23 (3) of the Constitution. In addition, Section 12 of the Employment and Labour Relations Court Act grants this Court unlimited original and appellate jurisdiction in all employment and labour relations disputes. Section 12 (3) of the Employment and Labour Relations Court Act and provides for remedies that may be awarded by the Court. It states: "(3), In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders- (i) interim preservation orders including injunctions in cases of urgency; (ii) a prohibitory order; ( ii) an order for specific

performance; (iv) a declaratory order; (v) an award of compensation in any circumstances contemplated under this Act or any written law; (vi) an award of damages in any circumstances contemplated under this Act or any written law; (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or (viii) any other appropriate relief as the Court may deem fit to grant. "Therefore, the instant Petition having been premised on blatant violation of the right to fair labour practices, and taking into consideration the nature of the reliefs sought, we submit that this Court is best placed to hear and determine the dispute. The Public Service Commission lacks the power to determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights; or to grant the reliefs sought in the Petition. We gather support from *Leleruk & 41 others v Isiolo County Government & 2 others* (supra) where the Court held: Having considered the provisions of the constitution and the statutes I reiterate that this Court is best placed to hear and determine the petition herein.

### Decision

6. The petitioner sought for the following remedies in his petition –
  - a. A declaration that the act of the Respondent in withholding the Petitioner's salary for the period from September, 2020 to August, 2022 is a breach of the Petitioner's constitutional rights under 41 of the Constitution.
  - b. Special damages of Kshs. 6,886,675/- under Article 23 (3) of the Constitution being compensation in respect of:
    - i. Withheld salary in the sum of Kshs. 6,237,000/-;

- ii. Gratuity pay in the sum of Kshs. 649,675/-;
  - c. General damages under Article 23 (3) of the Constitution being compensation for violation of the Petitioner's rights.
  - d. Interests on (a), (b) and (c) above at court rates from the date of filing this Petition until payment in full.
7. The court on perusal of the petition finds that this was a claim for compensation of dues under contract. There was no other claim of constitutional rights violation outside labour rights hinged on the said salary and gratuity. On the merits of the preliminary objection, the court agreed that, if the petitioner were an employee of the respondent, as alleged, his remedy was an appeal to the Public Service Commission. There was no constitutional issue outside the remuneration and gratuity to justify the determination of the petition on merit by the court. The forgoing 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 emphasize 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 employment relationship and the petitioner alleged issues related to contract breach. I find the authority relevant and hold the forum for the resolution the employment dispute is the Public Service Commission pursuant to section 77 of the County Government Act.*

8. The decision in Leleruk & 41 others v Isiolo County Government & 2 others (Employment and Labor Relations Petition E010 of 2023) [2025] KEELRC 98 (KLR) (24 January 2025) (Judgment) on inadequacy of Public Service Commission mechanism is distinguished. The issues before the court are not constitutional, but claims under the employment contract. The court and indeed the Court of Appeal have upheld the constitutional and statutory jurisdiction of the Public Service Commission to decide disputes on employment in county governments as stated in section 85 of the Public Service Commission, to wit: ‘85.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;’ The court is further guided by the case of National Assembly VS James Njenga Karume Civil Application No.92 of 1992 the court held as follows; “In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of parliament, the procedure should be strictly followed...” There is a clear procedure under section 77 of the County Government Act to be followed by the petitioner for his claims. The court invokes the provisions of Rule 56(5)(c) of Employment and Labour Relations Court (procedural) rules 2024 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 remuneration which falls under jurisdiction of the Public Service Commission. The petition is stayed pending the outcome of the mechanism before the Public Service Commission.

29. It is so Ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MACHAKOS THIS 8<sup>TH</sup> DAY OF MAY, 2026.

JEMIMAH KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Applicant : Ms Kyengo

petitioner/ Respondent: Nguma