



REPUBLIC OF KENYA



**Wajir Wasco Limited alias Wajir Water & Sewerage Company & another v Mohamed & 2 others (Civil Appeal E396 of 2023) [2024] KECA 937 (KLR) (2 August 2024) (Judgment)**

Neutral citation: [2024] KECA 937 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E396 OF 2023  
PO KIAGE, JM MATIVO & PM GACHOKA, JJA  
AUGUST 2, 2024**

**BETWEEN**

**WAJIR WASCO LIMITED ALIAS WAJIR WATER & SEWERAGE  
COMPANY ..... 1<sup>ST</sup> APPELLANT  
COUNTY GOVERNMENT OF WAJIR ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ABDI JIKRE MOHAMED ..... 1<sup>ST</sup> RESPONDENT  
MARYAN FARAH SALAH ..... 2<sup>ND</sup> RESPONDENT  
SAFI ABDULLAHI ADAN ..... 3<sup>RD</sup> RESPONDENT**

*(An appeal from the ruling by the Employment and Labour Relations Court (ELRC) at Nairobi (Ongaya, J.) dated on 25th May 2023 in ELRC Petition No. E076 of 2023)*

**JUDGMENT**

1. In this appeal, the appellants (Wajir Wasco Limited Alias Wajir Water & Sewerage Company, and County Government of Wajir) are aggrieved by the ruling delivered by the Employment and Labour Relations Court (ELRC) at Nairobi (Ongaya, J.) on 25<sup>th</sup> May 2023. By the said ruling, the learned Judge dismissed the appellants' Notice of a Preliminary Objection dated 3<sup>rd</sup> May 2023 and issued a conservatory order directing the 1<sup>st</sup> appellant and its agents to pay the respondents (Safi Abdullahi Adan, Abdi Jikre Mohamed, Maryan Farah Salah) together with other employees their withheld salaries from the month of October 2022 to date of the ruling. The learned Judge also directed the 1<sup>st</sup> appellant to continue paying the respondents and the other employees their salaries as and when they fall due as long as the respective contracts of service remain in place.
2. A brief summary of the facts which triggered the litigation before the ELRC is necessary so as to contextualize the arguments presented by the parties in support of their respective positions.



Fortunately, the facts are essentially common ground or uncontroverted. Briefly, the respondents and the 76 others were employed by the 1<sup>st</sup> appellant between the years 2014 and 2020 in various job categories. On October 2022, the appellants stopped the respondents' salaries. On 13<sup>th</sup> December 2022, the 1<sup>st</sup> appellants through its Managing director vide an internal memo informed the respondents and all other staff that there will be an internal Human Resource Audit on 15<sup>th</sup> December 2022 which was to be conducted at its headquarters and the staff s' work stations for those working outside Wajir. The respondents were asked to individually present an original and a copy of their appointment letters, acceptance letter, original and copy of identity card, academic testimonials, and copy of birth certificate, copy of KRA PIN, NHIF and NSSF. The petitioners claim that they complied with the said requirements.

3. It is the stoppage of their salaries that prompted the respondents to file Constitutional Petition No. E076 of 2023 at the ELRC. The petition was accompanied by an application dated 17<sup>th</sup> April 2023 seeking orders to compel the appellants to pay the salaries that were withheld and to continue paying future salaries pending hearing and determination of the petition. In response to the petition, the appellants filed a Notice of a Preliminary Objection to the petition dated 3<sup>rd</sup> May 2023 stating that:
  - (a) the proceedings had been instituted in violation of section 77 of the *County Governments Act* which vests the jurisdiction to hear the grievances cited by the respondents to the Public Service Commission;
  - (b) that the proceedings violated section 82 of the Water Service Act which provides for appeals to the Water Services Regulatory Board;
  - (c) that the proceedings violated section 9 (2) of the *Fair Administrative Action Act*.
4. The appellants also filed grounds of opposition to the application and a replying affidavit both dated 3<sup>rd</sup> May 2023 stating:
  - (a) that the petition and the application were premature and sought to curtail the Human Resource Audits so as to entrench ghost workers in the county public service;
  - (b) that the respondents had also filed a petition before the County Assembly;
  - (c) that the petition and the application violated section 77 of the *County Governments Act* and various decisions of this Court; and,
  - (d) that the respondents had not exhausted alternative dispute resolution mechanisms under the law.
5. Upon considering the respondents' application, the appellants' Notice of Preliminary Objection, the grounds of opposition, the replying affidavit and the respective parties submissions, the learned Judge (Ongaya J.) distilled the following issues for determination:
  - (a) whether the employees of the 1<sup>st</sup> appellant are not subject to the powers of the County Service Board or any other county authority because the 1<sup>st</sup> appellant is a company registered under the *Companies Act* and regulated by its Memorandum and Articles of Association;
  - (b) whether section 82 of the *Water Act* provides for alternative procedure for dispute resolution that the petitioners failed to exhaust and therefore rendering the jurisdiction of the court diminished on account of the suit being premature; and whether the petitioners have established a case for grant of an interim conservatory order as prayed for. In the impugned ruling dated 25<sup>th</sup> May 2023, Ongaya J. issued the following orders:



- a. That the preliminary objection is dismissed with costs in the cause.
  - b. That pending the hearing and determination of the petition, a conservatory order is hereby issued directing the 1<sup>st</sup> respondent and its agents to pay the petitioners together with the aggrieved employees all withheld salaries from the month of October 2022 to date and further directing the 1<sup>st</sup> respondent to continue paying the petitioners and the aggrieved employees their salaries as and when they fall due without any further delay for as long as the respective contracts of service are in place.
  - c. That parties to set down the petition for mention for directions for the expeditious hearing and determination.
6. Aggrieved by the said ruling, the appellants filed this appeal seeking to set it aside. They also pray that their Notice of Preliminary Objection dated 3<sup>rd</sup> May 2023 be upheld. In their quest to overturn the said ruling, the appellants have cited a whopping 17 grounds of appeal in their Memorandum of Appeal dated 7<sup>th</sup> June 2023. The grounds of appeal are verbose and repetitive. However, in his oral submissions, learned counsel for the appellants Mr. Saka condensed the grounds into two broad issues:
- (i) whether the suit was heard in disregard to the doctrine of exhaustion contrary to section 77 of the [County Governments Act](#); and,
  - (ii) whether the superior court fell into error in making conclusive findings at an interlocutory stage.
7. On the first issue, Mr. Saka submitted that the respondents are County Public Officers and the 1<sup>st</sup> appellant is a County corporation by dint of section 2 (1) of the [Public Finance Management Act](#) as was held in *Okiya Omtata Okoiti & Others vs. Nairobi City County & 5 Others* [2014] eKLR. Consequently, since the 1<sup>st</sup> appellant was a county corporation, under section 77 of the [County Governments Act](#), any person dissatisfied or affected by a decision of the County Public Service Board, or any person in exercise of purported exercise of disciplinary control against any County Public Officer may appeal to the Public Service Commission against the decision. Counsel maintained that since the respondents were dissatisfied by the decision of the County Public Service Board, the respondents ought to have raised and lodged their complaint with the Public Service Commission as the first port of call.
8. Regarding the issue whether the learned Judge made final findings at an interlocutory stage, the appellant contended that no witnesses had testified and therefore the order that all the respondents were legally employed was a final finding. Mr. Saka cited this Court's decision in *Olive Mwhaki Mugenda & Another vs. Okiya Omtata Okoiti & 4 Others* [2016] eKLR in support of the holding that a final order ought not to be granted at an interlocutory stage.
9. Mr. Kusow, learned counsel for the respondent in opposing the appeal addressed three issues. One, whether the trial court erred in dismissing the appellants' Notice of Preliminary Objection (grounds 1, 2, 3 and 11). Counsel submitted that section 77 of the [County Governments Act](#) deals with appeals to the Public Service Commission and that the appellant is a corporate entity and under clause 3(gg) of its Memorandum and Articles of Association, its objects include appointing such persons on such terms and conditions as it deems fit and remunerate them. Consequently, the respondents were recruited by the 1<sup>st</sup> appellant and not by the County Service Board. Thus, the procedure under section 77 of the [County Governments Act](#) is inapplicable to the respondents. Counsel cited *Kenya County Government Workers Union vs. Bomet Water & Sanitation Company Limited* [2022] eKLR in which the ELRC



(Makau J.) held that employees not recruited by the County Service Board cannot be subject to section 77 of the County Government Act.

10. In addition, Mr. Kusow maintained that no disciplinary sanction had been imposed against the respondents to give rise to an appealable decision before the Public Service Commission. He asserted that the respondents' grievance is that their fundamental rights were violated, therefore, it is the ELRC that has the original and unlimited jurisdiction to determine violation of fundamental rights because the Public Service Commission has no jurisdiction to determine issues relating to breach of fundamental rights as was held in *Abdikadir Suleiman vs. County Government of Isiolo & Another* [2015] eKLR.
11. On whether the proceedings before the trial court were instituted in violation of Section 82 of the *Water Act*, the respondent submitted that the said provision is inapplicable since the decisions that are appealable to the Regulatory Board do not include those arising from employment relationships. Further, the jurisdiction and functions of the Regulatory Board does not include sitting on appeal over issues arising from employment disputes because its jurisdiction under section 72 is limited to disputes concerning water resources or services where there is a business contract and the decisions arising from issuance or denial of water license, revocation of water license, disconnection of water etc. Under Section 124, appeals ought to lie in the Environment and Land Court and not the ELRC. Therefore, recourse to the Water Services Authority Board is thus not applicable in this case.
12. On whether the proceedings before the ELRC were instituted in violation of section 9 (2) of the *Fair Administrative Action Act*, counsel submitted that there was no available alternative mechanism to exhaust since the Public Service Commission and the Water Services Regulatory Board as demonstrated above are not available and applicable to the respondents.
13. On the question whether the 76 other aggrieved employees are properly represented by the named respondents and are thus proper parties to the proceedings before the trial court (ground 4, 5 & 6), Mr. Kusow maintained that the said employees are properly represented and are proper parties to the proceedings because the respondents filed a constitutional petition before the trial court alleging violation of their fundamental rights to equality and non-discrimination. Further, Rule 9 of the Employment and Labour Relation (Procedure) Rules, 2016 provides for institution of a suit on behalf of other parties with a similar cause of action with a letter of authority filed and signed by all the other parties as evidenced in the authority dated 17<sup>th</sup> April 2023. In addition, Rule 4(2)(ii) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms), Practice and Procedure Rules, 2013, Article 22 and 258 of *the Constitution* permit a person acting as a member of, or in the interest of a group or class of people to institute court proceedings citing violation of rights or *the Constitution*.
14. Regarding the issue whether the learned judge erred in directing payment of withheld salaries at interlocutory stage (Grounds 7, 8, 9 and 10), Mr. Kusow maintained that the respondents are employees of the 1<sup>st</sup> appellant, they were recruited and have been in employment for more than 4 years. At no point was a complaint raised against them by the employer. They were never issued with any notice to show cause; they were never suspended; they were never terminated, in October 2022 their salary was stopped after working for a month and expecting their salaries and three months later, the 1<sup>st</sup> appellant purported to conduct an audit after it has already withheld their salaries. Mr. Kusow maintained that the respondents complied with the audit request by providing all the needed documents. However, to date the findings of the audit have never been shared with the respondents.
15. Mr. Kusow argued that the trial court was confronted with facts showing that respondents had proper documents and had been earning salaries. Therefore, the trial court exercised its discretion judiciously in issuing the mandatory injunction. Counsel relied on *Shariff Abdi Hassan vs. Nadhif Jama Adan*



[2006] eKLR where this Court specified the circumstances under which a mandatory injunction can be granted.

16. In his rejoinder, Mr. Saka maintained that the respondents are county public officers as captured in the impugned ruling. Therefore, by virtue of their being county public officers, they are subject to section 77 of the *County Governments Act* and as a result they are governed by the County Public Service Board and the decision to stop their salaries emanated from the County Public Service Board. Therefore, they ought to have lodged their complaint with the Public Service Commission.
17. We have considered the grounds of appeal and submissions by counsel and the authorities cited. We are cognizant of the fact that this appeal arises from an interlocutory ruling and that the petition is still pending determination before the ELRC. However, the bulk of the submissions by counsel for both parties digressed to the merits or otherwise of the petition. We shall only confine ourselves to what is necessary for us to determine this interlocutory appeal and resist the temptation to stray into the merits of the yet to be resolved issues.
18. This Court's jurisdiction is set out in section 3 of the *Appellate Jurisdiction Act*, Cap 9 Laws of Kenya. Sub-section (2) thereof provides:

For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.

19. This being a first appeal, we are obliged to evaluate the evidence on record and arrive at our own conclusions. Upon considering the entire record, we find that the following issues fall for determination:
  - a. Whether the respondents' suit offends the doctrine of exhaustion of remedies.
  - b. Whether the learned Judge made conclusive findings of fact at an interlocutory stage.
20. Regarding the first issue, it is important to underscore at the outset that the question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks judicial review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting judicial review only when all available administrative proceedings fail to produce a satisfactory resolution. There are numerous decisions of this Court holding that this doctrine is now of esteemed juridical lineage in Kenya. The doctrine was felicitously stated by this Court in *Speaker of National Assembly vs. Karume* [1992] KLR 21 in the following words: -

"Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

21. Many post-2010 court decisions have found the reasoning sound and have provided justification and rationale for the doctrine under *the Constitution*. For example, this Court in *Geoffrey Muthinja Kabiru & 2 Others vs. Samuel Munga Henry & 1756 Others* [2015] eKLR provided the constitutional rationale and basis for the doctrine. It stated:

"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 fora of last



resort and not the first port of call the moment a storm brews... 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 the courts...This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

22. The High Court In the Matter of the Mui Coal Basin Local Community {2015} eKLR stated thus:-

"The reasoning is based on the sound Constitutional policy embodied in Article 159 of *the Constitution*: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." *The Constitution* does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, *the Constitution* creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases..."

23. With the above legal principles in mind, we now examine the appellants' contestation that the respondents ought to have exhausted the statutory ordained dispute resolution mechanism under section 77 of the *County Governments Act* and Section 82 of the *Water Act*. Section 77 of the *County Governments Act* 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 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. ...."

24. The above provision makes reference to the Public Service Commission. The respondents' counsel argued that the *Public Service Commission Act* is inapplicable in the instant case. To confirm the correctness or otherwise of the respondents' assertion, we will examine the relevant provisions of the



said Act in detail. For starters, Section 87 (2) of the Public Service Commission Service 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”. (emphasis added)

25. But, what are these appeals from the county government public service? As we search for an answer, we start by recalling that the Public Service Commission has jurisdiction under Articles 234(2)(1) of *the Constitution* as read with Section 85 & 86 of the *Public Service Commission Act* to hear and determine appeals in respect of any decision relating to engagement of any persons in a county Government Public Service, including a decision in respect of “terms of service”. Authority for the foregoing statement is to be found in Section 85 of the Public Service Act which provides as follows:
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;
  - 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.
26. The above provision clearly provides the matters which fall under the mandate of the Public Service Commission. These matters are described as “appeals in respect of any decision relating to engagement of any person in a County Government, including a decision in respect of” all the matters listed in paragraphs (a) to (g). The question before us narrows to whether the respondents and their grievances fell within the ambit of the above provision.
27. We will now turn to the record of appeal to search for the answer to the above question. We note that the trial Judge held that the 1<sup>st</sup> appellant is an independent company and is not the County Public Service Board and therefore the respondents cannot be



governed by section 77 of the County Government Act. The key question here is whether this definitive finding is supported by the material on record and the law. A reading of the 1<sup>st</sup> appellant's Memorandum and Articles of Association at page 694 of the record shows that the 2<sup>nd</sup> appellant out of the 5000 shares in the 1<sup>st</sup> appellant, holds 4997 shares. The remaining 3 shares are held by the County Executive Member of Finance and Economic Planning of the 2<sup>nd</sup> appellant and the Executive Member of Water, Energy and Natural Resources of the 2<sup>nd</sup> Appellant.

28. We now turn to the law. Section 2 of the [Public Service Commission Act](#) defines a public body to include-
- (a) any corporation, council, board, committee or other body which has power to act under and for purposes of any written law relating to the undertakings of a public utility or otherwise to administer funds belonging to nor granted by the government or money raised by rates, taxes or charges in pursuance of any such law;
  - (b) a corporation, the whole or a controlling majority of shares which are owned by a person or entity that is a public body by virtue of any of paragraph (a) of this definition;
  - (c) statutory bodies; or
  - (d) any public body brought under the jurisdiction of the Commission by an Act of Parliament for a specified function to the extent of that function.
29. Also pivotal to the determination of the question whether the 1<sup>st</sup> respondent is a county government entity is section 2 of the [Public Finance Management Act](#) which provides:
- 1. In this Act, unless the context otherwise requires-
    - a. An accounting officer of a county government entity referred to in section 148.



30. Also relevant is Section 148 (1) of the same Act which provides as follows:
- (1) A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.
31. A reading of the provisions of the law cited above and the shareholding of the 1<sup>st</sup> appellant highlighted earlier leaves no doubt that the 1<sup>st</sup> respondent is county government entity. In fact, the salaries earned by the respondents are drawn from the 2<sup>nd</sup> appellant's funds as evidenced by their pay slips annexed which they annexed to their affidavit in support of their case. Why is the 2<sup>nd</sup> respondent paying them if they are not its employee or of the 1<sup>st</sup> respondent is not an entity owned by the 2<sup>nd</sup> respondent? It is also uncontroverted that the respondents' salaries were stopped by the 1<sup>st</sup> appellant in October 2022 and all the respondents were summoned to appear at its head office on 15<sup>th</sup> December 2022 for an internal human resource audit. Following the audit, the respondents' salaries were stopped, which prompted the respondents to approach the ELRC vide Petition No. E076 of 2023. One may also ask why the respondents sued the 2<sup>nd</sup> respondent if at all it had nothing to do with their employment.
32. We are clear in our minds that the learned judge in holding that the respondents were not subject to section 77 of the County Government Act did not address his mind to the various provisions of the law we have cited above. Had the learned considered sections 85, 86, 88 of the *Public Service Commission Act*, he would have arrived at a different conclusion. Section 85 provides for appeals from the County Government Public Service. Section 86 details procedure for appeal while section 88 provides for review. Importantly, section 89 of the said Act provides for enforcement of decisions as follows:
1. Any person who is affected by the decision of the Commission made under this part may file the decision for enforcement by the ELRC provided under Article 162 (2) (a) of *the Constitution*.
33. It is our considered view that the Managing Director of the 1<sup>st</sup> appellant is an employee of the 2<sup>nd</sup> appellant since the 1<sup>st</sup> appellant is wholly owned by the 2<sup>nd</sup> appellant. This is supported by the shareholding discussed earlier. Consequently, pursuant to section 85 of the *Public Service Commission Act*, the stoppage of the respondents' salaries which are paid from the 2<sup>nd</sup> appellant's coffers ought to be appealed to the Public Service Commission since by virtue of the respondent's remuneration, they are county public servants. To fortify our above finding, we refer to this Court's decision in Secretary, County Public Service Board & Another vs. Hulbhai Gedi Abdille [2017] eKLR where this Court confronted by similar issues as in this case held:
- “Where there exists other sufficient and adequate pursue that avenue or forum and not invoke the court avenue or forum to resolve a dispute, a party ought to 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 ... in our view, the most suitable and appropriate recourse for the Respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance”.
34. Similarly, this Court Kisumu County Public Service Board vs. Samuel Okuro & 7 Others (2018) eKLR held as follows:
- “We have come to the conclusion that the Governor initiated the removal of the respondent without following the appropriate machinery. The respondents being county public officers, the Governor could not terminate their services without involving the County Board and the county assembly.



In sending the respondents on compulsory leave and terminating the respondents' contract, the Governor usurped the role of the County Board. This denied the respondents their rights under section 77 of the County Government Act that allows any county public officer that is dissatisfied with the decision of the County Board in a disciplinary process to appeal to the Public Service Commission. Further, the respondents' constitutional fundamental rights were violated.”

35. The respondents' grievance was basically stoppage of their salaries by the 1<sup>st</sup> appellant. We have also found that the funds that remunerate the respondents originate from the 2<sup>nd</sup> appellant. A reading of section 77 of the [County Governments Act](#) leaves no doubt that the respondents grievance fell squarely within the ambit of the said section. We reiterate that section 85 of the Public Service Act in no uncertain terms provides that the Public Service Commission shall determine appeals in respect of any decision relating to engagement of any person in a County Government. The decision to stop the respondents' salaries was made by the managing director of the 1<sup>st</sup> appellant and the county secretary of the 2<sup>nd</sup> appellant. We have no doubt in stating that the respondents' grievance falls under section 77(2) (b) and (g). of the [County Governments Act](#).

36. This Court held in *Secretary, County Public Service Board & another vs. Hulbhai Gedi Abdille (Supra)* as follows:

warranted the bypassing of the statutory appellate “In our view, the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance. In terms of *Republic v National Environment Management Authority (supra)*, we discern no exceptional circumstances in this appeal that would have her an opportunity to question the procedure followed process by the respondent. Her contention that she disregarded the appeal because it could not afford by the appellant is in our view, without basis because Section 77 has placed no fetter to the jurisdiction of prosecute an appeal before it. It does not also matter the Public Service Commission. There is no requirement for instance that reasons for the decision be availed to an aggrieved party before he can that an applicant in judicial review proceedings need not exhaust all other available remedies. The invocation of judicial review jurisdiction of the court was in the circumstances premature and uncalled for. The first ground of appeal therefore succeeds.”

37. Having concluded that the 1<sup>st</sup> appellant is a county entity and that the respondents' grievances fell within the ambit of section 77 and therefore ought to have been challenged at the Public Service Commission under section 85 as the first port of call, we now turn to the appellants' ground that the respondents' suit offended the provisions of section 9(2) of the [Fair Administrative Action Act](#). This section provides that the High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. There is no doubt that the reliefs sought in the respondents' petition are judicial review orders. The appellants in their petition are challenging the decision to withhold their pay.

38. Under section 9 (3) of the [Fair Administrative Action Act](#), the ELRC was mandatorily required consider the nature of the dispute and “...if it is not satisfied that the remedies referred to in sub-section 2. have been exhausted, direct that an applicant shall first exhaust such remedy before instituting proceedings under sub- section (1).” The trial Court never addressed its mind to this provision at the earliest opportunity possible or even while determining the Preliminary Objection. It took the erroneous view that the 1<sup>st</sup> respondent was a limited liability company.



39. Notably, section 9 (2) and (3) of the *Fair Administrative Action Act* are couched in peremptory terms. However, Parliament in its wisdom fully aware of the strictures of the said provisions provided a safe way out at sub-section (4) which provides an exception to the parameters of subsection (2). It reads:

Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. Two requirements flow from the above sub-section. First, the applicant must demonstrate exceptional circumstances.

40. The respondents never applied for exemption under the above provision. We say no more. The import of their failure is that the suit before the trial court was caught up by the doctrine of exhaustion. This leads us to the final definitive question, which is whether, by filing constitutional petition citing violation of fundamental rights the respondents' petition cannot be said to offend the doctrine of exhaustion.

41. There is no dispute that the germane dispute is stoppage of salaries. This is an employer/employee dispute. We are alive to the fact that every case has a constitutional underpinning, be it a criminal case, civil or commercial. However, it is important to point out that not every dispute ought to be brought as constitutional question. A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute. The germane issue in this case can be resolved by interpreting the facts, the contract documents, (written or oral) and the relevant statutes. This discourse brings into focus the doctrine of constitutional avoidance, which is defined as a preference of deciding a case on any other basis other than one which involves a constitutional. The doctrine of constitutional avoidance was fortified in *Sports and Recreation Commission vs. Sagittarius Wrestling Club and Anor* 2001 (2) ZLR 501 (S) in the following passage:

“...Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights.”

42. In *Chawira & Ors vs. Minister of Justice Legal and Parliamentary Affairs & Ors* CCZ 3/17 the Constitutional Court of Zimbabwe held:

“...courts are generally loathe to determine a constitutional issue in the face of alternative remedies. In that event they would rather skirt and avoid the constitutional issue and resort to the available alternative remedies.”

43. The court in *S vs. Mhlungu* 1995 (3) SA 867 (CC) 59 laid out constitutional avoidance as a general principle in the following terms:

“I would lay it down as a general principle that where it is possible to decide any case, criminal or civil, without reaching a constitutional issue, that is the course which should be followed.”

44. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In Kenya, the Supreme Court stated in *Communication Commission of Kenya & 5 Others vs. Royal Media Services Ltd & 5 Others* [2014] eKLR (at para 256) that the principle of avoidance means that a court will not determine a constitutional issue when a matter may properly be decided on another basis.



45. Currie and de Waal in *The Bill of Rights Handbook* (2013) 72 opine that the principle of constitutional avoidance is of crucial importance in the application of the Bill of Rights. The authors state:

“When applying the Bill of Rights in a legal dispute, the principle of avoidance is of crucial importance. As we have seen, the Bill of Rights always applies in a legal dispute. It is usually capable of direct or indirect application and, in a limited number of cases, of indirect application only. The availability of direct application is qualified by the principle that the Bill of Rights should not be applied directly in a legal dispute unless it is necessary to do so.”

46. Flowing from our analysis of the facts, the law and the legal principles laid down in decisional law, we have arrived at the following conclusions:

- (a) the learned judge fell into error when he failed to appreciate the clear provisions of the *County Governments Act*, the Public Finance and Management Act and the *Public Service Commission Act* which clearly define a county entity.
- (b) the learned judge took a narrow view of what constitutes a county entity as defined under section 2 of the *Public Finance Management Act*.
- (c) the learned judge fell into error by failing to interrogate the applicability of the doctrine of exhaustion to the dispute before him.
- (d) the learned judge failed to appreciate that the germane issue before him was basically an employer employee dispute and the mere invocation of Articles of *the Constitution* did not bar him from addressing his mind to the question whether the respondents could get an adequate remedy at the forum provided under the statute. Consequently, the learned judge erred in dismissing the appellants’ Notice of Preliminary Objection.

47. In conclusion, the learned judge erred in failing to uphold the appellants’ Notice of Preliminary Objection. Having so concluded, we find no need to address the question whether the learned judge erred in granting final orders. The upshot of the foregoing is that the appellants’ appeal succeeds. We therefore set aside the entire ruling dated 25<sup>th</sup> May 2023 delivered by Ongaya J. together with all the consequential orders and substitute it with an order allowing the appellants’ Notice of Preliminary Objection dated 3<sup>rd</sup> May 2023. The respondents’ petition before the ELRC is hereby dismissed for offending the doctrine of exhaustion of remedies. Each party shall bear its own costs for this appeal and before the trial court.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF AUGUST, 2024.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**J. MATIVO**

.....

**JUDGE OF APPEAL**

**M. GACHOKA, C.Arb, FCIArb.**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

