



Nyaoga v Chairman Kisii County Assembly & 3 others (Civil Appeal E034 of 2023) [2023] KECA 1540 (KLR) (8 December 2023) (Judgment)

Neutral citation: [2023] KECA 1540 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL E034 OF 2023
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
DECEMBER 8, 2023**

BETWEEN

JAMES OMARIBA NYAOGA APPELLANT

AND

CHAIRMAN KISII COUNTY ASSEMBLY 1ST RESPONDENT

SPEAKER, KISII COUNTY ASSEMBLY 2ND RESPONDENT

COUNTY ASSEMBLY SERVICE BOARD KISII 3RD RESPONDENT

DANIEL OMWOYO MBAKA 4TH RESPONDENT

(An Appeal from the ruling of the Employment and Labour Relations Court at Nairobi (Radido, J.) dated 23rd November 2023 in ELRC Petition No. E036 of 2022)

JUDGMENT

1. This appeal arises from the decision of the Employment and Labour Relations Court of Kenya at Kisumu (Radido, J.) dated 23rd November 2023 in ELRC Petition No. E036 of 2022 dismissing the appellant's petition on grounds that the court lacked jurisdiction to deal with the matter in the first instance.
2. A brief background on the genesis of the matter, will help to put issues in perspective. The appellant, James Omariba Nyaoga, was appointed Clerk of the County Assembly of Kisii in the year 2013. On or around 25th July 2022, David Kombo the acting Chair of the County Assembly Service Board cum Speaker of the Kisii County Assembly issued a show cause to the appellant, requiring a response within 7 days.
3. The appellant claims to have notified the other members of the County Assembly Service Board; and some of them disowned the notice; nevertheless, the appellant eventually responded to the notice by



a letter dated 4th August, 2022. On 24th August 2022, the 1st respondent, invoking section 22 of the [County Assembly Services Act](#) wrote to the appellant informing him of his suspension from office; and on the same day, Daniel Omwoyo Mbaka, the 4th respondent, was appointed to act as the Clerk to the County Assembly.

4. The appellant, being aggrieved, by the turn of events, filed the petition Kisumu No. E036 of 2022 challenging the suspension; and simultaneously filed a motion seeking for temporary injunction pending the hearing of the petition. The trial court issued a temporary injunction staying the contemplated action against the appellant, pending hearing of the motion. However, when the application came up for hearing the respondents raised a preliminary objection in regard to the court's jurisdiction, pointing out that the appellant had not exploited all available appeal mechanism options provided under Articles 234 (2) of the [Constitution](#) of Kenya, section 77 of the [County Governments Act](#) as read together with sections 85, 86, and 87(2) of the [Public Service Commission Act](#), Regulation 4(c) of the [Public Service Commission \(County Appeals Procedures\) Regulations, 2022](#) and clause D36 of the Kisii County Assembly Human Resource Manual, 2016. That as a consequence, the application and petition ought to have gone before the Public Service Commission; and not the Employment and Labour Relations Court.
5. The 1st and 4th respondents maintained that the trial court was devoid of the requisite jurisdiction as the appellant had not exploited the appeal mechanisms provided under Articles 234(2) of the [Constitution](#) of Kenya, 2010, Sections 77 of the [County Government Act](#) as read with Sections 85 and 87 (2) of the [Public Service Commission Act](#), Regulations 4 (c) of the [Public Service Commission \(County Appeals procedures\) Regulations, 2022](#) and Clause D. 36 of the Kisii County Assembly Human Resource Manual, 2016.
6. Upon hearing and considering the arguments by the parties therein, the trial court was of the view that Article 234 (2)(i) of the [Constitution](#) read with sections 77(1) & (2) of the [County Governments Act](#) and section 85, 86 & 87 of the [PSC Act](#) did not apply to the employees of legislative arm of government whether at the national or devolved level, courtesy of the doctrine of separation of powers; as the PSC is a public body established for the executive. The trial court noted that the County Assembly of Kisii expressly clothed the PSC with the power to hear and determine appeals from decisions of the board in clause D.36 & 37 of the Human Resource Manual.
7. The trial court held that through these clauses in the Human Resource Manual, the County Assembly Service Board clothed the PSC with appellate jurisdiction to hear and determine appeals from the decisions of the Board while exercising disciplinary control over its employees, and specifically Clauses D35 and D37 of the Human Resource Manual 2016, addressing disciplinary matters affecting a Clerk to the Assembly. The learned Judge acknowledged that the PSC's appellate jurisdiction flowed from the Board's internal instruments; and not any statutory provisions.
8. Ultimately, it was the trial court's finding that since what was being challenged was the decision made by the Board, or on behalf of the Board, irrespective of whether it was quorate or properly constituted, and in the purport of disciplinary control, then the challenge should have been placed before the PSC in the first instance; or before the County Assembly Service Review Board for review. Consequently, the trial court dismissed the petition with costs, holding that the jurisdiction of the court was invoked prematurely.
9. The appellant being aggrieved by the outcome, challenges the ruling of the ELRC on 7 grounds of appeal. The grounds are that the trial court misapprehended the appellant's case; and ended up declining jurisdiction based on a policy document; failing to appreciate that the jurisdiction of the



court is founded on the Constitution or Statute; and elevating a policy document to the status of a provision in the Constitution or Statute.

10. As to whether a policy document can oust statutory jurisdiction of the ELRC, the appellant contends that the HR Manual 2016, was an internal instrument, and not a provision of the Constitution; that as such it could not oust the trial court's jurisdiction; and that with regard to appeals to the PSC, the provision in the Manual was not couched in mandatory terms. In support of this position, the appellant refers to the provision in Article 94(5) of the Constitution of Kenya 2010 that:

No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.

In arguing that the trial court should have preserved the ordinary jurisdiction of the court, given the constitutional and legal issues raised, the appellant faults the trial Judge's decision saying that he failed to take into account the immutable rule that, ouster clauses had to be construed strictly and narrowly. In support of this submission, the appellant draws from what Lord Reid stated in the case of *Anisminic vs. Foreign Compensation Commission* [1969]1 ALL ER 208, at page 213 that:

"It is a well-established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly meaning, I think, that if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court."

The appellant further argues that the HR manual did not expressly remove matters from the realm of the court; rather, it afforded opportunity for an alternative option of appeal to PSC as matter of choice.

11. The appellant also introduces the issue on whether the appellant's suspension was procedural; and contends that his removal is provided for under section 22 & 23 of the County Assembly Services Act, which gives pre-conditions for suspending the clerk to include: arraignment in court, or conviction of criminal charges. The appellant argues that the show cause was replete with mere allegations and that there was no provision for show cause in the HR manual, neither was the appellant accorded 21 days to respond, he was suspended via WhatsApp after 7 days expired. The appellant contends that he was suspended on unsubstantiated allegation. He also contends that the majority of the board members were not in agreement as two of the members were not aware of any meeting held nor were they notified. That by reason of the foregoing the appellant was never accorded a fair hearing.
12. As regards the issue on whether a court can decline jurisdiction where a party has not exhausted alternative remedies, the appellant's contention is that the option of appeal as provided for in the HR manual is not couched in mandatory terms; and that the court still retained residual jurisdiction to intervene despite the existence of alternative remedies, where the action complained of was marred by illegality and procedural irregularities. He cited the decision in *Fleur Investment Ltd vs. Commission of Domestic Taxes & Another* [2018] eKLR to support this proposition.
13. The appellant argues that the respondent's actions, omissions and commissions resulted in breach of the appellant's constitutional rights and fundamental freedoms and that the impugned suspension was triggered by the un-procedural manner in which the respondents commenced and proceeded to discipline the appellant; that the issues raised in the petition did not fall within the jurisdiction of the PSC as outlined under section 77 of the County Governments Act or the County Assembly Service Board under the Human Resources Manual. The appellant further contends that his case is that of procedural and legal impropriety committed by the respondents, that the remedies sought due to



these infringements fall squarely within the court's realm; and only the court could give the protection sought. In support of this argument, the appellant draws from *Republic vs. IEBC Ex parte National Supper Alliance (NASA) Kenya & 6 Others* [2017] eKLR, which to paraphrase states that exemption from the doctrine of exhaustion is to be dealt with on a case-by-case basis.

14. Basically, the appellant's argument on the exemption from the doctrine of exhaustion is that, based on the legal issues as raised, and the available alternative option not being couched in mandatory terms, then the trial court invariably had the requisite jurisdiction to hear and determine the petition on merit, rather than declining jurisdiction based on an internal instrument. The appellant also argues that since the petition raised constitutional and legal issues, the trial court had jurisdiction and that by filing the preliminary objection, the respondents did not contest the allegations.
15. The 2nd and 3rd respondents submit that the cause of action being challenged has been overtaken by events, as the 3rd respondent has acted in compliance with the trial court's order and further taken disciplinary procedure as laid out in section 23(2) (c) of the *County Assembly Act* by inviting the appellant to respond to the charges. In addition, that the appellant is guilty of material non-disclosure of the fact that the disciplinary process has begun as procedurally laid down, the trial court having given the appellant the option of moving to the PSC or the 3rd respondent reviewing the impugned decision.
16. It is, therefore, the 2nd and 3rd respondent's submission that the existing cause of action by the appellant, if any, had been extinguished and a new cause of action, if at all, brought to life by the said review and further disciplinary procedure already undertaken. On the issue of the trial court's jurisdiction the 2nd and 3rd respondents are in agreement with the trial court that it did not have jurisdiction as the PSC had appellate jurisdiction.
17. The 1st and 4th respondents have only submitted on the issue of jurisdiction and are in agreement with the findings of the trial Judge basing their submission on clause D. 35 & D 37 of the HR manual; their common position is that where there exists an alternative avenue of disputes a party is mandatorily required to pursue such and is precluded from invoking court process before pursuing such alternative.
18. This being a first appeal, as has been reiterated in several decisions of this Court, it is this Court's primary duty to evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as set out under Rule 31(1) (a) of the *Court of Appeal Rules*. This duty has been reiterated in *Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Company Advocates* [2013] eKLR.
19. The main issues that would dispose of this appeal is whether or not the appellant had exhausted all the available alternative remedies before invoking the court's jurisdiction; whether or not trial court had jurisdiction; and the place of the doctrine of exhaustion.
20. The doctrine of exhaustion of remedies was created by courts in order to promote an efficient justice system and autonomous administrative state. It is a principle that requires parties to exhaust all available local administrative remedies before seeking redress in a court of law on a constitutional issue. An aggrieved party must first pursue all avenues of relief found within the administrative agency responsible for the issue at hand. The reason for this is to allow administrative agencies to address, and to potentially resolve the issue before escalating the same to the courts.



21. Indeed, this Court in *Mutanga Tea & Coffee Company Ltd vs. Shikara Limited & Another* [2015] eKLR cited with approval the case of *Speaker of the National Assembly vs. Karume* [2008] 1 KLR 425 where the court stated:

“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.”

22. This Court in *Geoffrey Mutbinja & Another vs. Samuel Muguna Henry & 1756 Others* (2015) eKLR gave credence to the view that it is essential to utilize non-judicial methods of dispute resolution before turning to the courts. Courts should not be the initial choice for resolving conflicts within organizations, as this may lead to unnecessary legal battles.

23. We also take note of the sentiments expressed in *William Odhiambo Ramogi & 3 Others vs. Attorney General & 4 Others; Muslims for Human Rights & 2 Others (interested parties)* (2020) eKLR by this Court that:

“the question of exhaustion of administrative remedies arises when a litigant aggrieved by an agency’s action, seeks redress from a court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine 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.”

24. That having been said, this Court also needs to look at the flip side and discuss the exception to the doctrine of exhaustion before coming to our final conclusion. These exceptions provide circumstances where an individual may bypass the exhaustion requirement and directly seek redress from court. In *Chief Justice and President of the Supreme Court of Kenya & Another vs. Bryan Mandila Khaemba* [2021] eKLR this Court acknowledged that the doctrine of exhaustion notwithstanding, courts still retain residual jurisdiction to intervene in exceptional circumstances despite existence of alternative remedies where the action complained of is marred by illegality and procedural irregularities.

25. As provided in section 9(4) of the *Fair Administrative Action Act*, there are exceptions to the exhaustion rule in exceptional circumstances [underlined and emboldened for emphasis]. In the case of *Republic vs. National Environmental Management Authority Ex Parte Sound Equipment Ltd.*, [2011] eKLR this Court stated:

“...where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only on exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made... it is necessary for the court to look carefully at the suitability of the statutory appeal in context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.”

26. Section 9(4) of the *Fair Administrative Actions Act* provides that the High Court or 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 remedy to be in the interest of justice. See the *William Odhiambo Ramogi case* (supra) paragraphs 60 & 61.



27. This Court in *Fleur Investments Limited vs. Commissioner of Domestic Taxes & Another* [2018] eKLR did state that:

“whereas courts of law are enjoined to defer to specialized tribunals and other ADR statutory bodies created by parliament to resolve certain specific disputes, the court cannot, being a bastion of justice, sit back and watch such institutions roughshod on the rights of citizens who seek refuge under the *Constitution* and other legislations for protection. This Court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.”

28. The question we are now called upon to determine is whether or not the appellant was exempt from the doctrine of exhaustion so as to have invoked the jurisdiction of the trial court directly. At the risk of sounding repetitive, we once again state that the doctrine of exhaustion prevents a litigant from seeking a remedy in court until all remedies provided have been exhausted and/or pursued as fully as possible. The appellant argues that the Kisii County Assembly Human Resource Manual is not couched in mandatory terms and as such the appellant could seek redress from the Employment and Labour Court considering the magnitude of the redress and reliefs sought. The redress in question here, is the manner in which the respondents attempted to discipline the appellant.

29. Clause D35 of the Manual Ex.DOK1 referred to by 4th respondent reads as follows:

35. Procedure for Removal of the Clerk

- a. Where the board considers it necessary to remove the Clerk under Section 22 of the County Assemblies Services Act 2017, the Board shall:
 - i. Frame a charge(s) against the Clerk;
 - ii. Forward the statement of the said charge(s) to the Clerk together with a brief statement of the allegations in support of the charges;
 - iii. Invite the Clerk to respond to the allegations in writing within 21 days setting out the grounds on which he/she relies to exculpate himself/herself; and
 - iv. Invite the Clerk to appear before the board either personally or with an advocate as he/she may opt on a date to be specified ... to exculpate himself.
- b. If the Clerk does not furnish the reply to the charge/ charges within the period specified, or if in the opinion of the Board the Clerk fails to exculpate himself/herself the Board shall notify the Clerk of its decision in writing. Upon receipt of the decision of the Board under Subsection 3 the Clerk may appeal to the Public Service Commission of Kenya as provided for in Section D.37 with a copy to the Board. The Board shall allow the Public Service Commission sixty days to determine the appeal before taking any further action on the Clerk.

Upon receipt of the decision of the Public Service Commission that confirms the allegations against the clerk, the Board may submit a notice of motion to the Speaker seeking that the County Assembly revoke the appointment of the Clerk.

On the other hand, Clause D36 provides on appeals inter alia that:

A. 36 Appeals



- a. Any person dissatisfied or affected by a decision made by the CASB a person in exercise of purported exercise of disciplinary control against any County Assembly officer may appeal to the Public Service Commission against the decision.
- b. The appeals may be on any decision relating to employment of a person in the County Assembly Service including a decision in respect of;
 - i. Recruitment, selection, appointment and qualifications attached to an officer;
 - ii. Remuneration and terms and conditions of service;
 - iii. Disciplinary control in, National values and principles of governance, under Article 10 and values and principles of assembly service under Article 232 of the Constitution;
 - iv. Pension benefits, gratuity and any other terminal benefits;
 - v. Any other decision the Commission considers to fall within its Constitutional competence to hear and determine on appeal in that regard.

Whilst Clause D37 states thus:

37. Review

- a. Any person dissatisfied or affected by a decision made by the Assembly Service board on appeal in a decision made in a disciplinary case may apply for review, and the Assembly Service Board may admit the application if;
 - i. The Board is satisfied that there appears in the application new and material facts which might have affected its earlier decision, and if adequate reasons for the non-disclosure of such facts at an earlier date are given; or
 - ii. There is an error apparent on record of either decision.
- b. An application for review shall be in writing and made within the time prescribed by the Board in regulations governing disciplinary proceedings, but the Board may entertain an application for review later if, in the opinion of the board the circumstances warrant it.

We take note that a similar document referred to by the appellant as the Human resource Manual 2016 (revised 2021) provides for appeals under D37 – the wording is similar to the extent that the difference is the same. It is important that we deliberately set out in detail, the elaborate removal procedure, as well as the appeals process, so as to understand the context and content of the Human Resource Manual. It is clear to us that clause D. 35 and D 37 of the Kisii Human Resource manual clothed the PSC with the power to determine appeals from the decision of the board in exercise of its disciplinary control.

30. Our reading of Article 253(1) (c) of the Constitution alongside section 77 of the County Government Act, confirms to us that the Constitution bestows the responsibility of exercise of disciplinary control over and removing persons holding or acting in offices established in the County Government on the



County Government. We concur with the respondents' submissions that the Kisii County Human Resource Manual has the backing and force of law, contrary to what the appellant would have this court believe.

31. In addition, the appellant has also not led any evidence to show the existence of exceptional circumstances to warrant the direct invocation of court's jurisdiction without exhausting all remedies available first. We hold the view that the appellant ought to convince this Court that the internal remedy would be ineffective, unavailable and inadequate.
32. It is also on record that the 3rd respondent, did in line with the court's order, review the charges contained in the show cause letter and suspension; and affirmed the same with variation on suspension terms, and the appellant was invited to respond to said new charges.
33. From this, it is clear to us that the appellant has not exhausted the available remedies as the original charges have been varied and the appellant has been invited to respond to said charges. Indeed, we echo what was pointed out by the trial court that section 9 of the said regulations provides that the commission may hear appeals against any decision regarding the engagement of any person in a county government including inter alia, disciplinary control such as dismissal and imposition of any other administrative punishment. These regulations have a settling effect on the question as to whether the appellate processes set out in Section 77 of the County Government Act is applicable to both staff employed by the County Public Service Board and the County Assembly Service Board. We do not detect any error in application of the law, or in application of legal principles on the part of the trial Judge. We thus find that the trial Judge was not at fault in finding that the court lacked jurisdiction for want of the appellant exhausting all available remedies before directly invoking the court's jurisdiction.
34. We also agree with the respondents that a Human Resource Manual is recognized properly by the court as well as under the Employment Act as an instrument of choice in use of disciplinary matters. It in no way ousts the jurisdiction of the court, rather, it simply postpones that jurisdiction, awaiting exploration of all other avenues of redress. See Susan Khakase Oyatsi vs. JSC (Petition E111 of 2021) [2022] KEELRC 3 (KLR).
35. The upshot is that the appellant's appeal lacks merit and we uphold the judgment of the trial court. We award costs of this appeal to the respondents.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF DECEMBER, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

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

Signed



DEPUTY REGISTRAR.

