Otieno v County Government of Siaya (Cause E081 of 2024)
[2025] KEELRC 104 (KLR) (22 January 2025) (Ruling)

Neutral citation: [2025] KEELRC 104 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE E081 OF 2024

NZIOKI WA MAKAU, J

JANUARY 22, 2025

BETWEEN

SAMUEL OMONDI OTIENO ..... CLAIMANT

AND

COUNTY GOVERNMENT OF SIAYA ..... RESPONDENT

RULING

1. Before court is a preliminary objection, dated 19th November 2024, filed by the Respondent in response to the Claimant's Memorandum of Claim dated 1st October 2024. The preliminary objection contends that this court lacks jurisdiction to entertain the Memorandum of Claim, as it violates the provisions of Articles 159(2)(c) and 234(2)(i) of *the Constitution*, section 9(2) of the Fair Administrative Actions Act, and section 77(2) of the *County Governments Act*. The court issued directions regarding the filing of submissions on 20th November 2024. However, by the time of writing this ruling, only the Respondent had filed submissions.

Respondent's Submissions

2. The Respondent submits that the issue of whether a court has jurisdiction meets the threshold of a preliminary objection as outlined in the case of Mukisa Biscuits Co. Ltd v West End Distributors Ltd [1969] EA 696 where a preliminary objection was defined as:

> " a point of law which has been pleaded, or which arises by clear implication out of pleadings and which, if argued as preliminary point, may dispose of the suit."

3. The Respondent asserts that the issue of interdiction as raised in the claim falls within its purview, and therefore, the court does not have original jurisdiction. In further support of the Preliminary Objection the Respondent submits that the Claimant has offended the exhaustion doctrine, citing section 77(1), 77(2)(c) of the *County Governments Act* and section 85(c) of the *Public Service Commission Act*, which

prescribe the Public Service Commission as the first port of call for disciplinary disputes. It refers to the case of Geoffrey Muthinja & another v Samule Muguna Henry & 1756 others [2015] eKLR where it was held:

> "It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts can be invoked. Courts ought to be the 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 interests 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."

4. Additionally, the Respondent cites the Court of Appeal in Speaker of the National Assembly v James Njenga Karume [1992] eKLR which emphasized on Constitutional and statutorily provided redress mechanisms being strictly followed. The Respondent further submits that section 77(2) of the *County Governments Act* is couched in mandatory terms leaving no room for discretion. It relies on the Court of Appeal case of Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017] eKLR where the court addressed the application of section 77 of the *County Governments Act*, stating:

> "There is no doubt that the Respondent initiated the judicial review proceedings in utter disregard of the dispute resolution mechanism availed by section 77 of the Act. The section provides not only a forum through which the Respondent could agitate her grievance at first instance, but the jurisdiction is a specialized one, specifically tailored by the legislators to meet the needs such as the respondent's. 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.....Her contention that she disregarded the appeal because it could not afford her an opportunity to question the procedure followed by the Appellant is in our view without basis because Section 77 has placed no fetter to the jurisdiction of the Public Service Commission.....it does not also matter 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."

5. The Respondent equally asserts that the Claimant's alleged violation of Article 41 and 50 of *the Constitution* does not justify disregarding of section 77 of the County Government Act and section 85 of the *Public Service Commission Act*. It references the case of Antony Miano & others v Attorney General & others [2021] eKLR where Mrima J. held:

> "Having said so, and in unique circumstances of this case, and further being alive to the legal position that statutory provisions ousting Court's jurisdiction must be construed restrictively, I find and hold that, the Petitioners have failed to demonstrate any of the exceptions to the doctrine of exhaustion. This is one such case that, even if there are Constitutional issues raised in the Petition, such issues ought to wait the consideration of the matters before the Tribunal. The Petitioners, in the first instance, approach the Tribunal for resolution of the dispute."

6. In conclusion, the Respondent asserts that the Claimant has failed to demonstrate any attempts at exploring the statutory mechanisms provided by law. Furthermore, it asserts that the Claimant has not demonstrated entitlement to exemptions from the exhaustion doctrine, rendering this suit premature.

The Respondent relies on the cases of Mayers & another v Akira Ranch Limited [1972] EA 347, Narok County Council v Transmara County Council [2000] IEA 161, and Stephen Wanyee Roki v Kenya Airports Authority HCCC No. 162 of 2001 (unreported) as restated in Ishmael Noo Onyango & another v Siaya County Public Service Board & another [2018] eKLR, which affirms that:

> "Although the jurisdiction of the Employment and Labour Relations Court is unlimited on matters employment and labour, where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, it should be strictly followed."

7. The Respondent submits that to avoid usurpation of the Commission's jurisdiction and the possibility of conflicting decisions, that the claim should be dismissed with costs.

8. The Court's jurisdiction is challenged on account of the exhaustion doctrine. The Claimant is accused of not exhausting the mechanisms available under the *County Governments Act*, *the Constitution* and the *Public Service Commission Act* inter alia. The issue being challenged relates to interdiction, a matter competently within the purview of the Public Service Commission and the *County Governments Act* and the internal mechanisms under the law. Time and time again, the Court of Appeal and this Court have dealt with the exhaustion doctrine. The doctrine of exhaustion is a constitutional and administrative law imperative. This doctrine seeks to have issues resolved efficiently and with deference to the administrative bodies that exercise quasi-judicial authority in our realm, before one involves the Court. This ensures efficiency and optimal utilisation of resources as one will not be handled as the Claimant here is about to be handled. The plethora of cited cases did not include the case of William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR. The decision was by the High Court in a 5 Judge bench. The Court stated as follows:

> 52. 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. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution*. [Emphasis added]

9. Clearly, 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. In this case, the Claimant pre-empted the resolution at the administrative level by approaching court prematurely – simply put, he did not follow the grievance resolution process prescribed for such. The finding of the Court is that the interdiction meted out to the Claimant is an administrative action taken by an employer and the Court is hardly the appropriate first port of call. One would expect the aggrieved party to seek resolution within the confines of the administrative spectrum before coming to court. As such, I find merit in the objection raised by the Respondent. Suit is struck out for being rather premature and misconceived at present. Each party to bear their own costs.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF JANUARY 2025

NZIOKI WA MAKAU, MCIARB.

JUDGE