



REPUBLIC OF KENYA



KENYA LAW
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**Nyamweya v Chief Officer Health and Sanitation Kisumu (Petition
E015 of 2023) [2025] KEELRC 29 (KLR) (21 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 29 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E015 OF 2023**

JK GAKERI, J

JANUARY 21, 2025

**IN THE MATTER OF EXERCISE OF DISCIPLINARY
CONTROL OVER THE PETITIONER BY THE RESPONDENT**

AND

**IN THE MATTER OF ARTICLES 22, 27(1), 41, 47, 50, 150(2)
AND 163 OF THE CONSTITUTION OF KENYA 2010**

BETWEEN

DR NYANGWENCHA DICKENS NYAMWEYA PETITIONER

AND

CHIEF OFFICER HEALTH AND SANITATION KISUMU RESPONDENT

JUDGMENT

1. The Petitioner filed the instant Petition on 7th June, 2023 alleging violation of Articles 50, 47 and 41 of *the Constitution* of Kenya, namely right to fair hearing, fair administrative action and fair labour practices.
2. It is the Petitioner's case that he is an employee of the Kisumu County Service Board as a medical doctor and thus subject to the Boards disciplinary control.
3. The Petitioner avers that the Respondent, the Chief Officer, Health and Sanitation, Kisumu County issued him with a warning letter on 6th June, 2022 without authority to do so and the same is ultra vires as he was not afforded any hearing before the letter was written.
4. That the presence of the letter in his file could hamper his future career growth and development.
5. The Petitioner prays for:



- i. Declaration that the Respondent has neither constitutional nor statutory power to exercise disciplinary control over the Petitioner.
- ii. Declaration that the decision of the Respondent contained in the letter dated 6th June, 2022 is ultra vires.
- iii. Declaration that the Petitioner's rights under Articles 50, 47, and 41 of *the Constitution* were violated by the Respondent.
- iv. The Honourable Court do issue a writ of certiorari to quash the Respondent's decision contained in the Respondent's letter dated 6th June, 2022.
- v. Any such reliefs as the Court may deem fit in the interest of justice.
- vi. Costs and interest.

Respondent's Case

6. Vide a Reply to Petition dated 12th February, 2024, the Respondent denies the Petitioner's allegations and avers that the instant Petition was instituted in bad faith.
7. It is the Respondent's case that following an investigation in consonance with the Public Service Commission Disciplinary Manual and Human Rights Policies, (it is unclear to the Court whether such a policy exists), the Respondent issued a notice to show cause to the Petitioner and a hearing took place through the Departmental Human Resource Disciplinary Committee.
8. According to the Respondent, the committee resolved the issue at hand and the Petitioner's suspension was lifted on 23rd March, 2022 and the salary reinstated on 8th June, 2022 and regularised.
9. In an endeavour to embellish its case the Respondent attached a copy of the suspension and show cause letters, letter to the County Secretary on reinstatement of the Petitioner's salary and minutes of the Advisory Committee on Ethics and Conduct of Officers hearing on 23rd March, 2022.

Petitioner's Submissions

10. Counsel for the Petitioner isolated no specific issue(s) but submitted on the Respondent's lack of authority or mandate to write to the Petitioner a suspension letter and the warning letter and no hearing had taken place.
11. Counsel urges that a fair hearing can only take place before the body with the power to exercise disciplinary control.
12. Reliance was made on the decision in *Samwel Okuru & Others V Olang'o Onudi County Secretary Kisumu County (2018) eKLR* on the place of the County Service Board.
13. The decision in *Kisumu County Public Service Board & Another V Samwel Okura & 7 Others [2018]* was also cited to urge the powers of the County Public Service Board vis-avis the County Governor.

Respondent's submissions

14. On the Respondent's mandate to conduct disciplinary proceedings against the Petitioner, Counsel cites that Public Commission Act and the Public Service Disciplinary Manual as the basis of disciplinary proceedings as well as the provisions of Section 41 of the *Employment Act* and Section 77 of the *County Governments Act* to urge that the Respondent followed the laid down procedure as



per the public service and the petitioner was suspended after a confrontation and investigations were conducted.

15. Counsel submits that hearing was conducted by the Departmental Human Resource Committee and the Petitioner was accorded the opportunity to present his case as was the case in *Otieno V Pendo Health Ltd* [2024] eKLR on the right to fair hearing.
16. According to Counsel, the lifting of the Petitioner's suspension shows that the Respondent acted within his mandate.
17. Finally, the Respondent's Counsel urges that the Petitioner did not exhaust all avenues of complaint as prescribed by the manual and the petitioner did not utilize the internal appeal mechanism before resorting to the Court which renders the Petition premature as held in *Secretary County Public Service Board & Another V Hulbhai Gedi Abdille* [2017] eKLR, that a party must exhaust all internal dispute resolution mechanisms before seeking judicial intervention.
18. That the doctrine of exhaustion required the Petitioner to approach the Public Service Commission to canvass the grievance and having failed to do so, the Petition must fail.

Analysis and determination

19. It is common ground that the Petitioner was at all material times an employee of the Respondent as a medical doctor at the Jaramogi Oginga Odinga Referral Hospital.
20. It is equally not in contest that the Respondent issued a suspension and notice to show cause to the Petitioner dated 14th February, 2022 and responded on 5th April, 2022 and participated in the hearing conducted by the Advisory Committee on Ethics and Conduct Officers on 23rd March, 2022.
21. Finally, it is also not in dispute that the suspension and show cause letters, lifting of suspension letter and the letter on reinstatement of the Petitioner's salary emanated from the office of the Chief Officer Health and Sanitation, Kisumu County.
22. This far it is discernible that the Kisumu County Public Service Board (herein after CPSP) was not involved.
23. It is trite law that the CPSPs is a body corporate with perpetual succession, seal and capacity to sue or be sued in its corporate name as ordained by the provisions of Section 57 of the [County Governments Act](#).
24. Significantly, Section 59 of the [County Governments Act](#) sets out the powers and functions of County Public Service Board as follows:
 - a. establish and abolish offices in the County Public Service;
 - b. appoint persons to hold or act in offices of the County Public Service including in the Boards of cities and urban areas within the County and confirm appointments;
 - c. exercise disciplinary control over and remove, persons holding or acting in those offices as provided under this part;
 - d. prepare regular reports for submission to the County Assembly on the execution of the functions of the Board;
 - e. promote in the County Public Service the values and principles referred to in Article 10 and 232;



- f. evaluate and report to the County Assembly on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the County Public Service;
 - g. facilitate the development of coherent and integrated human resource planning and budgeting for personal emoluments in counties;
 - h. advise the County Government on Human Resource Management and Development;
 - i. advise County Government on implementation and monitoring of the national performance management system in counties;
 - j. make recommendations to the Salaries and Remuneration Commission on behalf of the County Government on the remuneration, pensions and gratuities for County Public service employees.
25. Additionally, under Section 59(4) of the County Government Act the CPSB has power to:
- a. inform and educate County Public Officers and the Public about the values and principles
 - b. ...
 - c. ...
 - d. ...
 - e. ...
 - f. Investigate, on its own initiative or upon a complaint made by any person or group of persons the violation of any values and principles.
26. The foregoing provisions lay it bare that appointment of persons to offices of the County Public Service and discipline are the preserve of the County Public Service Board unless delegated in accordance with the law.
27. The Respondent has neither denied nor controverted the assertion that the Petitioner was serving as a medical doctor at the Jaramogi Oginga Odinga Referral Hospital and an employee of the Kisumu County Public Service Board; the only body with statutory and constitutional mandate to discipline him absent written delegated authority.
28. Relatedly, the respondent has not demonstrated that he had authority to issue the suspension and notice to show cause letter dated 14th February, 2022 or that the Advisory Committee on Ethics and Conduct of Officers had the mandate to conduct the hearing on 23rd March, 2022.
29. It is unclear to the Court whether the Advisory Committee is a standing or Adhoc Committee of the Kisumu County Government and its place vis-à-vis the County Public Service Board as no evidence was adduced to demonstrate its establishment, membership or functions.
30. Puzzlingly, in his Reply to Petition dated 12th February, 2024 the Respondent relies on the Public Service Commission Discipline Manual and Human Rights Policies but did not avail a copy or specify the provisions relied upon.
31. The Court is not persuaded that the Public Service Commission of Kenya has issued a document by that title and if there is one, when it became operative?
32. As if the foregoing is not enough, the Respondent avers that the Petitioner was allowed a hearing through the Departmental Human Resource Disciplinary Committee yet the Petitioner appeared



before an Advisory Committee on Ethics and Conduct of Officers not a disciplinary committee as the minutes availed by the respondent reveal.

33. Even assuming that the respondent was relying on the Public Service Commission Human Resource Policies and Procedure Manual for the Public Service May 2016, evidence ought to have been adduced to show that the Kisumu County Public Service Board had adopted and domesticated the same and was therefore part of its policies and procedures as held by the Court of Appeal in *Onudi V Okuro & 7 Others* [2023] KECA 272 (KLR)¹⁷ where the Court was unanimous that:

“...the appellant needed to prove that the manual had been duly adopted by the Kisumu County Public Service Board and was therefore part of its policies and procedures. Only then could he rely on its contents. Needless to say the appellant fared poorly on this aspect. One can quickly see the wisdom in the power to delegate granted to the County Public Service Board by the provisions of Section 86(1) of the Act...”

34. These sentiments apply on all fours to the circumstances of this case as no delegation by the CPSB was demonstrated.
35. Clearly, the Respondent and the Advisory Committee on Ethics and Conduct of Officers acted without authority of the County Public Service Board and their actions and decisions were a nullity ab initio and thus of no consequence.
36. As to whether the instant Petition is premature, it is common ground that the Petitioner was obligated to exhaust all internal dispute resolution mechanisms before invoking the Courts jurisdiction as submitted by the Respondent.
37. See *Secretary, County Public Service Board & Another V Hulbhai Gedi Abdille* [2017] eKLR *Speaker of the National Assembly V Karume* [1990-1994] EA 549.
38. The Petitioner did not address this issue directly.
39. Regrettably, the Respondent relies on the so called ‘Public Service Disciplinary Manual’ as the document the Petitioner did not comply with.
40. The Court is unsure of what the Petitioner did not do as per the document cited, which is not a Kisumu County Public Service document nor a Public Service Commission document which the County Public Service Board has adopted.
41. Reliance on the provisions of Section 77 of the *Public Service Commission Act* would have accorded the Respondent a firm basis on which to ground its argument that the Petition herein was filed prematurely.
42. Reliance on a non-existent Public Service Disciplinary Manual which is neither a document of the Kisumu County Public Service Board nor adopted by the Board cannot avail the Respondent.
43. The argument that the instant Petition was premature is unsustainable.
44. In the end, having found that the Respondent and the Advisory Committee acted without the requisite mandate and their actions were thus void and having further found that the argument that the instant Petition was filed prematurely was not substantiated, the Court is satisfied that the instant Petition is merited and is allowed in the following terms.
1. Declaration that the Respondent had neither constitutional nor statutory power to exercise disciplinary control over the Petitioner.



2. Declaration that the Respondent's decision in the letter dated 6th June, 2022 was ultra vires.
3. The Order of certiorari is hereby issued to bring into this honourable court and quash the Respondent's decision contained in the letter dated 6th June, 2022 on lifting of the Petitioners suspension for being ultra vires Section 59 of the County Government Act.
4. Respondent shall bear the costs of the Petition.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 21ST DAY OF JANUARY, 2025.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

