Esuron v Turkana County Public Service Board & another (Judicial Review E001 of 2025) [2025] KEELRC 704 (KLR) (7 March 2025) (Ruling)

Neutral citation: [2025] KEELRC 704 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE

JUDICIAL REVIEW E001 OF 2025

MA ONYANGO, J

MARCH 7, 2025

BETWEEN

DAVID EYANAE ESURON ..... APPELLANT

AND

TURKANA COUNTY PUBLIC SERVICE BOARD ..... 1ST RESPONDENT

COUNTY SECRETART, COUNTY GOVERNMENT OF TURKANA .... 2ND RESPONDENT

RULING

1. Vide a Notice of Preliminary Objection dated 10th February 2025 the Respondents raise the following grounds of objection against the suit herein:

    i. Thatthe application dated 3rd February 2025, seeking to enjoin by injunction the Respondents from conducting interviews of the County Solicitor of the County Government of Turkana is bad in law, frivolous, vexatious and is an abuse of the process of this Honourable Court and the Respondents hereby gives notice that it shall seek to strike it out.

    ii. Thatthe Application dated 3rd February 2025 is both frivolous and premature, as the Applicant commenced but failed to exhaust the available internal appeal or review mechanisms outlined in Section 9(2) of the Fair Administrative Actions Act,2015, and Section 77 of the *County Governments Act*, 2012, and for the later the appropriate forum for initiating the matter should have been the Public Service Commission.

    iii. Thatthe Application dated 3rd February 2025 is bad in law and an abuse of the court process as the Applicant did not obtain leave as required under Order 53 Rule 1 of the Civil Procedure Rules 2010 before instituting the Judicial Review proceedings before this Honourable Court as it appears that the Applicant is seeking orders under Section 8 and 9 of the Kenya *Law Reform Act*.

iv. Thatthe Application dated 3rd February 2025 is an abuse of court process for lack of clarity as how the Applicant approaches the court. It is not clear under which provision of the law this court's jurisdiction is invoked, whether it is under Kenya *Law Reform Act* or under *the Constitution* of Kenya 2010 thus going against the provisions of Section 8 and 9 of the *Law Reform Act* and Order 53 of the Civil Procedure Rules 2010.

v. Thatthe application is a blatant abuse of the court process and should be dismissed with costs to the Respondents.

2. For clarity, it is proper to state the background of the Judicial Review application before the court. The Applicant, filed the application dated 3rd February 2025 by way of Originating Motion seeking for orders that:

i. The Respondents jointly and severally be enjoined by injunction from conducting interviews for the position of County Solicitor scheduled between 5th Wednesday February 2025 to 7th Friday February 202pending hearing and determination of this motion.

ii. An order of mandamus to issue to be compel the 1st Respondent to include the name of David Eyanae Esuron, herein the applicant, among the shortlisted candidates for the position of solicitor for the County Government of Turkana and to conduct an interview for him objectively and without bias.

3. The grounds in support of the application dated 3rd February 2025 are contained in the affidavit annexed to the said application sworn by the applicant, Esuron David Eyanae who avers inter alia that he is an employee of the County Government of Turkana at the Office of the County Attorney, currently serving as the Principal Legal Counsel and acting County Solicitor following the end of the contract of the then County Solicitor.

4. The Applicant stated that on 27th August, 2024, the Turkana County Public Service Board posted an advert for the position of County Solicitor to which he tendered his application; that on 16th November 2024, the Turkana County Public Service Board re-advertised the position of Turkana County Solicitor; that his inquiry as to why the position was re-advertised was not responded to; that due the short period given to interested candidates to make applications, the Applicant applied for the position on 25th November, 2024; that on 16th January, 2025, Turkana County Public Service Board published a list of candidates short listed for the position of County Solicitor and his name was missing from the list of shortlisted candidates despite having been appointed as County Solicitor in an acting capacity; that he had legitimate expectation that having served as County Solicitor in acting capacity since 2nd September, 2024, he would be short listed for the interviews for the position of County Solicitor.

5. The Applicant contended that Section 64(1) of the *County Governments Act*, 2012 provides that a person shall not be appointed to hold a public office in an acting capacity unless the person satisfies all the prescribed qualifications for holding that public office. He contends that his appointment as County Solicitor in acting capacity was sufficient proof that he satisfied all the prescribed qualifications for holding that public office.

6. It was the Applicant's case that the criteria used by the Public Service Board is prejudicial to him and contravenes the principles of governance and national values.

7. Before the judicial review application was heard, the Respondents filed the instant Preliminary Objection dated 10th February, 2025, which was argued in court orally on 12th February 2025.

8. In his oral submissions before court, Counsel Nabenyo for the Respondents faulted the approach by the Applicant in filing the Application dated 3rd February 2025. According to the Respondents' counsel, the Applicant filed the instant application in blatant disregard of Order 53 rule 1 of the Civil Procedure Rules which requires leave to be obtained before such an application is filed. Counsel Nabenyo also raised objection to the application for failure to exhaust the alternative dispute resolution process of appeal before the Public Service Commission as provided for under section 77 of the *County Governments Act*.

9. Counsel Arunda for the Applicant opposed the Preliminary Objection. He submitted that the application is anchored on *the Constitution* of Kenya and the *Fair Administrative Action Act*, 2015 and that leave was not a prerequisite for one to file a Judicial Review application. According to the Applicant, leave is not required to seek judicial review under the *Fair Administrative Action Act*.

10. In response to the allegation that the application dated 3rd February 2025 was filed prematurely before exhaustion of the available internal appeal mechanisms, the Applicant's counsel submitted that the circumstances of this case with regard to the timelines for interviews informed the decision to bypass the provisions of section 77 of the *County Governments Act* requiring the intervention of the court.

Determination

11. The issue that presents itself for determination before this court is whether the preliminary objection is merited.

12. The Respondents seek the striking out of the application dated 3rd February 2025 on grounds that it is bad in law, frivolous, vexatious and is an abuse of the process of this Court; that the Applicant commenced but failed to exhaust the available internal appeal or review mechanisms outlined in Section 9(2) of the Fair Administrative Actions Act, 2015, and Section 77 of the *County Governments Act*, 2012; that leave was not sought before the judicial review application was instituted; and, that the Applicant failed to clarify under what provisions of the law the court's jurisdiction was invoked.

13. As submitted for the Applicant, not all the grounds raised in the notice of preliminary objection constitute grounds for preliminary objection. The Supreme Court of Kenya, while considering a preliminary objection in the case of Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others, cited Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd. (1969) EA 696, where the Court defined a preliminary objection as follows:

> " a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

14. Again in Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR the Supreme Court made the following observation as relates to Preliminary Objections:

> " The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be

committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."

15. In Henry Wanyama Khaemba v Standard Chartered Bank Ltd & Another [2014] eKLR, the Court held that:

> " That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly".

16. In the instant case, the first ground in the preliminary objection is that the suit is bad in law, frivolous, vexatious and an abuse of court process. This is certainly not a matter of law that may be discerned from the pleadings. It does not therefore qualify to be raised as a preliminary objection as it is not a pure point of law and the objector will need to go outside the pleadings and the law to justify the same.

17. The second ground raised in the preliminary objection is that the applicant failed to exhaust the internal appeal or review mechanisms outlined in section 9(2) of the *Fair Administrative Action Act* and section 77 of the County Government Act. This, I agree, is a matter for which a preliminary objection may be raised.

18. The third ground in the notice of preliminary objection is that the application is bad in law and an abuse of court process as the Applicant did not obtain leave as required under Order 53 Rule 1 of the Civil procedure Rules.

19. The applicable law on leave to commence judicial review proceedings is Order 53 Rule 1 of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court has been sought and granted. This is an objection on the format of the application.

20. Section 9 of the *Fair Administrative Action Act* is titled Procedure for judicial Review. The section reads:

> 9. Procedure for judicial review
>
> 1. Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.
>
> 2. The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
>
> 3. The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

4. 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.

5. A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal

21. Section 7 of the *Fair Administrative Action Act* also does not give any guidance on the procedure to approach the court. The section simply provides at subsection (1) that:

1. Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to

    a. a court in accordance with section 8; or

    b. a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

22. It is clear from a reading of the sections that the Fair Administrative Act does not provide for the procedure of approaching the court.

23. Order 53 of the *Civil Procedure Act* provides for leave to file a judicial review application. However, it is a matter for debate if a person seeking to exercise a right under Article 47 of *the Constitution* or any other right under the Bill of Rights ought to approach the court under Order 53.

24. In the case of Masai Mara (SOPA) Limited v Narok County Government (2016) eKLR the Court held as follows: -

> " on the issue of the application of Order 53 of the Civil Procedure Rules to a constitutional petition where a party seeks judicial review reliefs I must hasten to point out that since the promulgation of *the Constitution* in 2010, administrative law actions and remedies were also subsumed in *the Constitution*. This can be seen in the eyes of article 47 which forms part of the Bill of Rights. It is safe to state that there is now substantive constitutional judicial review when one reads article 47 as to the right to fair administrative action alongside article 23(3) which confers jurisdiction, on the court hearing an application for redress of a denial or violation of a right or freedom in the Bill of rights, to grant by way of relief an order for judicial review. Order 53 of the Civil Procedure Rules do not consequently apply to Constitutional Petitions where the court is expected to exercise a special jurisdiction which emanates from *the Constitution* and not a statute."
>
> [Emphasis added]

25. The Employment and Labour Relations Court (Procedure) Rules, 2024 provide for institution of judicial review applications as follows:

> Institution of petitions and judicial review proceedings.
>
> 10. (1) Any person who wishes to institute a petition shall do so in accordance with *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of *the Constitution*) Practice and Procedure Rules.
>
> 2. Any person who wishes to institute judicial review proceedings shall do so in accordance with sections 8 and 9 of the *Law Reform Act* and Order 53 of the Civil Procedure Rules.

3. Notwithstanding anything contained in this rule, a person may seek the enforcement of any constitutional right and freedom or any constitutional provision in a statement of claim or other suit filed before the Court.

[Emphasis added]

26. Again, Article 159, perhaps in recognition that judicial review is a tool in defense of the Bill of Rights, demands that formalities relating to proceedings to enforce the Bill of Rights be kept to a minimum, and that the court shall in appropriate cases entertain proceedings on the basis of informal documentation. However, the Chief Justice has the discretion to make rules regulating the procedure and practice in matters of judicial review.

27. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of *the Constitution*) Practice and Procedure Rules were enacted in furtherance of the provisions of Article 159.

28. Section 20 of the *Employment and Labour Relations Court Act* echoes the provisions of Article 159. It provides:

1. In any proceedings to which this Act applies, the Court shall act without undue regard to technicalities:

Provided that the Court may inform itself on any matter as it considers just and may take into account opinion evidence and such facts as it considers relevant and material to the proceedings.

29. In any event, the Applicant had, together with his originating motion, filed an ex parte chamber summons seeking leave to apply for an order of mandamus to compel the 1st Respondent to include his name among the shortlisted candidates for the position of solicitor for the County Government of Turkana and to conduct an interview for him objectively and without bias. It was the court that decided that the originating motion be heard inter partes and therefore the chamber summons was not argued.

30. It is my view that the procedure under which the Applicant approached the court cannot be a basis of striking out the suit that has been brought before the court contesting violation of a right in the Bill of Rights. This is because the *Fair Administrative Action Act* does not provide the procedure under which persons may approach the court.

31. The foregoing takes care of ground 4 in the notice of preliminary objection which is that the application is an abuse of court process for lack of clarity as to the legal provisions under which the Applicant approached the court.

32. The only ground in the notice of preliminary objection that is for consideration by the court is therefore ground 2 on exhaustion of available internal appeal and review mechanisms.

33. Section 77 of the County Government Act provides:

77. Appeals to the Public Service Commission

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.

3. An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of the Commission, the circumstances warrant it.

4. The Commission shall not entertain an appeal more than once in respect to the same decision.

5. Any person dissatisfied or affected by a decision made by the Commission on appeal in a decision made in a disciplinary case may apply for review and the Commission may admit the application if—

    a. the Commission is satisfied that there appear 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

    b. there is an error apparent on record of either decision.

6. An application for review under subsection (5) shall be in writing and made within the time prescribed by the Commission in regulations governing disciplinary proceedings, but the commission may entertain an application for review later if, in the opinion of the Commission, the circumstances warrant it.

34. The parties did not submit or raise the issue whether the refusal to shortlist a candidate or failure to give reasons thereof as raised by the Applicant herein fall under section 77(2)(a) that is recruitment, selection, appointment and qualifications attached to any office? I will deal with this point later. At this point I can only point out that both parties proceeded on the basis that the issues raised by the applicant herein fall under subsection (2)(a).

35. The principle of exhaustion has been addressed in several decisions. In the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR, the Court of Appeal stated:

> "…. In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed."

36. Similarly, in Republic v National Environment Management Authority exparte Sound Equipment Ltd, [2011] eKLR, the Court of Appeal held:

> " .....Where there was an alternative remedy and especially where Parliament had provided a 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 is 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 the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...."

37. The foregoing is stated in section 9(2) and (3) of the *Fair Administrative Action Act* which provide that:

> 2. The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
>
> 3. The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

38. The Court of Appeal in the case of NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019) [2023] KESC 17 (KLR) while dealing with the doctrine of exhaustion of internal remedies observed as follows:

> " The principle running through these cases is where there was an alternative remedy and especially where parliament had provided a 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 the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it..."

39. In the instant case, the Applicant and the Respondents agree that the Applicant commenced the process provided for under the Act by seeking explanation why he was not shot-listed through the letter from his advocates dated 29th January, 2025 but did not follow it through to conclusion. The Applicant states that he was told to wait for 14 days for the information sought, by which time the process of recruitment would have been completed.

40. The Applicant came to court on 3rd February, 2025. The interviews were to commence on 5th and end on 7th February, 2025. The 14 days from 29th January, 2025 would end on 13th February 2025. This would have been long after the interviews were conducted and concluded.

41. The specific prayers of the applicant are to be included in the list of short-listed candidates. Does this fall under the provisions of section 77 of the County Government Act to warrant an appeal to the Public Service Commission? Does the Public Service Commission have jurisdiction under section 77 to compel the Respondents to give the information requested in the Applicant's advocates letter dated 29th January, 2025?

42. My answer to both questions would be no. Demand for information and demand to be included in a short list of candidates is not the same as an appeal on a decision relating to employment of a person in a county government including a decision in respect of recruitment, selection, appointment and qualifications attached to any office.

43. It is my view that no decision on recruitment, selection, appointment had taken place. The Applicant was only asking for information which once given, would have been the basis of an appeal. Without the information, he had no ground of appeal against the Respondents under section 77 of the *County Governments Act*.

44. For these reasons I find no merit in the preliminary objection by the Respondents dated 10th February, 2025 and dismiss the same.

45. Costs shall abide the outcome of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 7TH DAY OF MARCH 2025

MAUREEN ONYANGO

JUDGE