



**Mobegi v County Secretary, County Government of Nyamira & 3 others
(Petition E003 of 2025) [2025] KEELRC 1050 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1050 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E003 OF 2025**

JK GAKERI, J

APRIL 3, 2025

**IN THE MATTER OF ARTICLES 41 OF THE
CONSTITUTION OF KENYA ON FAIR LABOUR PRACTICE**

AND

IN THE MATTER OF EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION, 2015

AND

**IN THE MATTER OF UNLAWFUL REMOVAL FROM PAYROLL
AND DENIAL OF SALARY WITHOUT DUE PROCESS**

BETWEEN

SIMON OKONG'O MOBEGI PETITIONER

AND

**THE COUNTY SECRETARY, COUNTY GOVERNMENT OF
NYAMIRA 1ST RESPONDENT**

**THE CHAIRMAN, COUNTY PUBLIC SERVICES MANAGEMENT, COUNTY
GOVERNMENT OF NYAMIRA 2ND RESPONDENT**

**THE COUNTY CHIEF OFFICER, PUBLIC SERVICES MANAGEMENT,
COUNTY GOVERNMENT OF NYAMIRA 3RD RESPONDENT**

**THE PAYROLL MANAGER, COUNTY GOVERNMENT OF
NYAMIRA 4TH RESPONDENT**



RULING

1. The Petitioner herein filed the instant Petition on 6th March, 2025 together with a Notice of Motion dated on 6th March, 2025 under a Certificate of Urgency and when the matter came up on 10th March, 2025, it was not certified urgent and directions on service were given and a hearing slated for 24th March, 2025 when counsel for the respondents intimated that he had filed and served a Notice of Preliminary Objection dated 17th March, 2025 and responded to the Petition.
2. Counsel for the Petitioner indicated that he had responded to the Preliminary Objection and his response was sufficient for purposes of disposal of the objection. The respondent's counsel confirmed that he had filed submissions on the Preliminary Objection.
3. The Notice of Preliminary Objections is against the entire proceedings on the ground that the court lacks jurisdiction ab initio on account that:
 1. The proceedings are instituted contrary to the provisions of Section 87(2) of the *Public Service Commission Act*.
 2. The first appellate legal procedure for adjudicating grievances relating to employment of a person in a County Government in relation to recruitment, selection, appointment, remuneration and disciplinary control is prescribed by law.
 3. The Petitioner has not pleaded exhaustion of the mandatory legal procedures spelt out in the law.
 4. The proceedings offend the elemental legal doctrine of exhaustion and constitutional avoidance.
 5. The instant Petition is entirely premised on alleged breach of an employment contract and does not pinpoint any constitutional violation or the manner of violation and discloses no constitutional violation and should be struck out.

Applicant's Response

4. Counsel for the Petitioner contends that the Notice of Preliminary Objection does not meet the threshold of a Preliminary Objection established in *Mukisa Biscuit Manufacturing Co. Ltd V Wes end Distributors Ltd [1969] 696*, of being a pure point of law.
5. Reliance was placed on *Kenyago V Kerato & Another [2024] KEELRC 2231 (KLR)* and *Daniel Kago Gachanja V Inspector General & 2 others [2020] eKLR*, to urge that cases involving contested employment status proceed to hearing.
6. That the Petitioner was challenging his being struck off the payroll despite being an employee of the respondent.
7. Counsel urges that Section 77 of the County Government Act and 87(2) of the *Public Service Commission Act* apply where an administrative decision affecting an employee has been made as exhaustion of internal reliefs presupposes the existence of a decision, and in this case there is no decision.



8. Reliance was placed on Kenya County Government Workers Union V County Government of Nyeri & Another [2017] eKLR and James Tanai Murete & Others V County Government of Kajiado & Others [2023] eKLR to urge that removal from payroll is not an appealable decision under the law.
9. On exhaustion, counsel urges that the doctrine of exhaustion is not absolute and courts have recognized exceptions.
10. Reliance was placed on Republic V National Environment Management Authority [2011] eKLR, where an internal remedy would be ineffective and Geoffrey Muthinja & Another V Samuel Muguna Henry & 1756 Others [2015] eKLR that the doctrine of exhaustion should not be a bar to access to justice, to urge that due to the respondent's in action the court was the best option.
11. On jurisdiction, reliance was placed on Article 162(2)(a) of *the Constitution* of Kenya, 2010 and Section 12 of the *Employment and Labour Relations Court Act* to urge that the Court has jurisdiction to hear and determine disputes arising from contracts of service including those involving County Governments.
12. Counsel prays for dismissal of the Notice of Preliminary Objection with costs.

Respondent's Submissions

13. On jurisdiction, reliance was placed on the sentiments of the Supreme Court in Samuel Kamau Macharia & Another V Kenya Commercial Bank Ltd & 2 Others [2012] eKLR, Attorney General & 2 Others V Okiya Omtata & 14 Others [2020] eKLR to underscore the essence of jurisdiction.
14. Counsel urged that the dispute between the parties arises from a contract of employment and the mandatory initial appeal procedure is under Section 77 of the *County Governments Act* Section 87(2) of the *Public Service Commission Act* and Article 234(2)(i) of *the Constitution* of Kenya on appeals.
15. Counsel further submitted that the Petitioner had not pleaded having exhausted other mandatory procedures and cited the decision in NGOs Co-ordination Board V EG & 4 Others; Katiba Institute (Amicus Currie) [2023] KESC 17(KLR) on exhaustion.
16. Reliance was also placed on the sentiments of the court in United Millers Ltd V Kenya Bureau of Standards; Director, Criminal Investigation & 5 Others [2021] eKLR as well as Albert Chaurembo Mumba & 7 Others V Maurice Munyao & 48 Others [2019] eKLR among others on exhaustion of other mechanisms in dispute resolution.
17. Finally, reliance was also placed on the sentiments of the Court in Evans Shipala Molunji V County Government of Kakamega [2022] eKLR, Secretary County Public Service Board & Another V Hulbhai Gedi Abdille [2017] eKLR and Joy Atieno Owuocha & 2 Others V County Government of Homa Bay & Another [2021] eKLR, to urge that the Petition ought to be dismissed.
18. Counsel urged the court to strike out the Petition.

Analysis and determination

19. The Applicant/Petitioner contended that he Respondent's Notice of Preliminary Objection does not meet the threshold of a Preliminary Objection on the premise that the notice raises factual issue on an employment relationship.
20. It requires no emphasis that the classical rendition of what constitutes a Preliminary Objection are the sentiments of Law JA and Sir Charles Newbold P, in Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd (Supra) as follows:



“ ... A Preliminary Objection consists of a pure point of law which has been pleaded or which arises by clear implication out of the 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...”

Sir Charles Newbold P stated:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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”.

21. The Respondent’s Notice of Preliminary Objection is challenging the court’s jurisdiction on the grounds of exhaustion of internal dispute resolution mechanisms and the rule in *Anarita Karimi Njeru V Republic* [1979] eKLR on Constitutional Petitions.
22. Granted that the respondent’s Notice of Preliminary Objection is not questioning the employment relationship between the applicant and the respondents and the Notice is grounded on the doctrine of exhaustion which is a threshold issue in law, the court is satisfied that the Notice of Preliminary Objects meets the threshold of a Preliminary Objection as envisioned by *Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd* (Supra).
23. The threshold of a Constitutional Petition was laid in *Anarita Karimi Njeru V Republic* (Supra) where Trevelyne and Hancox JJ stated as follows:

“ We would however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the constitution*, it is important (if only to ensure justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed”.
24. The court expressed similar sentiments in *Kiambu County Tenants Welfare Association V Attorney General & Another* [2017] eKLR.
25. In addition, under the Employment and Labour Relations Court (Procedure) Rules 2024, the filing of Petitions is governed by *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and the Petition must disclose the Constitutional provisions violated, the nature of injury caused or likely to be caused to the Petitioner or the person in whose name the Petitioner has instituted the suit or the class of person or community in the case of a public interest case.
26. Although paragraph 28 of the Petition makes reference to Articles 41, 47 and 28 of *the Constitution* of Kenya, details of the nature and extent of the violation and injury are largely missing.
27. More significantly, if the only issue being litigated is the removal of the applicant’s name from the respondent’s payroll, it is unclear to the court why has taken the Petitioner about 8 months to seek redress.



28. In the court's view, the Petitioner's complaint is a quintessential dispute between an employee and an employer and raises no Constitutional issue under *Anarita Karimi Njeru V Republic (Supra)*.
29. However, the pith and substance of the respondent's Notice of Preliminary Objection is the want of the court's jurisdiction because the Petitioner has not exhausted internal dispute resolution mechanisms.
30. In *Republic V Commissioner General, Kenya Revenue Authority Ex Parte Sanofi Aventis Ltd [2017] eKLR*, the court explained the doctrine of exhaustion as follows:

“The doctrine 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. This doctrine is now of esteemed judicial lineage in Kenya. It was felicitously stated by the Court of Appeal in *Speaker of National Assembly V Karume...*”

31. In *Geoffrey Muthinja Kabiru & 2 Others V Samuel Munga Henry & 1756 Others (Supra)*, the Court of Appeal was categorical that:

“It is imperative that where a dispute resolution mechanism exists outside courts the same be exhausted before the jurisdiction of the Court is invoked. Courts ought to be of last resort and not the first part 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”.

See also *William Odhiambo Ramogi & 3 Others V Attorney General & 4 Others, Muslim for Human Rights & 2 Others Interested Parties [2020] eKLR*.

32. Similarly, in *NGOs Co-ordination Board V EG & 4 Others; Katiba Institute (Amicus Curie) (Supra)*, the Supreme Court stated:

“...Even when Superior Courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to the relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute...

It is now firmly established that in cases where there is an alternative dispute resolution mechanisms established by legislation, the courts must exercise restraint in exercising their jurisdiction and accord deference to such dispute resolution bodies under the doctrine of exhaustion. This court in its previous decisions has settled the jurisprudence regarding the doctrine of remedies”.

See *Secretary, County Public Service Board & Another V Hulbhai Gedi Abdille (Supra)*.

33. The Applicant/Petitioner's primary grievance is that the respondents have not responded to her letters following her alleged removal from the respondent's payroll and opines that the court is the next port



of call for a remedy as opposed to other constitutional bodies with jurisdiction to hear and determine his complaint.

34. Article 234 (2)(i) of *the Constitution* of Kenya provides that:

The Commission shall hear and determine appeals in respect of County Governments Public Service...

35. This provision mandates the Public Service Commission to hear appeals on decisions or actions taken by the County Government Public Service. This provision is given effect by the provisions of Section 77 of the *County Governments Act* and Section 87(2) of the *Public Service Commission Act*.

36. Section 77 of the *County Governments Act* provides

- (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) ...
 - (b) remuneration and terms and conditions of service;

37. Although Section 77(1) of the *County Governments Act* uses the term “may”, the court is persuaded that any person dissatisfied or affected by a decision under that provision is obligated to appeal to the Public Service Commission.

Significantly, sub-Section (2) is couched in mandatory terms that the Commission “shall entertain appeals on any decision relating to employment”.

38. The foregoing is fortified by the sentiments of Mumbi Ngugi J. (as she then was) in *James Tinai Murete & Others V County Government of Kajiado & Another; Nailantei Supeyo & 19 Others; Interest Parties* (Supra) as follows:

“... The Petitioners were dissatisfied with the decision of the respondents with regard to recruitment to various positions within the County and they cannot argue, in the face of the clear provisions of Section 77 of the *County Governments Act*, that they can bypass the legislation and come to this court by way of a Constitutional provision”.

Aside from the view expressed in the two decisions set out above, I take this view for two additional reasons. First, it is my view that the legislature could not have intended to establish a dispute resolution mechanism and then render it redundant immediately by giving parties the option to choose whether to follow it or not. Read as a whole, the provisions of Section 77 of the *County Governments Act* evince an intention to have all disputes arising out of appointments by County Service Boards dealt with by the Public Service Commission hence its grant to the Commission of the mandate in mandatory terms by providing that the Commission “...shall entertain appeals in respect of recruitments, selection, appointment and qualifications attached to any office”.

There is no option given to a party to choose whether or not to file grievances with the commission...



In the circumstances, I find that the issues raised in the present Petition should have been raised before the Public Service Commission which has the statutory mandate under Section 77 of the *County Governments Act* to deal with such disputes”.

39. The foregoing sentiments apply on all fours to the circumstances of the instant case.
40. Contrary to the Petitioner’s contention that there is no appealable decision, the removal of the Petitioner from the payroll and the consequent non-payment of salary is, in the courts view a decision relating to terms and conditions of employment, principally remuneration and both Article 234(2) of *the Constitution* of Kenya and Section 77(2) of the *County Governments Act* are unambiguous that the Public Service Commission is the only body with jurisdiction to hear appeals from dissatisfied or affected persons.
41. The applicant’s grievance against the respondents is appealable at the Public Service Commission which should have been her first port of call before invoking the court’s jurisdiction.
42. Relatedly, Section 86 of the Public Service Act operationalizes the provisions of Section 77 of the *County Governments Act* by prescribing the procedure and the possible outcomes upon considering of the appeal.
43. Significantly, Section 87 of the *Public Service Commission Act* is categorical that:
 1. ...
 2. 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.
44. The foregoing provision is couched in mandatory tone to underscore the legislative intention that appeals from decisions or actions taken by the County Public Service Board or other persons be appealed against at the Public Service Commission.
45. However, the court is in agreement with the applicant’s submission that the doctrine of exhaustion is not absolute. There are indeed exceptions and courts have enforced these exceptions, albeit with difficulties on account of unclear delineation of the exceptions. See the sentiments of the court in Republic V Independent Electoral and Boundaries Commission & Others Ex Parte the National Super Alliance (NASA) Kenya and Republic V Dedan Kimathi University of Technology Ex Parte Muia Stephen Mutuku [2022] KEHC 358 (KLR), on exceptions to the doctrine of exhaustion.
46. Counsel for the Petitioner submitted that owing to the County Governments inaction, the only option was to invoke the court’s jurisdiction bearing in mind that the Petitioner has been without a salary since July 2024 and had not invoked the appellate procedure under Section 77 of the *County Governments Act* or copied any of her letters to the County Government to the Commission.
47. In the court’s view, inaction by the County Government, does not qualify as a situation whereby the doctrine of exhaustion may be qualified or excepted for the simple reason that failure to secure a response from the County Government ought to trigger the appellant mechanism before invoking the court’s jurisdiction. Consistent with the Court of Appeal decision in Speaker of the National Assembly V James Njenga Karume (Supra) as follows;

...that were 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...”



48. Having failed, refused or neglected to activate the appellate process prescribed by *the Constitution* of Kenya, *County Governments Act* and the *Public Service Commission Act*, to resolve a matter which is within the jurisdiction of the Public Service Commission for almost 8 months since the alleged grievance arose, and invoking this Court's jurisdiction, the court is satisfied that the Petitioner has not demonstrated that this case falls within the ambit of the exceptions to the doctrine of exhaustion.
49. In the circumstances, it is the finding of the court that grievance complained of should be raised before the Public Service Commission as statutorily ordained by the provisions of Section 77 of the *County Governments Act*.
50. In the upshot, the respondent's Notice of Preliminary Objection dated 17th March, 2025 is merited and the instant Petition is struck out with no Orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 3RD DAY OF APRIL, 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.

