



**Kimurgor v County Public Service Board Uasin Gishu County & 3 others (Employment and Labour Relations Petition E013 of 2024) [2025] KEELRC 1657 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1657 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET**

**EMPLOYMENT AND LABOUR RELATIONS PETITION E013 OF 2024**

**MA ONYANGO, J**

**MAY 29, 2025**

**IN THE MATTER OF ILLEGAL UNPROCEDURAL ESTABLISHMENT  
OF OFFICES WITHIN UASIN GISHU COUNTY GOVERNMENT**

**AND**

**IN THE MATTER OF ARTICLES 1,2(1), 3(1), 10,19,20,21,  
22,23,73,159,174,175,243,235,258 AND 259 OF THE CONSTITUTION OF KENYA,2010**

**AND**

**IN THE MATTER OF SECTION 8(1)A, 60(1)C, 62, 65,66,68B,  
87(C), 96 AND 97 OF THE COUNTY GOVERNMENT ACT**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES  
2,3,10,27,56,73(2),232 AND 235 OF THE COSNTITUTION OF KENYA,2010**

**AND**

**IN THE MATTER OF OPEN, TRANSPARENT AND COMPETITIVE RECRUITMENT  
AND APPOINTMENT OF COUNTY STAFF IN UASIN GISHU COUNTY GOVERNMENT**

**BETWEEN**

**MORGAN KIMURGOR ..... PETITIONER**

**AND**

**COUNTY PUBLIC SERVICE BOARD UASIN GISHU COUNTY .... 1<sup>ST</sup>  
RESPONDENT**

**CHAIRPERSON, COUNTY PUBLIC SERVICE BOARD UASIN  
GISHU ..... 2<sup>ND</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF UASIN GISHU ..... 3<sup>RD</sup> RESPONDENT**

**THE COUNTY SECRETARY UASIN GISHU COUNTY ..... 4<sup>TH</sup> RESPONDENT**



## RULING

1. The Petitioner filed a Notice of Motion dated 26<sup>th</sup> September 2024 seeking the following orders:
  - a. That pending the hearing and determination of this Petition, this honorable court be pleased to stay the appointment, swearing in and/or assumption of the 428 Appointees into the various offices within the 3<sup>rd</sup> Respondents offices.
  - b. That pending the hearing and determination of this Petition, this honorable court be pleased to issue conservatory order by way of injunction restraining the 428 appointees, their officers, staff, agents, servants and/or any other persons acting at his behest however from assuming, taking up office or performing any actions in their respective offices.
  - c. That upon grant of prayer i and ii, the interim orders to remain in force pending the hearing and determination of the Petitioner's appeal before the Public Service Commission.
  - d. That this court gives directions as it may deem just and fit.
  - e. That the Respondents be condemned to pay costs,
2. The application is based on the grounds set out at the foot of the application and supported by the sworn affidavit of the Petitioner dated 22<sup>nd</sup> February 2025.
3. In that affidavit, the Petitioner avers that sometime in 2023, the 4<sup>th</sup> Respondent declared vacant four hundred and twenty-eight positions within the 3<sup>rd</sup> Respondent's offices and subsequently invited qualified candidates to apply for the same.
4. He contends that in the said advert there were newly established offices within the County Government which were created in contravention of the procedural requirements outlined in Section 62 of the [County Governments Act](#). According to the Petitioner, the Intergovernmental and Diaspora Relations Office and Director Governor's Delivery Unit, a newly established office within the County Government, was created without the requisite approval from the County Assembly, thereby violating the established procedural framework under section 61 and 62 of the [County Governments Act](#).
5. It is the Petitioner's case that members of the public were denied an opportunity to provide comments and feedback through the County Assembly in line with Article 10 of [the Constitution](#) and Section 87 of the [County Governments Act](#) prior to the establishment of the said office.
6. In addition, the Petitioner asserts that the vacancies attracted over 37,000 applicants and months later without any open, transparent and competitive interviews, the Respondents listed in their website a list of successful applicants.
7. It is the Petitioner's case that the subsequent recruitment is in utter breach of section 65 of the [County Governments Act](#) as it was neither open nor transparent as at least thirty percent of the vacant posts at entry level were filled by candidates who are from the dominant ethnic community in the County.
8. The Petitioner contends that the recruitment process was characterized by irregularities and impropriety, as evidenced by the issuance of appointment letters to individuals who did not meet the established criteria. In addition, it is averred that the protracted duration of the recruitment process raises serious concerns regarding the transparency and fairness of the selection process.



9. It is the Petitioner's averment that as a result of the actions of the Respondents, he wrote to the Public Service Commission alleging that the national values and principles of governance, under Article 10 and values and principles of public service under Article 232 of *the Constitution* were not adhered to.
10. The Petitioner has taken the position that he is alive to the fact that there is nothing in the law that expressly confers upon the Public Service Commission the power to grant interim injunctive reliefs in the appeals that go before it and as such, he now seeks grant of interim conservatory and injunctive orders through the instant Petition pending the hearing and determination of the appeal before the Public Service Commission.
11. It is the Petitioner's case that the Respondents' decision, actions, and omissions offend the rule of law and fairness and constitute a direct affront and assault to the constitutional dictates.
12. The Petitioner further avers that it is in the interest of justice that this matter is urgently heard and determined to prevent further violation of *the constitution* by the Respondent.
13. Before the Notice of motion was heard the Respondents filed a Notice of Preliminary Objection dated 22<sup>nd</sup> October 2024 based on the following grounds: -
  - a. The jurisdiction of this Honourable Court has been prematurely invoked for the reason that the Petitioners have not exhausted the statutorily available remedies given that:
  - b. The issues raised in the Petition i.e the alleged unlawful employment, the illegality of the Staff Establishment and establishment of new offices and appointment of public service staff without approval of the County Assembly fall within the purview of conditions of service and appointments that ought to be resolved by the Public Service Commission pursuant to Section 77 of the County Government Act.
  - c. The Petitioners, on their own admission, have appealed to the Public Service Commission and not granted the Commission the opportunity to deliberate on the issues raised prior to invoking this Honorable court's jurisdiction.
  - d. The suit offends Rule 7(2) of the Employment and Labour Relation Court (Procedure) Rules which dictate that any person that wishes to institute judicial review proceedings ought to do so in accordance with section 8 & 9 of the *Law Reform Act* and Order 53 of the Civil Procedure Rules.
  - e. The 2<sup>nd</sup> and 4<sup>th</sup> Respondents have been improperly and wrongly joined to the Petition in light of Section 133 of the County Government Act that exempts any members of the staff of the County Government in service of the County Government from civil liability for the acts done in good faith under the direction of the County Government:
  - f. The Application does not meet the threshold for grant of conservatory orders for the reasons that:
  - g. The Conservatory Orders are overtaken by events for the reason that the appointees have already assumed their respective offices within the County Government of Uasin Gishu and granting same may amount to condemning them unheard of the;
  - h. The grant of the Conservatory Orders as sought shall amount to summary determination of the matter depriving the Respondents from arguing their case on merit.
14. Both the Preliminary Objection dated 22<sup>nd</sup> October 2024 and the Notice of Motion dated 26<sup>th</sup> September 2024 were disposed of by way of written submissions



## The Respondents' Response

15. The Respondents opposed the application dated 26<sup>th</sup> September 2024 vide a Replying affidavit sworn by Silah K. Ronoh, the 2<sup>nd</sup> Respondent on 27<sup>th</sup> February 2025. They aver that the application is fatally defective, does not raise any triable issues, incompetent and is an abuse of the court process.
16. According to the Respondents, in the year 2023 the 4<sup>th</sup> Respondent declared vacant the four Hundred and twenty-eight (428) positions within the 3<sup>rd</sup> Respondent's offices and subsequently invited qualified candidates to apply for the same. The vacancies attracted 43,005 applicants and after reviewing each and every application, the Respondents shortlisted 2,000 candidates and after interviews, suitable candidates were selected and eventually appointed to fill the advertised vacant position.
17. The Respondents maintained that the recruitment exercise was done in accordance with the laid down employment Laws and policies in recruitment and selection procedures and further, that the successful candidates have since been appointed and sworn in hence the instant application seeking orders of stay and conservatory orders of stay has been overtaken by events.
18. It is also the Respondent's case that the Petitioner has not met the required threshold for granting orders of stay and conservatory orders of injunction.

## The Petitioner's submissions

19. In his submissions, the Petitioner framed the issues for determination to be:
  - a. Whether the Petitioner has met the conditions requisite for grant of the conservatory order by way of injunction
  - b. Whether the Preliminary Objection is merited
20. On the first issue, the Petitioner submitted that he had established a prima facie case as is evident in his Supporting Affidavit wherein he demonstrated how the establishment process of the new offices and appointment process was marred with secrecy, biases and did not uphold the rule of law.
21. The Petitioner also submitted that the Respondents' actions were an affront to Articles 2, 3, 10, 27, 56, 73 (2), 232 and 235 of *the Constitution* and go against the principles of good governance, integrity, transparency and accountability.
22. It is the Petitioner's submission that the provisions of the *County Governments Act* specifically sections 60 (1) (c), 62, 65, and 87(c) have been violated as there was no requisite approval from the County Assembly and that at least thirty percent of the vacant posts at entry level were filled by candidates who are from the dominant ethnic community in the County are facts that have not been disputed.
23. On this basis, the Petitioner submitted that he has sufficiently demonstrated a prima facie case for grant of the conservatory orders sought.
24. Regarding the issue of irreparable harm, the Petitioner submits that he moved this court under Article 22(2)(c) acting in the public interest, and that the orders sought are for the benefit of the public at large which stands to suffer irreparable harm should the for hundred and twenty-eight appointees assume office and discharge their roles in gross violation of Articles 172(210, 27, 56, 73 (2), 232 and 235) of *the Constitution* of Kenya 2010.
25. According to the Petitioner, the Respondents established new offices without due regard to requirements under Section 61 and 62 of the *County Governments Act* and further, that they did not



- involve the County Assembly in the establishment of the new offices nor allow public participation contrary to Article 10 *the Constitution*.
26. It is also submitted that the Respondents appointed the dominant ethnic community in the County exceeding thirty percent contrary to the provisions of section 65 the *County Governments Act*.
  27. Based on the foregoing, the Petitioner submits that the balance of convenience tilts in his favor and that the court should grant the conservatory orders sought in the Notice of Motion dated 26<sup>th</sup> September 2024.
  28. On the second issue as to whether the Preliminary objection is merited, the Petitioner contends that the issue raised on whether the jurisdiction of this court has been invoked prematurely in view of section 77 of the *County Governments Act*, the Petitioner avers that there is nothing in the law that expressly confers upon the Public Service Commission the power to grant interim injunctive reliefs in the appeals that go before it, and that he has filed the instant application seeking grant of interim conservatory and injunctive orders pending the hearing and determination of the appeal before the Public Service Commission. In support of this position, the Petitioner cited the case in *Zena Achieng Mohammed v County Public Service Board of Kilifi & 6 Others* (2021) eKLR , *Kamba & 8 others v County Public Service Board, Machakos County Government & 2 others* (2023) and *Lomari & 4 others v County Government of Turkana & 5 others*; Attorney General 2023 (KLR)
  29. While submitting on the ground 2 in the preliminary objection, the Petitioner contended that the petition seeks a plethora of prayers and not just judicial review orders. According to the Petitioner, section 12(3) of the *Employment and Labour Relations Court Act* empowers the court to make interim preservation orders including injunctions in cases of urgency. The Petitioner thus submitted that Ground 2 in the Respondent's preliminary objection is misplaced.
  30. With regard to Ground 3 of the Preliminary Objection on whether the petition offends the provisions of section 133 of the County Government Act, the Petitioner submits that the 2<sup>nd</sup> and 4<sup>th</sup> Respondents have not been sued in their personal capacity but through the offices they hold and that a misjoinder of any party should not defeat a suit.
  31. Regarding Ground 4 of the Preliminary Objection, the Petitioner submitted that the same is not a pure point of law as contested facts have been presented before this court as a Preliminary Objection and the court was urged to hold as such.

### **The Respondents' submissions**

32. The Respondents filed two sets of submissions. The submissions to the Notice of Preliminary Objection dated 22<sup>nd</sup> October 2024 and the submissions to the application dated 26<sup>th</sup> September 2024.
33. In their submissions to the Preliminary Objection, the Respondents identified the main issue for determination to be whether the Preliminary Objection meets the threshold of what a Preliminary Objection is.
34. The Respondents in citing the supreme court case of *Samwel Kamau Macharia and another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR submitted that a court's jurisdiction flows from either *the Constitution* or legislation and as held by the Court of Appeal in the case of *Orange Democratic Movement v Yusuf Ali Mohammed & 5 Others* (2018)eKLR a party cannot through its pleading confer jurisdiction to a court of law and that when a court finds that it does not have the jurisdiction to entertain a matter before it, it must down its tools.



35. According to the Respondents, the issues that have been raised by the Petitioner herein are employment in nature and the court lacks jurisdiction to entertain the petition and application since the Public Service Commission sits as a quasi-judicial body duly vested with the mandate to hear and determine the issues raised in the petition.
36. It is the Respondents' submission that by dint of section 77 of the County Government Act, an issue relating to the recruitment, remuneration and conditions of service that fall within the ambit of the County Service Board are appealable to the Public Service Commission on the first instance.
37. The Respondents thus submitted that the appeal process under section 77 of the County Government Act to the Public Service Commission is a mandatory process under the *Public Service Commission Act* at section 85 and 86. On this basis, the Respondents submit that the jurisdiction of this court can only be invoked pursuant to compliance with section 87(2) of the *Public Service Commission Act*.
38. Further, it is submitted that the Public Service Commission under Article 243(2)(1) is mandated to hear and determine appeals in respect of any decision relating to engagement of any person in a County Government including a decision in respect of National Values and principles of governance under Article 10 and principles of Public Service under Article 232 of *the constitution*.
39. The Respondents therefore asserted that the Petitioner has moved the court prematurely as he is yet to exhaust the dispute resolution mechanisms established under *the constitution*, various statutes and the relevant human resources policies and procedure manual.
40. In the end, the Respondents urged the court to uphold the Preliminary Objection dated 22<sup>nd</sup> October, 2024 having met the required threshold of what a Preliminary Objection is to the extent that this Honourable Court lacks jurisdiction to entertain this Petition since the Petitioner has not exhausted the doctrine of exhaustion in compliance with the provisions of section 77 of the County Government Act.
41. The Respondents thus prayed for the Petition together with the application for conservatory orders to be struck out with costs to the Respondents.
42. In the submissions to the Petitioner's application dated 26<sup>th</sup> September 2024, the Respondent submitted on the main issue as to whether the Petitioner has met the required threshold for grant of orders of conservatory injunction.
43. The Respondent while citing the case of *Wilson Kabera Nkunja v the Magistrate and Judges Vetting Board & Others* Nairobi High Court Constitutional (2016) eKLR submitted that it is incumbent upon the Applicant to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders, he is likely to suffer prejudice.
44. According to the Respondents, the Petitioner has failed to present a prima facie case by not adducing any evidence of lack of qualification or merit of the people appointed on the various position and neither has the Petitioner adduced any evidence that majority of the appointees were from one tribe as alleged.
45. In addition, the Respondents submit that the Petitioner failed to adduce any evidence that there was a person who was appointed to the position of inter-governmental and diaspora Relations Office and Director Governor's delivery unit and also, that he did not demonstrate that these were newly created offices that were not in existence prior the advertisement.



46. The Respondents further submit that the Applicant has failed to demonstrate by presenting any arguments as to the loss or damage to any specific public right or interest under the bill of rights or written law that stands the risks of being infringed should the orders not granted.
47. It is the Respondents submission that the positions being intended to be enjoined by an order of conservatory orders are already filled and the nominated candidates have already commenced working and therefore the orders sought have since been overtaken by events. The Respondents aver that should the court grant this orders as sought it would result in a final determination of the petition before it is tried on merit, and that the order will prejudice the employed employees without submissions of proof by the Petitioner of the alleged lack of merit and will also affect service delivery mandated upon the 3<sup>rd</sup> Respondent.
48. The Respondents submitted that the application lacks merit and the same should be dismissed with costs.

### **Determination**

49. I have considered the Notice of Preliminary Objection dated 22<sup>nd</sup> October 2024 and Notice of motion dated 26<sup>th</sup> September 2024. The issues for determination are:
  - i. Whether the Preliminary objection is merited
  - ii. Whether the Petitioners has met the threshold for grant of Conservatory orders.

#### **i. Whether the Preliminary objection is merited**

50. The definition of what constitutes a Preliminary Objection was given in the celebrated case of Mukisa Biscuit Manufacturing Company –Vs- West End Distributors Limited [1969] EA where it was held as follows: -
  - a. “So far as I am aware, 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 on 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.”
51. In order to qualify as a Preliminary Objection, the applicant must raise a pure point of law. Where there are contested facts requiring determination, a Preliminary Objection cannot be raised.
52. The gist of the present Preliminary Objection is that the Petitioner has failed to exhaust the dispute resolution mechanism as provided for under section 77 of the County Government Act.
53. The Court of Appeal had an opportunity to pronounce itself on the question of interpretation of section 77 of the *County Governments Act*, 2012 in the case cited by the Respondents, Secretary County Public Service Board and Another v Hulbhai Gedi Abdulla (2017) eKLR where the court observed:
  - a. “There is no doubt that the Respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by Section 77 of the Act. The Section provides not the only forum through which the Respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one specifically tailored by the legislators to meet 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.”



54. Article 234 (2) (i) of *the Constitution* stipulates as follows:-

The Commission shall hear and determine appeals in respect of county governments' public service.

55. Section 77 of the County Government Act provides, in part, as follows:-

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.

56. Section 85 of the *Public Service Commission Act* provides that:

65. The Commission shall, in order to discharge its mandate under Article 234(2)(i) of *the Constitution*, hear and determine appeals in respect of any decision relating to engagement of any 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 forms of removal from the public 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 an appeal in that regard.

57. Section 86 goes further to provide that:

- a. Any person who is dissatisfied or affected by a decision made by any authority or person in respect of a County Government public service may appeal to the Commission against the decision.



- b. An appeal under subsection (1) shall be in writing and made within ninety days from the date of the decision: Provided that the Commission may consider an appeal out of time if, in the opinion of the Commission, the circumstances warrant it.
  - c. The Commission shall make regulations to guide the hearing and determination of appeals from the county public service boards.
    - (4) After considering an appeal under this section the Commission may—
      - (a) uphold the decision;
      - (b) set the decision aside;
      - (c) vary the decision as it considers to be just; or
      - (d) give such directions as it may consider appropriate with respect to the decision
58. Section 87 provide as follows:
- a. The Commission may in hearing and determining appeals from the County Governments' public service, co-opt relevant experts depending on the nature of the appeal.
  - b. 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.
59. From the wording of Section 85 of the *Public Service Commission Act* above provisions, there is no doubt that the Public Service Commission is mandated to deal with appeals from the decisions of County Public Service Board.
60. The wording in sections 77 of the *County Governments Act* and 85 of the Public Commission Act, there must be a decision made by the County Public Service Commission that is the subject of appeal to the public service Commission.
61. I have looked at both the petition and the application under reference and I have not seen any decision of the county public service board that is the subject of appeal to the Public Service Commission. I have further not seen any copy of the appeal to the Public Service Commission.
62. For this reason both the preliminary objection and prayer vi of the application must fail.
63. On the prayers for conservatory orders by way of injunction to restrain the 428 appointees from taking or assuming office, the Applicant has not rebutted the averments by the Respondents that the said appointments have been concluded and the appointed persons have taken office. An injunction cannot issue in respect of an action that has already taken place.
64. Further, if it is true that the persons appointed have already assumed office, this court cannot make orders against them as they are not parties to this suit.
65. There are further no orders sought to reverse the appointments that have already taken place either in the application or in the petition. Needless to state, parties are bound by their pleadings and the court cannot grant orders that have not been sought.
66. Consequently, both the preliminary objection and the application are not merited and are accordingly dismissed with no order as to costs.
67. Orders accordingly.



**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 29<sup>TH</sup> DAY OF MAY 2025**

**MAUREEN ONYANGO**

**JUDGE**

