



Polo & another v County Government of Homabay & another (Cause E079 of 2024) [2025] KEELRC 2358 (KLR) (28 May 2025) (Ruling)

Neutral citation: [2025] KEELRC 2358 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E079 OF 2024**

**JK GAKERI, J
MAY 28, 2025**

BETWEEN

**JULIUS OTIENO POLO 1ST CLAIMANT
JENNIPHER ANYANGO NDEGE 2ND CLAIMANT**

AND

**COUNTY GOVERNMENT OF HOMABAY 1ST RESPONDENT
HOMABAY COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT**

RULING

1. The claimants commenced this suit vide a Memorandum of Claim dated 1st October, 2024 and filed on 2nd October, 2024 claiming gratuity and pension contribution which they allege that the respondents have failed or refused to pay.
2. The respondents filed a response on 20th November, 2024 dated on even date and after the claimants application for reinstatement of the suit was compromised on 20th March, 2025, filed the instant Notice of Preliminary Objection dated 28th March, 2025.
3. The respondents contend that: -
 1. The court lacks jurisdiction to entertain the claimant’s suit as framed as it contravenes the law on dispute resolution in County Public Service employment matters.
 2. The suit is frivolous, vexatious and blatant abuse of the judicial process.
 3. The suit is devoid of any legal substratum on which the court can exercise jurisdiction.
 4. The pleadings are fatally and incurably defective, incompetent and unsustainable in law.



5. The suit is misconceived, incompetent and improperly before the court as it disregards Article 234[2][i] of *the Constitution* of Kenya, Section 87[2] and 77 of the *Public Service Commission Act* and the *County Governments Act* respectively.
4. The respondents prayed for the striking out of the claimant's suit with costs to the respondents.

Respondents submissions

5. As to whether the court has jurisdiction to hear and determine the instant suit, reliance was made on the sentiments of the Court of Appeal in *Owners of the Motor Vessel "Lilian S" v Caltex Oil [Kenya] Ltd [1989] KLR 1*, on the essence of jurisdiction, to submit that the court lacked jurisdiction to entertain the dispute at this stage because the claimants had not exhausted the statutory dispute resolution mechanisms at his disposal in accordance with *the Constitution* of Kenya 2010, *Public Service Commission Act* and the *County Governments Act*.
6. Reliance was specifically placed on the provisions of Article 234[2][i] of *the Constitution* of Kenya to underline the mandate of the Public Service Commission to hear appeals in respect of County Governments Public Service, Section 77[1] of the *County Governments Act* on the right of appeal against decision of the County Public Service Board or other persons in the exercise or purported exercise of disciplinary control against an employee and Section 87[2] of the *Public Service Commission Act* which prohibits in mandatory tone, the institution of legal proceedings in respect of matters within the jurisdiction of the Public Service Commission to hear and determine appeals from County Governments and other appointing authorities, to submit that the framework was mandatory before any form of judicial intervention.
7. As to whether the claimant had exhausted internal dispute resolution mechanisms, counsel submitted that the suit was fatally defective since the claimant had not complied with the attendant statutory framework and had not provided any evidence of having taken steps to file an appeal to the Public Service Commission, rendering the suit premature.
8. Reliance was placed on the sentiments of the Court of Appeal in *Geoffrey Muthinja Kabiru & another v Samuel Muguna Henry & 1756 others [2015] eKLR*, for the proposition that courts ought to be the last and not the first port of call in dispute resolution.
9. Also relied upon was the decision in *Mutanga Tea and Coffee Co. Ltd v Shikara Ltd & another [2015] eKLR* where the court held that statutory mechanisms must be complied with unless it is demonstrated that the mechanisms failed or were unavailable.
10. Counsel urged that it would be inappropriate for the court to assume jurisdiction over the matter as it would allow the bypassing of the constitutionally mandated process and undermine the authority of the Public Service Commission, and the claimant had not alleged or shown that he stood to suffer any prejudice.
11. The claimant had not filed submissions by 27th May, 2025.
12. As to what constitutes a Preliminary Objection, the rendition of the Court of Appeal for East Africa in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1968] EA 696* is the most commonly cited and authoritative, where Law JA stated:

“...A Preliminary Objection consists of a pure 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...”

13. According to Sir Charles Newbold, P.

“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 facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion”.
14. As the claimant has not contended that the respondents Notice of Preliminary Objection does not raise a pure point of law, the court is satisfied that the notice meets the threshold in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [supra].
15. Significantly, the Notice of Motion raises the issue of the court’s jurisdiction to hear and determine the suit at this stage.
16. See *Hassan Nyanje Charo v Khatib Mwashetani & 30 Others* [2014] eKLR and *Nitin Properties Ltd v Singh Kalsi Shabal and another* [1995] eKLR.
17. The gravamen of the respondent’s Notice of Preliminary Objection is that the court has no jurisdiction to hear and determine the claimant’s case at this stage because the claimant has not exhausted the mandatory internal dispute resolution mechanisms.
18. It is common ground that the claimants have neither averred nor demonstrated that they had presented any appeal before the Public Service Commission as by law required and the commission had made a decision.
19. 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; ...”
20. This provision mandates the Public Service Commission to hear all appeals on matters germane to County Governments Public Service and is amplified by the provisions of Section 77 of the *County Governments Act* and Section 87[2] of the *Public Service Commission Act*.
21. 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] ...
 - [c] ...
 - [d] ...



- [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.

[See Section 85 of the *Public Service Commission Act*].

22. Although sub-section [1] of the Act uses the word “may” which would appear to suggest that the person concerned may choose not to appeal to the Public Service Commission, sub-section [2] is couched in mandatory tone, that all decisions on matters within the jurisdiction of the Public Service Commission must be appealed against at the Public Service Commission prior to filing a suit.
23. This view is fortified by the decision of Mumbi Ngugi J [as she then was] in *James Tinai Murete & others v County Government of Kajiado & another; Nailantei Supeyo & 19 others; Interested Parties* [2023] eKLR.
24. Finally, Section 87 of the *Public Service Commission Act* provides 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 under this part has been exhausted.
25. In the court’s view, the cumulative effect of the foregoing provisions of *the Constitution* of Kenya, *County Governments Act* and the *Public Service Commission Act* is unambiguous that a person whose grievance against the County Government emanates from an employment relationship are required to lodge an appeal with the Public Service Commission before invoking the court’s jurisdiction.
26. The foregoing position is fortified by the sentiments of the Supreme court and the Court of Appeal in a catena of decisions.
27. In *NGO’s Co-ordination Board v EG & 4 OTHERS; Katiba Institute [Amicus Curie]* [2023] eKLR, where the Supreme Court stated as follows:

“...Even when Superior Courts had jurisdiction to determine profound questions of law, the first opportunity has to be given to the relevant persons, bodies, tribunals or 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 mechanism 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 exhaustion of administrative remedies”.

[See *Secretary County Public Service Board & another v Hubhai Gedi Abdille* [2017] eKLR].



28. In a similar vein, in *Speaker of the National Assembly v Karume* [1992] KECA 42 [KLR], 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”.

29. Finally, in *Geoffrey Muthinja Kabiru and 2 Others v Samuel Munga Henry & 1756 others* [2015] eKLR, the court expressed itself as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts the same be exhausted before the jurisdiction of the court invoked. Courts ought to be of a 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 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 *Republic v Commissioner General, Kenya Revenue Authority Ex parte Sanofi Aventis Ltd* [2019] eKLR, *William Odhiambo Ramogi & 3 Others v Attorney General & 4 Others; Muslim for Human Rights & 2 Others, Interested Parties* [2020] eKLR].

30. The foregoing analysis of constitutional and statutory provisions coupled with the rendition by courts leave no doubt as to the place of the doctrine of exhaustion in relation to resolution of grievances between employees or former employees of County Public Service Boards on matters grounded on an employment relationship.

31. It requires no emphasis that the first port of call ought to be Public Service Commission and having failed, refused or neglected to invoke the prescribed appellate process as prescribed by *the Constitution* of Kenya, County Governments’ Act, the claimant’s invocation of the court’s jurisdiction at this stage is patently premature because the Public Service Commission has jurisdiction over the grievance concerned.

32. Finally, as the claimants have not justified why they made the court the first port of call as opposed to the last when they filed the instant suit in October last year. The court has no other option but to act in accordance with the provisions of Article 159[2] which enjoins it to promote alternative dispute resolution mechanisms.

33. Flowing from the foregoing, it is discernible that the respondent’s Notice of Preliminary Objection dated 28th March, 2025 has merit and sustainable.

34. In the upshot, the claimant’s suit filed on 2nd October, 2024 is struck out with no Order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 28TH DAY OF MAY, 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

