



**Auma v Homa Bay County Public Service Board (Cause
E015 of 2025) [2025] KEELRC 1445 (KLR) (22 May 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1445 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E015 OF 2025**

JK GAKERI, J

MAY 22, 2025

BETWEEN

CHARLES MODI AUMA CLAIMANT

AND

HOMA BAY COUNTY PUBLIC SERVICE BOARD RESPONDENT

RULING

1. The Claimant filed the instant suit on 21st March 2025 vide Memorandum of Claim dated 15th March 2025 alleging unfair, unlawful and discriminative termination of employment by the Respondent for alleged gross misconduct.
2. The claimant avers that he was employed by the respondent on 10th March 2016 as the County Director of Human Resource Management initially on probation and was confirmed on successful completion of probation and served diligently until 2nd September 2022 when he was advised to proceed on compulsory leave and a notice to show cause followed on 20th September 2022 and responded vide letter dated 27th September 2022.
3. The Claimant avers that he was interdicted on 17th October 2022, appeared for a hearing before the County Human Resource Management Advisory Committee on 24th February 2023 and was dismissed from employment vide letter dated 28th February 2023, appealed vide letter dated 15th March 2024 and received a response dated 23rd April 2024.
4. In response to Claimant's case the respondent filed a Notice of Preliminary objection dated 28th March 2025 that:
 1. This Honourable Court lacks Jurisdiction to entertain the suit as framed as it contravenes statutory provisions on dispute resolution in County Public Service employment matters.



2. The suit is misconceived, incompetent and improperly before the court as it disregards Article 234 (2) (1) of *the Constitution* of Kenya, Section 87 (2) of the *Public Service Commission act* and section 77 of the *County Governments Act* that employment disputes in County Government service must be referred to the Public Service Commission before recourse to the court and the claimant had not demonstrated so.
3. The suit is frivolous vexatious and an abuse of the Judicial process as in a deliberate attempt to circumvent statutory dispute resolution mechanism by improperly invoking the court's jurisdiction.
4. The suit is devoid of legal substratum upon which the court can exercise Jurisdiction.
5. The suit is fatally defective, incompetent and unsustainable in law.

Claimant's Response

6. By Replying Affidavit sworn by the Claimant on 14th April 2025 the Claimant deposes that the court has jurisdiction to consider valid grievances from parties who lack adequate audience before a forum created by a statute.
7. Paragraphs 4-16 of the Replying Affidavit rehash the contents of the Memorandum of claim to urge that the claimant had exhausted the vertical appellate process and counsel's demand letter to the respondent was not responded to.
8. The claimant deposes that unless the Notice of Preliminary Objection is dismissed and his case heard on merit, his grievances will be unremedied and in any event the suit does not prejudice the respondents as they have the opportunity to respond to the questions raised by the claimant.
9. The affiant maintains that the court has Jurisdiction as he had exhausted the appellate process as the appeal by the Public Service Commission was unresponded to.

Respondent's submissions

10. As to whether the court had jurisdiction to hear and determine the instant suit, counsel for the respondent submitted the court had no jurisdiction at this stage because the Claimant had not exhausted statutory dispute resolution mechanisms available to him administratively as guided by Article 234 (2) (i) of *the Constitution* of Kenya, Section 77 of the *County Governments Act* and Section 87 (2) of the *Public Service Commission Act*. Counsel urged that compliance with these provisions was mandatory.
11. On whether the Claimant had exhausted other dispute resolution mechanisms, Counsel submitted that he had not and the instant suit was fatally defective for non-compliance with the doctrine of exhaustion as the Claimant had not availed evidence of having filed an appeal with the Public Service Commission and no correspondence on follow up or inquiry or a reference number of the appeal and it would be improper for the Court to entertain the suit in such a vacuum.
12. Reliance was placed on the sentiments of the court in *Geoffrey Muthinja Kabiru & another V Samuel Muguna Henry & 1756 others* (2015) eKLR as well as *Republic National Environment Management Authority* (2011) eKLR.
13. Counsel further urged that the Claimant had not invoked Order 53 to compel the Public Service Commission to act on his appeal.



14. Reliance was also placed on the decision in *Muranga Tea & Coffee Co. Ltd V Shikara Ltd & another* (2015) eKLR to argue that there is an assumption that the statutory mechanism is effective unless it is demonstrated to have failed or unavailable as opposed to being slow or silent.
15. Counsel argued that entertaining the suit at this point before there is clarity on the status of the claimant's appeal to the Public Service Commission would be tantamount to usurping the powers of the Public Service Commission.
16. As to whether the Claimant will suffer prejudice, counsel submitted that he did not stand to suffer any since the doctrine of exhaustion is grounded in Constitution of Kenya and statute law, a manifestation of a deliberate policy by parliament to entrust the Public Service Commission with appellate powers before the Court's Jurisdiction was invoked.
17. Counsel submitted that the alleged silence or inaction by the Public Service Commission could not justify by passing statutory procedures as no evidence of the alleged appeal had been provided.
18. Counsel urged the court to strike out the Claimant's suit.

Claimant's submission

19. On the Court's Jurisdiction, Counsel for the Claimant cited Article 162 (2) (a) of *the Constitution* of Kenya and Section 12 (1) of the *Employment and Labour Relations Court Act* as well as the sentiments of Majanja J in *United States International University V Attorney General* (2012) eKLR, to urge that the court had Jurisdiction to consider grievances of parties who lack adequate audience before another forum created by statute.
20. Counsel cited the decision in *Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others* (2014) eKLR to urge that if a process was unconstitutional, wrong unprocedural or illegal, it could not be said that the court had no Jurisdiction to address the grievances.
21. Counsel submitted that the Claimant complied with the provisions of the *County Governments Act* and *Public Service Commission Act* by filing appeals at the County Public Service Board and at the Public Service Commission on 2nd May 2024 and the appeals were unresponded to, to urge that the court had jurisdiction to hear and determine the suit.
22. As to whether the Memorandum of Claim is competent and should be heard, Counsel submitted that since the Claimant had exhausted the appeal process, the court had Jurisdiction to hear and determine his claim and the Notice of Preliminary Objection was ostensibly engineered to prejudice the Court against the Claimant by stopping it from hearing the Claimant's claim as it has happened since the unlawful termination and had exhausted the appeal process.
23. Reliance was placed on the decision in *Fluer Investments Ltd V Commissioner of Domestic Taxes & another* (2018) eKLR to urge that the court could intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the rule of law are manifest, to urge that the Notice of Preliminary Objection ought to be dismissed for the Claimant's case to be heard on merit.

Analysis and determination

24. Since Claimant has not contested whether the respondent's Notice of Preliminary Objection meets the threshold of a Preliminary Objection as enunciated in *Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd* (1969) EA 696 the singular question for determination is whether the claimant has exhausted the appeal process in order to invoke the court's Jurisdiction.



25. Parties have adopted opposing positions on this issue and this case turns on it.
26. It is common ground that the Claimant's employment was terminated by the respondent vide letter dated 28th February 2023.
27. He appealed to the County Public Service Board vide letter dated 15th March 2023 and received a response dated 23rd April 2024, more than one (1) year later informing him that the dismissal from employment was upheld by the Board meeting held on 2nd April 2024.
28. The Claimant stated and his counsel submitted that he lodged an appeal with Public Service Commission on 2nd May 2024 but did not attach a copy of the appeal to his Replying Affidavit as submitted by Counsel for the respondent.
29. The principles that govern exhaustion of statutorily prescribed dispute resolution mechanisms are well settled in a catena of Court of Appeal decisions and the Supreme Court of Kenya.
30. In Speaker of National Assembly V. Karume, (supra) the court was emphatic that:

“Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure must be strictly followed.”
31. Equally, in Geoffrey Mutinja and 2 others V Samuel Muguna Henry and 1756 others (supra) the court expressed itself as follows:

“We see this as the crux of the matter in this and similar cases.

It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. 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 of courts.

This accords with Article 159 of *the Constitution* which commands courts to encourage alternative means of dispute resolution.

We find and hold that the exhaustion doctrine applies even where as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed...And there was always the right acknowledged by the learned Judge of approaching the courts after exhaustion of the church mechanisms. By failing to do so, and quite apart from the force of their apprehensions, the appellants effectively failed to exhaust their remedies and essentially short-circuited the process by filing suits prematurely.

The learned Judge correctly found, as we do, that Article 21 of the church's Constitution, did not oust the jurisdiction of the courts.

Indeed, it did not. All it did in practical and pragmatic terms is postpone, permissibly in our view, the entry point by the courts and thus allow the church, a voluntary organization to have the first expansive go at resolving disputes within its ranks. That did not in any way deny the appellants and the plaintiffs in the various suits the right to fair trial”.



32. These sentiments apply to the circumstances of the instant case (see also William Odhiambo Ramogi & 3 others V Attorney General & 4 others: Muslim for Human Rights and 2 others Interested parties [2020] eKLR.
33. Similarly, in NGO’s Co-ordination Board V E G & 4 others Katiba Institute Amicus curie [2023 KESC 17 (KLR)] the Supreme Court stated as follows:

“...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 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 decision has settled the jurisprudence regarding the doctrine of exhaustion of administrative remedies”.
34. The court is bound by the foregoing sentiments.
35. See Secretary County Public Service Board & another V Hulbhai Gedi Abdille [2017] eKLR.
36. The gravamen of the claimant’s case is that his appeal to the Public Service Commission dated 2nd May 2024 is yet to be responded to and argues that he has thus exhausted the other mechanisms and the next port of call is this court.
37. Notably, the claimant did not furnish evidence of the appeal to the Public Service Commission or supportive evidence of there having been any follow up after May 2024.
38. Indeed, there is nothing on record to demonstrate how and when the appeal to the Public Service Commission was lodged.
39. Needless to belabour, the doctrine of exhaustion is indelibly ingrained in our law and in the case of public officers, the doctrine is now a constitutional imperative as submitted by the respondent’s counsel.
40. Article 234(2)(i) of *the Constitution* of Kenya provides that:
41. The Commission shall hear and determine appeals in respect of County Governments Public Service.
42. This provision empowers, in mandatory tone, the Public Service Commission to hear all appeals in matters germane to County Governments Public Service and is further amplified by the provisions of Section 77 of the County Government Acts and Section 87(2) of the *Public Service Commission Act*.
43. Section 77 of the *County Governments Act* which 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 appeal on any decision relating to employment of a person in a County Government including a decision in respect of -
 - a. ...



- b. ...
- c.
- d. Retirement and other removal from service.
- e.
- f. Pension benefits, gratuity and other terminal benefits.

44. In addition, Section 86 of the [Public Service Commission Act](#) prescribes the attendant procedure and possible outcomes after the appeal is considered.

45. Significantly, Section 87 of the [Public Service Commission Act](#) provides:

- 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.

46. This provision is couched in mandatory terms to underline the legislative intention that all appeals from decisions or actions taken by the County Public Service Board or other person be made at the Public Service Commission and the process must be exhausted.

47. The court is however in agreement with the claimant’s counsel’s submission that the doctrine of exhaustion has exceptions.

(See Independent Electoral and Boundaries Commission & Others Ex parte the National Super Alliance Kenya (NASA) and Republic V Dedan Kimathi University of Technology ex parte Mula Stephen Mutuku [2022] KEHC 358 (KLR).

48. The claimant has regrettably has not provided sufficient material to demonstrate that any of the recognized exceptions to the doctrine of exhaustion apply to his case as he has neither been denied audience by the Public Service Commission nor demonstrated that the process is unconstitutional, wrong, unprocedural or illegal or that the Public Service Commission had abused its discretion, by acting arbitrarily, capriciously, maliciously or in disrespect of the rule of law as held in Fleur Investments Ltd V Commission of Domestic Taxes & another (supra).

49. As adverted to elsewhere in this ruling, evidence of any follow up and/or communication from the Public Service Commission on the status of the appeal would have embellished the claimant’s contention significantly.

50. Going back to the provisions of Sections 77(1) of the [County Governments Act](#) and 87(2) of the [Public Service Commission Act](#), although Section 77(1) uses the term “may” the court is persuaded that any person dissatisfied by a decision which falls within the ambit of that provision is required to appeal to the Public Service Commission as emphasized by Section 77(2) cited elsewhere in this ruling that “the Commission shall entertain appeals on any decision relating to employment”

51. 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 and another; Nailantei Supeyo and 19 others Interested Parties [2023] eKLR 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 Government's Act, that they can bypass the legislation and come to this Court by way of a constitutional provision...

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.

Secondly, as observed earlier in this judgment, the petitioners are not dissatisfied with the process followed in the recruitment of personnel for the county. Their grievance relates to the merits of the decisions made, and the determination of who was suitable for recruitment or not...

This can properly only be done by a body hearing the appeal from the decisions made, and in my view, the body best placed to make such enquiries is the Public Service Commission. It is for this reason, I believe, that the legislature placed appeals and disputes with respect to appointments in counties with the Public Service 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".

52. The foregoing rendition of the learned Judge apply on all fours to the facts of the instant case as the claimant is challenging his termination from employment and denial of entitlements.
53. Contrary to the submission by the claimant's counsel that failure by the Public Service Commission to respond to the claimant's appeal is sufficient for the claimant to invoke the court's jurisdiction, it is patently not for the simple reason that, and as adverted elsewhere, that the claimant did not demonstrate any effort made to ascertain the status of the appeal inquiry letter or email.
54. More importantly, the claimant, as argued by the respondent's counsel could have filed a Judicial Review for the Public Service Commission to be compelled to fast track determination of the appeal. Public officers have used this avenue in the event of delay by the Public Service Commission.
55. The essence of exhaustion is that the employee must effectively interact with those other dispute resolution mechanisms effectively and a determination made unless it is not reasonably possible to secure a determination.
56. Lodging of an appeal with the Public Service Commission is an important process and there ought to be verifiable evidence of the filing and/or receipt of the appeal by the Public Service Commission.
57. Having failed to demonstrate that he invoked the appellate process at the Public Service Commission or made follow ups after the filing, it is the finding of the court that the claimant has failed to demonstrate that he has exhausted internal dispute resolution mechanisms as provided by law before invoking the jurisdiction of this court.
58. It is the further finding of the court that the instant suit was filed prematurely.



59. The upshot of the foregoing is that the respondent's Notice of Preliminary Objection dated 28th March, 2025 is merited.
60. Consequently, the claimant's Memorandum of Claim dated 15th March, 2025 and filed on 21st March, 2025 is struck out with no Order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 22ND 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

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