



**Kenya County Government Workers Union v County Government of Kitui &  
another (Petition E003 of 2024) [2025] KEELRC 1320 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1320 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS  
PETITION E003 OF 2024**

**B ONGAYA, J**

**MAY 9, 2025**

**IN THE MATTER OF ARTICLES 10,22,23,27,28,41,47  
AND 232 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF VIOLATION OF ARTICLES  
10(2)(B), (C) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 3 & 4 OF THE  
FAIR ADMINISTRATIVE ACTIONS ACT 2015**

**AND**

**IN THE MATTER OF SECTION 138 OF THE COUNTY GOVERNMENT ACT, 2012**

**AND**

**IN THE MATTER OF SECTIONS 10(5),13&26 OF THE EMPLOYMENT ACT, 2007**

**AND**

**IN THE MATTER OF SECTION 138(A) OF THE COUNTY GOVERNMENT ACT 2012**

**AND**

**IN THE MATTER OF THE DOWNWARD VARIATION AND/OR REDUCTION OF  
THE SALARIES OF THE EARLY CHILDHOOD DEVELOPMENT EDUCATION (ECDE)**

**TEACHERS BY THE COUNTY GOVERNMENT OF KITUI**

**AND**

**IN THE MATTER OF CONSTITUTIONAL PETITION**

**BETWEEN**

**KENYA COUNTY GOVERNMENT WORKERS UNION ..... PETITIONER**



**AND**

**COUNTY GOVERNMENT OF KITUI ..... 1<sup>ST</sup> RESPONDENT**

**KITUI COUNTY PUBLIC SERVICE BOARD ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup> and 2<sup>nd</sup> respondent have filed a Notice of Preliminary Objection dated 11.03.2025 drawn by S.K.Kyengo & Company Advocates and made on the following grounds:
  - a. That this honourable court lacks the jurisdiction to entertain the petition. The petitioners have not exhausted the dispute resolution procedure under Sections 77 of the County Governments Act 87(2) of the Public Service Commission Act and both of which require an employee that is aggrieved by a decision of a County Government to appeal against such decision to the Public Service Commission (PSC). In addition, the 1<sup>st</sup> respondent asserts that the claimants did not issue the Respondents with a notice of intention to sue under section 13A of the Government Proceedings Act before presenting their case to court. As such the suit is bad in law.
2. Section 77 of the County Governments Act states:
  - (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.
3. Section 87 of the *Public Service Commission Act*, 2017 states as follows:
    - (1) 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.
    - (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.
  4. The parties filed their respective submissions. The court has considered the parties' respective positions and returns as follows:
    - a. The Court has considered the cited sections and indeed they prescribe appeal to the Commission in the first instance prior to moving the Court.
    - b. However, the Court considers that moving the Court prior to exhaustion of that statutory procedure may only render the suit premature and not render the jurisdiction of the Court unavailable or lacking.
    - c. Further, the Court considers that alternative dispute resolution process or finality or ouster clauses such as the cited provisions shall not operate as to bar the Court's jurisdiction in disputes about legality or constitutionality of an action, omission, decision or such other matter in dispute. In the instant case, illegality and unconstitutionality is alleged. Thus, it appears the ouster clauses or statutory appellate procedure does to operate to defeat the Court's jurisdiction. The petitioner's submission is upheld in that respect.
    - d. In that regard Rule 56 (5) of the *Employment and Labour Relations Court (Procedure) Rules* provide thus:
      - "(5) Where the *Constitution*, a written law, collective bargaining agreement, contract of service, policy, or other instrument provides for alternative dispute resolution mechanisms—
        - (a) a person being party to a dispute may file a suit and seek appropriate interlocutory relief pending exhaustion of such alternative dispute resolution mechanisms or pending determination of the suit;
        - (b) want of exhaustion of such alternative dispute resolution mechanisms shall not operate as a bar to a suit for application for interim orders or alleging unconstitutionality or unlawfulness of the action, omission, decision or other matter in dispute pending such exhaustion; and



(c) a suit filed prior to exhaustion of such alternative dispute resolution mechanisms may be stayed and not struck out on account of such exhaustion.”

e. In the circumstances, the preliminary objection will fail with costs in the cause. In conclusion the preliminary objection herein is determined with orders:

1. The preliminary objection is dismissed with costs in the cause.
2. Parties to take directions for expeditious determination of the petition or further appropriate steps in the matter.
3. The Deputy Registrar to return the Court file to the Machakos Court’s sub-registry forthwith.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 9<sup>TH</sup> MAY, 2025**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

