



Republic v County Government of Kakamega & 4 others; Kakamega County Public Service Board (Interested Party); Aleyo & 16 others (Ex parte Applicants) (Judicial Review E004 of 2024) [2025] KEELRC 1311 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEELRC 1311 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
JUDICIAL REVIEW E004 OF 2024**

DN NDERITU, J

MAY 8, 2025

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF DECLARATION, PROHIBITION, CERTIORARI AND MANDAMUS

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY GOVERNMENT OF KAKAMEGA 1ST RESPONDENT

THE GOVERNOR, COUNTY GOVERNMENT OF KAKAMEGA ... 2ND RESPONDENT

THE COUNTY SECRETARY, COUNTY GOVERNMENT OF KAKAMEGA 3RD RESPONDENT

CHIEF OFFICER MEDICAL SERVICES, COUNTY GOVERNMENT OF KAKAMEGA 4TH RESPONDENT

CHIEF OFFICER PUBLIC SERVICE, COUNTY GOVERNMENT OF KAKAMEGA 5TH RESPONDENT

AND

KAKAMEGA COUNTY PUBLIC SERVICE BOARD INTERESTED PARTY

AND

DR. MAUREEN MALECHE ALEYO EX PARTE APPLICANT

DR. SHARON OGINDA EX PARTE APPLICANT

DR. SARAH AGUNDA EX PARTE APPLICANT

DR. BENSON MAINA EX PARTE APPLICANT



DR. NELSON ODUOR	EX PARTE APPLICANT
DR. KOHE ALEXANDRE	EX PARTE APPLICANT
DR. GEOFFREY MATETE	EX PARTE APPLICANT
DR. BONFACE NYUMBILE	EX PARTE APPLICANT
DR. FAITH MUTAI	EX PARTE APPLICANT
DR. LOUIS WEKESA	EX PARTE APPLICANT
DR. BRIAN OPONDO	EX PARTE APPLICANT
DR. JEDIDAH KIMUTAI	EX PARTE APPLICANT
DR. EVANS MALENJE	EX PARTE APPLICANT
DR. DAVID ANDAMBI	EX PARTE APPLICANT
DR. SARAH OKIYA	EX PARTE APPLICANT
DR. BARBARA MURILA	EX PARTE APPLICANT
DR. YONAH OLUOCH OPONDO	EX PARTE APPLICANT

RULING

I. Introduction

1. On 3rd October, 2024 the ex-parte applicants (the applicants) were granted leave to commence judicial review proceedings against the respondents for various administrative reliefs set out in a chamber summons application dated 26th September, 2024.
2. In a notice of motion (the application) dated 6th October, 2024 the applicants, through Nyukuli, Shifwoka & Co Advocates, are seeking for the following orders –
 - a. ThatT the Honourable court be pleased to issue an order of declaration that the applicants’ supposed removal from the payroll and stoppage and or withholding of their salaries since 21st August, 2024 is tantamount to economic, financial and psychological torture and an act of outright violation and breach of their economic rights contrary to Articles 25(a) – (c), 41(1)& (2), 43(1)(a), 47 & 50 of *the Constitution* of Kenya as well as in clear breach of Sections 26, 35, 44, 45 & 46 of the *Employment Act*, and consequently unconstitutional and illegal for being irregularly summary, unlawful and unfair, an act of constructive termination and or dismissal from employment and is therefore a nullity.
 - b. ThatT the Honourable court be pleased to issue an order of prohibition to prohibit any of the respondents or their agents and or any person from implementing or further implementing or acting on any and or all the contents of the supposed letters and or notices to show cause dated 21/08/2024 giving the applicants 14 days from the date thereof to respond and only brought to the attention of applicants at a “Consultative” meeting with the respondents on 16/09/2024, long after the response period had lapsed.
 - c. ThatT the Honourable court be pleased to issue an order of certiorari to bring to this court and quash all the said letters and or notices to show cause dated 21/08/2024 giving the applicants 14 days from the date hereof to respond and only brought to the attention of applicants at a



“Consultative” meeting with the respondents on 16/09/2024, long after the response period had lapsed.

- d. That the Honourable court be pleased to issue an order of Mandamus directing respondents and the interested party to proceed without any further delay and implement the terms and all conditions of the return to work formula mutually negotiated, agreed upon and executed by and or for the parties hereto on 8/05/2024 and as further been prior legitimately planned and agreed upon vide the Roadmap Promotion of Doctors, Pharmacists and Dentists on 22/09/2023.
 - e. That the costs of this application be provided for.
3. The application is expressed to be brought under Article 47 & 165(6) of *the Constitution*, Section 7 of the Fair Administrative Actions Act, and Order 53 Rule 3 of the Civil Procedure Rules. It is supported with the affidavit of the 1st applicant sworn on even date with several annexures thereto. Amongst the annexures attached is a duly signed authority by the other applicants authorizing the 1st applicant to plead and sign all documents necessary in prosecution of the proceedings on her own behalf and on behalf of all the other applicants.
 4. Upon service the respondents, through Brian Otieno & Company Advocates, filed a notice of preliminary objection (PO) dated 3rd February, 2025 raising the following preliminary issues –
 - a. This Honourable court lacks jurisdiction to hear and determined the instant application as it offends the express provisions of Section 77 of the *County Governments Act* and Sections 87, 88 and 89 of the *Public Service Commission Act*;
 - b. That the provisions are based on the fundamental principles of exhaustion of administrative remedies which requires parties to exhaust all administrative remedies before seeking judicial review;
 - c. That the applicants prayer for a declaratory order on their substantive rights is a stretch beyond judicial review court that would require an inquisition into the merits of the decisions of the respondents.
 - d. That in the premises and in substance, the application as drawn and filed are misconceived and bad in law and otherwise amounts to and/or constitutes a gross abused of the process of this Honourable court and therefore ought to be struck out and/or dismissed with costs in favour of the respondents.
 5. As at the time of authoring this ruling the respondents other than filing the PO have not filed a response to the substantive motion notwithstanding that they were directed on the timelines for filing the same on 20th November, 2024.
 6. On 4th February, 2024 it was, by consent, directed that the PO be argued and canvassed by way of written submissions ahead of the substantive motion. Counsel for the respondents, Mr. Otieno, filed written submissions dated 11th February, 2025 while counsel for the applicants, Mr. Shifwoka, filed submissions dated 20th February, 2025.
 7. This ruling is thus in regard to the PO as raised by the respondents.

II. Submissions By Counsel

8. Counsel for the respondents in support of the PO identified a single issue for determination – Whether this court has jurisdiction to hear and determine the matter before it.



9. Counsel cited Owners of Motor Vessel “Lilian S” V Caltex Oil (Kenya) LTD (1989) KLR 1 and Samuel Kamau Macharia & Another V Kenya Commercial Bank LTD & Another (2012) eKLR in laying emphasis on the eternal obligation for a court of law to function within its constitutionally and statutorily delineated jurisdictional limits.
10. It is submitted that the applicants ought to have exhausted the provisions of Sections 77 of the County Governments Act as read alongside Sections 85 & 87(2) of the Public Service Commission Act. It is submitted that the applicants ought to have approached the Public Service Commission (the Commission) before filing these proceedings in court. It is submitted that the claim by the applicants is that they were removed from the payroll and their salaries suspended and or withheld which issues are well within the jurisdiction of the Commission based on the law cited above.
11. It is thus submitted that this court lacks jurisdiction as the first port of call since the applicants failed to exhaust the foregoing provisions. It is submitted that by filing the matter in court in the first instance the applicants are in violation of the doctrine of exhaustion. Counsel cited a multitude of decisions in this regard including Secretary County Public Service Board & Another V Hulbhai Gedi Abdille (2017) eKLR, Evans Muswahili Ladtema V Vihiga County Public Service Board & Others (2021) eKLR, and Albert Chaurembo Mumba & 7 Others V Maurice Munyao & 148 Others (2019) eKLR. All those decisions emphasize that a party shall exhaust all the laid down administrative procedure of dispute resolution before lodging a claim in court.
12. It is submitted that the dispute between the applicants and the respondents arose from the decision by the respondents to take disciplinary action against the applicants for their desertion of duty and the subsequent removal or suspension of the applicants from the payroll. It is submitted that the facts speak for themselves that the applicants were (are) employees of the 1st respondent recruited through the County Public Service Board. It is thus further submitted that the complaints by the applicants squarely lie within the jurisdiction of the Commission as per the law and the decisions cited above. It is urged that the court has no jurisdiction over the matter in the first instance.
13. Further, it is submitted that there are no special or compelling reasons or circumstances that may entitle the applicants to side step the procedure discussed above and seek relief from the court in the first instance. The court is urged to allow the PO and strike out the proceedings with costs.
14. On the other hand, counsel for the applicants delineated tenets of a properly raised PO based on Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd (1969) E.A 696 and Gladys Pereruan V Betty Chepkorir (2020) eKLR.
15. It is submitted that the dispute between the parties and the complaint by the applicants is enforcement of a Return to Work Formulae (RTWF) deposited with the court (ELRC) on 8th May, 2024 and a Roadmap Promotion for doctors and pharmacists executed on 22nd September, 2023 that the respondents have failed, refused, and or neglected to implement. It is submitted that the above issues were the subject in Nairobi ELRC Petition Nos. E032, E033, & E0036 of 2024 wherein the Commission was a party.
16. It is further submitted that the applicants are doctors and consultants in various medical fields serving in various facilities operated by the 1st respondent and they are members of the Kenya Medical Practitioners, Pharmacists, and Dentists Union (KMPDU) and are beneficiaries of the settlements reached in the aforementioned causes. It is submitted that the proceedings herein are intended to enforce and order the respondents to comply with the settlements alluded to above.



17. In the circumstances, and in view of the undisputed and uncontroverted facts as pleaded by the applicants, it is pleaded that the Commission has no jurisdiction over the subject matter and the Commission cannot resolve the issue that has been litigated and settled in court.
18. It is submitted that the jurisdiction of this court is founded on Article 162(2)(a) of *the Constitution* and further expounded under Section 12 of the *Employment and Labour Relations Court Act*. It is submitted that the declaratory and judicial review orders sought by the applicants cannot be granted by the Commission under Sections 85, 87, 88, & 89 of the *Public Service Commission Act*.
19. The court is urged to apply Article 259(4) of *the Constitution* to give full effect in the realization of the purposes, values, and principles in *the Constitution*. The court is further urged to apply the said principles that are intended to advance rule of law, human rights and fundamental freedoms, development of the law, and good governance.
20. It is reiterated that Section 77 of the *County Governments Act* does not donate to the Commission the jurisdiction to enforce collective bargaining agreements, RTWF, or such other matters and more so when the same have been litigated and or settled in court. Further, it is submitted that the jurisdiction of the Commission as invoked by this section is discretionary hence the use of the word “may”. It is argued that the nature of the dispute herein as can be deduced from the reliefs sought is completely outside the jurisdiction of the Commission.
21. Citing Mohamed Ali Baadi V Attorney General & 11 Others (2018) KEHC 5397 (KLR) it is submitted that the predominant issues in this matter are within the jurisdiction of this court and as such a separationist approach shall lead to the court failing to address the issues raised leaving the applicants without legal redress.
22. On the doctrine of exhaustion, counsel submitted that the Commission has no jurisdiction to deal with the issues raised in these proceedings and more so since the issues are about enforcement of rights and remedies arising from a decision of a court in the proceedings cited above. It is reiterated that the Commission was a party in Nairobi ELRC Petition Nos. 32 & 33 of 2024 which were consolidated with No. 36 of 2024.
23. Citing Orwaba V Management University of Africa (2022) KEHC 1168 (KLR) wherein Mohamed Ali Baadi V Attorney General & 11 Others (supra) was cited, counsel submitted that the doctrine of exhaustion is only applicable where the alternative forum is accessible, affordable, timely, and effective. It is submitted that the argument by the respondents on this issue does not hold water as the Commission lacks jurisdiction over the issues raised and any reference of the issues to the Commission shall render the applicants without a remedy.
24. Citing Tana & Athi Rivers Development Authority V Jeremiah Kimigho Mwakio & 3 Others (2015) KECA 674 (KLR), it is vehemently argued that the applicants are not in abuse or violation of the court process. It is submitted that the applicants have filed this matter in good faith and within the tenets of the law with the sole objective of obtaining remedies sought as per the law established.
25. The court is reminded that the facts giving rise to these proceedings as pleaded and stated by the applicants have not been controverted and or disputed by the respondents and the court is urged not to allow the PO and order the hearing and determination of the proceedings on merits. The court is urged to dismiss the PO with costs.



Issues For Determination

26. In the considered view of the court there is only one broad issue for determination in this application – Should the court allow the PO as prayed and hence strike out these judicial review proceedings?
27. The court has carefully and dutifully gone through the application for judicial review orders as filed by the applicants and the evidence presented. Further, the court has in detail gone through the PO as filed and presented by the respondents. And further, the court has read and understood the good and able submissions by counsel for the respondents in support of the PO and those by counsel for the applicants in opposition thereto. All the foregoing pleadings and submissions have been summarized in the foregoing parts of this ruling.
28. On 20th November, 2024 the respondents were granted 14 days within which to respond to the substantive motion herein dated 6th October, 2024. However, the respondents did file any response as directed. The import of this is that the facts as deposed to by the applicants in the supporting affidavit stand unchallenged and uncontroverted. In that case the court is persuaded at this juncture to prima facie accept the facts as presented by the applicants in considering the merits of the PO.
29. The foundation of the PO as presented by the respondents has been summarized in the foregoing parts of this ruling. In the short-form, the respondents’ position is that these proceedings are bad in law and misconceived as, according to them, the court lacks jurisdiction to hear and determine the same. The respondents argue that the applicants are in violation of the doctrine of exhaustion and ought to have appealed to the Commission prior to lodging the dispute in court.
30. The PO is premised on Section 77 of the [County Governments Act](#) and Sections 85 and 87(2) of the [Public Service Commission Act](#). For ease of reference, Section 77 of the [County Governments Act](#) provides 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 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 office;
 - 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 ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of Commission, the circumstances warrant it.



4. The Commission shall not entertain an appeal more than once in respect of one 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, of the Opinion of the Commission, the circumstances warrant it.
31. Sections 85 and 87(2) of the *Public Service Commission Act* provide as follows –
85. The Commission shall, in order to discharge its mandate under Article 234 (2) (1) 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 on appeal in that regard.
32. Section 87(2) provides that –
- “(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.”
33. The above provisions of the law clearly provide for a mechanism or a system wherein a dispute should be referred to the Commission as an appeal before being filed in court. The nature and the limits of such disputes are as stated in that law. This is an example of a situation wherein the doctrine of exhaustion applies. And the rationale is simple – where the law provides for a primary mechanism for resolution of disputes the parties should invoke and apply such system in the first instance before lodging the matter in a court of law.
34. What the respondents are saying in their PO is that the applicants ought to have complied with the above law by first lodging an appeal with the Commission before filing these proceedings in court. It



is the respondents' position that by the applicants failing to so comply this court lacks jurisdiction to hear the matter since, according to the respondents, the same is improperly before court and filed in gross violation of the law and court process.

35. It is correctly submitted by counsel for the respondents that a court that proceeds without jurisdiction labours in vain. The pronouncements by Nyarangi JA in *Owners of Motor Vessel "Lilian S" V Caltex Oil (Kenya) LTD (Supra)* hold true to this day. Many other decisions have come up thereafter expounding on that position while maintaining the substance of the same. For example, the Supreme Court in *Samuel Kamau Macharia & Another V Kenya Commercial Bank LTD & Another (supra)* affirmed that same position.
36. But then, what is a PO and what should it entail to succeed? The *causa classica* on this issue is the old case of *Mukhisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd (supra)*. From this celebrated decision, a PO should be based on pure point(s) of law founded on the assumption of the uncontested facts. Therefore, a PO cannot be raised on facts that are contested or on facts that the court shall have to ascertain. Likewise, a PO should not be raised on matters of exercise of judicial discretion.
37. As noted above, the facts as pleaded by the applicants have neither been challenged nor contested by the respondents. While the court may not assume that the said stated facts are "true" or "real" it is important to note that no alternative set of facts have been pleaded and or presented to the court by the respondents, notwithstanding that they were allocated time and an opportunity to do so.
38. The applicants are complaining about specific issues – unlawful removal from the payroll and stoppage of salaries; unlawful and un-procedural issuance of show-cause letters; and deliberate and unjustified delay by the respondents in implementation of the terms of RTWF that was purportedly mutually negotiated and agreed. It is the applicants position that the RTWF was arrived at after a strike notice was issued following the respondents' failure and or refusal to implement the same. It is the applicants' case that the RTWF was a result of at least three causes adjudicated in court as cited elsewhere in this ruling. It is stated that the Commission was a party in two of those causes.
39. In my considered view, *prima facie*, the issues raised by the applicants in these proceedings are not within the purview and jurisdiction of the Commission based on the law cited above. The applicants are seeking for specific judicial review remedies stated in the introductory part of this ruling. Those are not reliefs that the Commission can grant.
40. The court is fully aware and cognizant of the doctrine of exhaustion and agrees that whenever an alternative or primary method of dispute resolution is provided for, the court shall stay away and allow the parties to first exhaust that method before approaching the court. A multitude of decisions have been cited by counsel for both parties on this issue and the court has summarized the same in the foregoing parts of this ruling.
41. In *Abidha Nicholus V Attorney General & Others (2023) KESC 113 (KLR)* the Supreme Court opined that for a court to ignore, remand, or strike out proceedings in favour of an alternative method of resolution (exhaustion) such method must be effective, fair, just, and efficient. Specifically, the Court at Paragraph 107 stated as follows –

Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal



framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant's right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism. See also our decision in *Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 Others* (Pet.No.15 of 2020) [2023] KESC 14(KLR) (Const. and JR) (17 February 2023) (Judgment).

42. This court takes the view that the issues raised by the applicants are well within the jurisdiction of this court and a critical view of the proceedings and the issues raised by the applicants reveal that the same cannot be heard and determined within the limited jurisdiction of the Commission within the law stated and discussed elsewhere in this ruling.
43. In any event, courts have held that for specific reasons to be assigned on case to case basis, a court may exempt a litigant from following the primary out of court adjudication and proceed to hear and determine a matter filed before it. In *Orwoba V Management University of Africa* (supra) the court opined that the doctrine of exhaustion is only applicable where the alternative forum is accessible, affordable, timely, and effective. This court is of the considered view that the Commission shall not be timely and effective in resolving the issues raised by the applicants as it lacks jurisdiction over the same.
44. In any event, no reply or response to the application has been filed by the respondents.
45. In the circumstances, the court finds and holds that the PO is without merit and the same is hereby denied and dismissed.

III. Orders

46. The court makes the following orders –
 - a. The preliminary objection raised by the respondents in the notice dated 3rd February, 2025 is hereby dismissed with costs to the applicants.
 - b. The application for judicial review by the applicants shall proceed to hearing and determination on merits on priority basis.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 8TH DAY OF MAY 2025.

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DAVID NDERITU

JUDGE

ELRC KAKAMEGA

