



**Ondari v County Government of Kisii & 3 others (Petition E008 of 2025) [2025] KEELRC 1793 (KLR) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1793 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E008 OF 2025**

**JK GAKERI, J**

**JUNE 19, 2025**

**IN THE MATTER OF ALLEGED INFRINGEMENT OF THE PROVISIONS OF ARTICLES 1(1), 1(3), 2(1), 2(2), 10, 19, 20(1), 20(2), 20(3)(B), 20(4), 21(1), 21(3), 23(3), 22, 23(1), 24(1), 27(1), 27(2), 27(5), 28, 29(A), 35, 36, 39, 41, 47, 50, 165(3), 165(6), 165(7), 232(1)(E), 258, 259(1), 259(3) AND 260 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT**

**BETWEEN**

**DR ENOCK OTIENO ONDARI ..... PETITIONER**

**AND**

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

**THE CHIEF OFFICER, DEPARTMENT OF MEDICAL SERVICES, PUBLIC HEALTH & SANITATION ..... 2<sup>ND</sup> RESPONDENT**

**OFFICE OF THE COUNTY SECRETARY AND HEAD OF COUNTY PUBLIC SERVICE ..... 3<sup>RD</sup> RESPONDENT**

**THE KISII COUNTY PUBLIC SERVICE BOARD ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Petitioner commenced the instant suit by way of a Petition dated 23<sup>rd</sup> April, 2025 together with a Notice of Motion of even date seeking various orders.
2. It is common ground that the Petitioner/Applicant is an employee of the respondent and the Petition herein is grounded on his relationship with the respondents as employers.



3. The Petition and Application were triggered by the suspension of the Petitioner by the respondents vide letter dated 18<sup>th</sup> February, 2025. When the matter came up on 24<sup>th</sup> April, 2025, under Certificate of Urgency, the court did not certify it urgent but directed the Petitioner/Applicant to serve the respondents who were to respond within 10 days and inter partes hearing was slated for 12<sup>th</sup> May, 2025 when the respondent's counsel informed the court that the respondents had filed a Notice of Preliminary Objection of even date arguing that the Petitioner/Applicant had not exhausted other dispute resolution mechanisms.
4. The court granted prayer No. 6 of the Notice of Motion which accorded the Petitioner/Applicant liberty to move throughout Kenya previously restricted by the respondents and directed that the Notice of Preliminary Objection be canvassed by way of written submissions. The respondent was also accorded 7 days to respond to the Petition and Notice of Motion.
5. The respondents Notice of Preliminary Objection dated 9<sup>th</sup> May, 2025 objects to the Petitioner's Notice of Motion and Petition dated 23<sup>rd</sup> April, 2025 on the following points of law: -
  1. The Application and Petition offends the provisions of Section 77 of the [County Governments Act](#) and Section 85 and 87 of the [Public Service Commission Act](#) which requires any person dissatisfied or affected by a decision made by the Public Service Board or a person in exercise of disciplinary control to appeal to the Public Service Commission.
  2. In the instant suit the Petitioner has not exhausted the internal/alternative dispute resolution mechanism and the Petition is premature.
  3. Accordingly, the Honourable court lacks jurisdiction in the first instance to entertain the Application and Petition herein and both should be dismissed with costs on a higher scale.
6. Counsels for the parties highlighted their submissions on 12<sup>th</sup> June, 2025 and the matter reserved for ruling on 19<sup>th</sup> June, 2025.

### **Respondents' submissions**

7. Counsel cited the provisions of Section 77 of the [County Governments Act](#) on appeals by employees of County Governments to the Public Service Commission to submit that the provisions allowed public officers employed by County Governments to invoke the jurisdiction of the Public Service Commission (herein after referred to a PSC) in respect of decisions made by the County Public Service Board or a person exercising or purporting to exercise disciplinary control against the officer to urge that as a public officer the applicant was not excluded by the provision.
8. Reliance was placed on the provisions of Section 87(2) of the [Public Service Commission Act](#) which prohibits the institution of legal proceedings in court on matters within the jurisdiction of the PSC emanating from the County Governments Public Service prior to exhaustion of internal processes.
9. Counsel urged that since the applicant's complaint was the suspension by the respondent, it did not meet the threshold of a Constitutional Petition and the suspension letter was grounded on serious allegations and the Kisii County Government Human Resource Policies and Procedures Manual for the County Public Service, provided for delegation of disciplinary powers of the Public Service Board to the County Secretary including suspension of staff in Job Group "T" and below.
10. Counsel cited the provisions of the Human Resource Policies and Procedures Manual for the Kisii County Government to urge that suspension of the Petitioner/Applicant was lawful.



11. Reliance was also placed on the decisions in *James Omamba Nyaoga V Chairman Kisii County Assembly Service Board and 3 others*, to underscore the essence of the provisions of the Human Resource Policies and Procedure Manual as were the sentiments of the Court in *Ismael Onyango & another V Siaya County Public Service Board & another* [2018] eKLR, *Secretary County Public Service Board & another V Hulbhai Gedi Abdullah* [2017] eKLR and *Sebastian Sunya & 5 others V Busia County Public Service Board*, ELRC Petition NO. E005 of 2022, to urge that where there is a clear procedure for redress the same ought to be followed. Counsel submitted that the Petitioner/Applicant was obligated to invoke the appellate procedure prescribed by law and the court had no jurisdiction to hear or determine the Petition and the Application herein.

### **Petitioner's submissions**

12. As to whether the doctrine of exhaustion was absolute under Section 77 of the *County Governments Act*, counsel for the Petitioner submitted that the doctrine is not absolute as provided by Section 9(4) of the *Fair Administrative Action Act*, which excepts the doctrine of exhaustion.
13. Counsel cited the sentiments of the court in *Krystalline Salt Ltd V Kenya Revenue Authority* [2019] eKLR and *Republic V Council of Legal Education Ex Parte Desmond Tutu Owuoth* [2019] eKLR, to buttress the submission that the doctrine of exhaustion is qualified where the procedures would not be effective, would be futile or where the other person or body has developed a rigid policy to urge that the court was enjoined to examine the dispute resolution mechanism to establish its competency and in any case, counsel argued the court retained discretion to intervene when the statutory process is ineffective.
14. Reliance was made on the sentiments of the Court of Appeal in *Karisa Chengo & 2 Others V Republic* [2015] eKLR on the status of the High Court and courts of equal status, to urge that the doctrine of exhaustion was not a mechanical box checking rule but was based on availability of an effective administrative remedy.
15. Other decisions relied upon included *Republic V Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR, to urge that the court must analyse the facts, scheme and interests involved in determining whether the doctrine of exhaustion ought to be upheld, to urge that the PSC mechanism was inadequate to address constitutional violations such as early suspension and the delegation was ultra vires the County Secretary and minutes of the committee that made the decision were not supplied.
16. Reliance was also placed on the sentiments of the court in *Chief Justice and President of the Supreme Court of Kenya & another V Khaemba* [2021] KECA 322 (KLR), as were the decisions in *Polycap Mbagaya Mumia V Chairman and Board of Governor Mukumu Boys High School ELRC Cause No. 76 of 2016 on suspension*, *Republic V National Environment Management Authority Ex Parte Sound Equipment Ltd William Odhiambo Ramogi & 3 others V Attorney General & 4 others Muslims for Human Rights & 2 others (Interested Parties)* [202] KEELRC 1044 KLR and *Mohammed Ali Badi & Others V Attorney General & 11 other* [2018] eKLR on accessibility, affordability, timeliness and effectiveness of the alternative forum, *David K Jawara V Gamba*.
17. On Section 77(1) of the *County Governments Act*, counsel for the Petitioner submitted that the provisions uses the phrase “may appeal” to the Public Service commission” which according to counsel suggested choice and cited the decision in *Salat V I.E.& B.C. & 7 others* [2014] KESC 12 (KLR), on the discretion under Rule 53 of the Supreme Court Rules and a similar phraseology was used in Section 86(1) of the *Public Service Commission Act* which meant that a public officer could challenge the decision in court or before the Public Service Commission citing the decision in *Kenya Wildlife*



Services V Joseph Musyoki Kilonzo [2017] eKLR, Kenya Wildlife Service V M’Ndiene [2025] KEHC 2478 (KLR) as well as the sentiments of the court in Charles Mwangi Muraya V Republic [2001] KLR and Standard Chartered Bank Ltd V Lucton (Kenya) Ltd HCCC No. 462 of 1992 where the term shall was used in a statute to urge that whereas shall denoted mandatory “may” denoted choice to urge that the provisions of Section 77 of the *County Governments Act* and 86 of *Public Service Commission Act* made the appellate procedure to the PSC by choice Section 87(2) contradicts that option and according to counsel the specific law prevails over the general under the principle of *lex specialis derogate generali* and cited the decision in MJ V NK & another [2017] KEHC 4238 (KLR) and Nyagol V Judicial Service Commission [2024] KESC 69 (KLR), to urge that provisions of the County Government Act prevail thus, appeal to the PSC is by choice.

18. On jurisdiction of the court to hear and determine breaches of constitutional rights, reliance was placed on various Articles of *the Constitution* and Section 76 of the *County Governments Act* on observance of the rules of natural justice, to urge that the Petitioner/Applicant’s suspension was indefinite citing the decision in Abdikadir Suleiman V County Government of Isiolo & another Nyeri ELRC No. 76 of 2015, to urge that the Petitioner’s complaints could not be addressed by the procedure under Section 77 of the County government Act and urge that the court had jurisdiction to hear and determine the Petition.
19. According to counsel, the Petitioner was challenging violations of *the Constitution* not the disciplinary procedure as the suspension was unlawful and without due process.
20. Also cited were the decisions in Republic V National Environment Management Authority Ex Parte sound Equipment Ltd (supra) and Fleur Investments Ltd V Commissions of Domestic Taxes and another [2018] eKLR to urge that the exhaustion requirement may be excepted on a case by case basis based on the circumstances of each case.
21. Finally, counsel submitted that the Petitioner was not heard hence Article 50(1) of *the Constitution* of Kenya was violated.

### **Analysis and determination**

22. Before determining whether the Petitioner/Applicant’s suit was instituted prematurely courtesy of the doctrine of exhaustion, it is essential to dispose of the essential but uncontested issue of whether the respondents’ Notice of Preliminary Objection raises a competent Preliminary Objection.
23. The locus classicus rendition of the essence of a Preliminary Objection are the sentiments of Law JA and Sir Charles Newbold P in the often cited decision of the Court of Appeal in Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd where Law JA stated that:

“... 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 of the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

24. Sir Charles Newbold P expressed himself as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued 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 if what is sought is the exercise of discretion...”

25. Since the Petitioner has not argued that what is before the court is not a Preliminary objection, and argues that the breaches and violations are constitutional, the court is satisfied that the respondent’s Notice of Preliminary Objection meets the threshold in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd* (supra), as restated by the Supreme Court in *Hassan Nyanje Charo V Khatib Mwashetani & 3 others* [2014] eKLR. See also *Nitin Properties Ltd V Singh Kalsi Said Shabal & another* [1995] eKLR.
26. Having so found, I will now proceed to determine whether the respondents Notice of Preliminary jurisdiction is merited to dispose of the Petitioner’s suit at this stage.
27. The Petitioner is a medical doctor and once served as the Medical Superintendent, Kisii Level 5 Hospital.
28. According to the Petitioner, vide letter dated 6<sup>th</sup> February, 2025, the 2<sup>nd</sup> respondent informed him that it had received information that the Petitioner had committed or suspected of committing a criminal offence against or to the detriment of the employer and had provided false information to the Director Human Resource at the County Government of Kisii and had received monies by false pretences, Kshs.69,200 and the conduct amounted to gross misconduct.
29. That vide letter of even date referencing a notice to show cause dated 5<sup>th</sup> February, 2025, the 2<sup>nd</sup> respondent informed the Petitioner that he had been suspended with immediate effect pending finalization of his case and was to report to the County Secretary every fortnight.
30. The Petitioner argued that did not receive the notice to show cause.
31. It is clear that the Petitioner received the alleged notice to show cause dated 6<sup>th</sup> February, 2025 as opposed to 5<sup>th</sup> February, 2025 as the letter on record isolated two (2) instances of alleged misconduct and required a response within 21 days and the Petitioner responded vide two (2) letter of even date on 18<sup>th</sup> February, 2025 received on the same day.
32. A perusal of the Notice of Motion dated 23<sup>rd</sup> April 2023 and the Petition of even date reveals that the bone of contention is the suspension vide letter dated 18<sup>th</sup> February, 2025 and the interim and substantive reliefs sought to remedy the suspension.
33. On the issue of exhaustion of internal disciplinary mechanisms, parties have adopted contrasting positions with the Petitioner contending that this case falls outside the doctrine of exhaustion principally because it is grounded on constitutional breaches and violations namely, right to fair labour practices, fair hearing, freedom of movement, access to justice, fair administrative action and national values and principles of governance.
34. The respondents argue and maintain that there exists a statutory prescribed dispute resolution mechanism which the Petition has not invoked before invoking the jurisdiction of the court.
35. It is trite law that where the law prescribes a clear procedure or process of resolving disputes or grievances that procedure must be strictly followed, as held by the Court of Appeal in *Speaker of National Assembly V Karume* [1992] KECA 42 (KLR).



36. In *Geoffrey Muthinja and 2 others V Samuel Muguna Henry & 1756 others* [2017] eKLR, the Court of Appeal stated:

“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 the fora of last resort and not the first port of call...

The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a 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...”

37. Equally, the Supreme Court of Kenya has expressed itself authoritatively on this issue.

38. In *NGO’s Co-ordination Board V EG & 4 others; Katiba Institute (Amicus Curie)* [2023] eKLR the court stated:

“...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”.

39. Finally, in *Republic V Commissioner General, Kenya Revenue Authority Ex Parte Sanofi Aventis Ltd* [2019] eKLR the court held that:

“The doctrine of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency’s action, seeks Judicial Review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency’s action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. This doctrine is now of esteemed juridical lineage in Kenya. It was felicitously stated by the Court of Appeal in *Speaker of National Assembly V Karume*...”



40. See also Secretary County Public Service board & another V Hulbhai Gedi Abdille (supra), William Odhiambo Ramogi & 3 others V Attorney General & 4 others: Muslim for Human Rights & 2 others Interested Parties (supra). In the matter of Mui Coal Basin Local Community, Republic V Kenya Bureau of Standards & 4 others & the Department of Health Services Nakuru County (Interested Party) ex party United Millers Ltd, United Millers Ltd V Kenya Bureau of Standards, Directorate of Criminal Investigations & 5 others, Albert Chaurembo Mumbo & 7 others V Maurice Munyao & 148 others [2019] eKLR, the Zimbabwe Constitutional court in Chawira & Others V Minister of Justice Legal and Parliamentary Affairs and Dhow House Ltd V K.P.L.C [2022] KEHC 11840 (KLR).
41. Admittedly, and as correctly submitted by the Petitioner’s counsel, the doctrine of exhaustion is not absolute. It can be excepted.
42. Statutorily, the provisions of Section 9 of the *Fair Administrative Action Act* stand out, thus:
1. ...
  2. ...
  3. The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under subsection (1).
  4. Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
43. The foregoing provisions do not prescribe any exemption to the doctrine of exhaustion, they merely confer upon the court discretion to exempt a party from the doctrine on application, and if the court considers the exemption justifiable in the interest of justice.
44. However, and as correctly observed by the Petitioner’s counsel, there is no clear delineation of the exceptions to the doctrine of exhaustion.
45. In Republic V Independent Electoral & Boundaries Commission (I.E.B.C) & others Ex Parte the National Super Alliance (NASA) Kenya (supra) the court stated:
- “What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it.
- This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake”.



46. Similarly, in Republic V Dedan Kimathi University of Technology Ex Parte Muia Stephen Mutuku [2022] KEHC 358 (KLR) Njagi stated:

“What constitutes exceptional circumstances depends on the facts and circumstances of the case. Thus, where an internal remedy would not be effective, or where its pursuit is futile a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile”.

47. The court is in agreement with these sentiments.

48. Although counsel for the Petitioner submitted that the Petitioner was not contesting the dispute resolution mechanism before the County Public Service Board or the Public Service Commission but was contesting the process, put in alternative terms, alleged violations of *the Constitution* of Kenya, it is not lost to the court the Petitioner is principally challenging his suspension by the 2<sup>nd</sup> respondent as adverted to earlier in this ruling and other than alleging that the breaches complained of were constitutional, the requisite exceptional circumstances have not been articulated so as to be deemed an exception to the doctrine of exhaustion which applies to public officers.

49. As held in *Shedd Dennies Simotwo V Speaker Narok County Assembly & another*, for a suspension to be lawful, it must have either a contractual authority or statutory underpinning.

50. In the instant case, the Petitioner has not demonstrated that 2<sup>nd</sup> respondent had no authority to sign the suspension letter.

51. Similarly, the respondents submitted that the Human Resource Policies and Procedures Manual of the Kisii County Government permitted the County Public Service Board to delegate some disciplinary powers to the County Secretary on instructions issued from time to time and in consonance with the provisions of the *County Governments Act*.

52. Finally, the provisions of Section 9(4) of the *Fair Administrative Action Act* are clear that an exemption can only be granted on application by the applicant and there is none before this court for the respondents to respond to and the court to make a determination.

53. Significantly, the Petitioner's counsel raised an interesting argument centred on the provisions of Section 77 of the *County Governments Act*, 86(11) and 87(2) of the *Public Service Commission Act*, substantively on their phraseology and construction.

54. No doubt the Public Service Commission's power to hear and determine appeals from County Governments Public Service is a constitutional imperative under Article 234(2)(i) of *the Constitution* of Kenya 2010, which provides that:

“The commission shall hear and determine appeals in respect of County Governments Public Service...”

55. This provision confer upon the PSC jurisdiction to hear and determine appeals from employees of County Governments and is reinforced by the provisions of Section 77 of the County Government Act which provide that:

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) 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) ...
  - (f) ... or
  - (g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.
56. This provision confers upon the PSC jurisdiction to entertain appeals from County Government Public Service on any decision.
57. Similarly, Section 86(1) of the *Public Service Commission Act* is similar to Section 77(1) of the *County Governments Act* and states that 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.
58. Contrary to the Petitioner’s counsels argument that the provisions of the County Government Act would prevail in the event of any conflict between its provisions and those of the *Public Service Commission Act* under the principle of *lex specialis derogat lei generalis*, that the specific law prevails over a general statute, the court is of the view that the provisions of the Public Service Commission prevail on account that it is the latter statute and having enacted both statutes parliament was aware of the provisions of the earlier statute as well as those of Article 234(2)(1) of *the Constitution* of Kenya, 2010.
59. As regards Section 87(2) of the *Public Service Commission Act*, which prohibits the institution of a suit by persons on matters within the jurisdiction of the PSC prior to exhausting the appellate procedure, this provision binds all public officers in County governments on account of the *County Governments Act* and the PSC Act being the later statute prevails over the *County Governments Act*. See *Kutner V Phillips* [1891] 2 QB2 267 and *Martin Wanderi & 19 Others V Engineers Registration Board of Kenya* [2014] eKLR.
60. It is common ground that the cardinal rule of statutory construction is the literal or the plain language rule. That a statue must be interpreted literally, as it expressly provides.
61. However, this rule only applies in cases where the wording of the statue are clear and there is no ambiguity. See *County Government of Kiambu V The Senate & Others* [2017] eKLR, *Rotich Samuel Kimutai V Ezekiel Lenyongopeta & 2 Others* [2015] eKLR.
62. As contended by counsel for the Petitioner/Applicant, Section 77(1) of the *County Governments Act* and Section 86(1) of the *Public Service Commission Act* use the phrase “may appeal” to the Public Service Commission.
63. Literally, the term may express possibility or to be a possibility. It typically signifies choice.



64. Significantly Section 77(2) of the County Governments Act and Section 85 of the Public Service Commission are explicit that the PSC shall hear and determine appeals on any decision relating to employment of a person in a County Government and disciplinary control among others.
65. In the court's view, it is inconceivable that the Constitution of Kenya would establish an alternative dispute resolution for public officers and command courts and tribunals to promote it among others, and simultaneously intend it to be optional. The provisions of the County Government Act and the Public Service Commission Act cannot, in the court's view, be construed outside the context of Article 234(2)(1) of the Constitution of Kenya and the law is clear on the outcome for obvious reasons. The Constitution of Kenya is the Supreme law and prevails over all other laws.
66. The foregoing analysis is consistent with the holding of Mumbi Ngugi J (as he then was) in James Tinai Murete & others V County Government of Kajiado & another; Nailantei Supeyo & 19 others: Interested Parties) [2023] eKLR thus:
- ...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 Act, that they can bypass the legislation and come to this Court by way of a constitutional petition...
67. Aside from the views expressed in the two decisions set out above, I take this view for two additional reasons. 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".
68. There is no option given to a party to choose whether or not to file grievances with the Commission...
69. 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 dispute".
70. The foregoing sentiments of the court require no amplification, save that the jurisdiction of the Public Service Commission to hear and determine appeals in respect of County Governments Public Service is a constitutional imperative under Article 234(2)(i) of the Constitution of Kenya.
71. The above passages apply on all fours to the circumstances of the instant case for the simple reason that the Petitioner/Applicant herein has an appealable decision, the suspension from office under conditions he contests and is additionally contesting the process of suspension.
72. Irrespective of whether the suspension is administrative or a penalty, it is a matter within the jurisdiction of the Public Service Commission and ought not, in the court's view, to have been magnified to a constitutional issue.
73. Finally, the provisions of Section 87(2) of the Public Service Commission Act are couched in mandatory tone to accentuate the legislative intention that public officers dissatisfied or affected by decisions or actions taken by the County Public Service Board or other person be appealed against the Public Service Commission.



74. Flowing from the issues discussed above, the court finds and holds that the respondent's Notice of Preliminary Objection dated 9<sup>th</sup> May, 2025 is sustainable.
75. The instant Petition and Notice of Motion are inconsistent with the principle of exhaustion of internal disputes resolution mechanisms. The court's jurisdiction was invoked before internal dispute resolution process were exhausted.
76. The rights alleged to have been violated are remediable under the existing alternative dispute resolution mechanisms and if the Petitioner/Applicant is dissatisfied, the court has jurisdiction to hear and determine the suit a fresh.
77. In the upshot the respondent's Notice of Preliminary Objection is allowed and the Petitioner/Applicant's Petition and Notice of Motion both dated 23<sup>rd</sup> April, 2025 are struck out with no orders as to costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 19<sup>TH</sup> DAY OF JUNE, 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

