



Nyamira County Public Service Board & 2 others v Anari (Appeal E002 of 2025) [2025] KEELRC 1749 (KLR) (17 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1749 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E002 OF 2025
NZIOKI WA MAKAU, J
JUNE 17, 2025**

BETWEEN

**NYAMIRA COUNTY PUBLIC SERVICE BOARD 1ST APPELLANT
DIRECTOR - HUMAN RESOURCE MANAGEMENT 2ND APPELLANT
PAYROLL MANAGER 3RD APPELLANT**

AND

JAPHETH MOINDI ANARI RESPONDENT

(Being an appeal from the Ruling and Orders of Honourable W. K. Chepseba (C.M.) delivered on 29th October 2024 in Nyamira MCELRC Claim No. E006 of 2022)

JUDGMENT

1. Via a memorandum of claim dated 2nd June 2022 Mr. Japheth Moindi Anari filed suit against the Appellants before the Magistrate's Court at Nyamira, alleging the unlawful withholding of his salary. In response, on 9th January 2024, the Appellants raised a preliminary objection arguing that the suit violated the doctrine of exhaustion as contemplated under Article 234(2)(i) of *the Constitution*, read together with section 77 of the *County Governments Act* and sections 85, 86, and 87(2) of the *Public Service Commission Act*. They further contended that prayer no. 24(a) of the claim raised constitutional issues which fell outside the jurisdictional mandate of the Magistrate's Court, contrary to section 8 of the Magistrates' Courts Act, 2015.
2. In a ruling delivered on 17th September 2024, the Chief Magistrate dismissed the preliminary objection, holding that the alleged withholding of salary amounted to an unfair labour practice over which the court had jurisdiction. Dissatisfied with this ruling the Appellants lodged a memorandum of appeal with this Court contending:



1. That the learned trial Magistrate erred in law by failing to appreciate that the claim arose from County Government employment, and was therefore subject to the procedural requirement under section 87(2) of the *Public Service Commission Act* [Cap. 185 – Laws of Kenya], which bars direct filing in court without prior reference to the Commission;
 2. That the learned trial Magistrate erred in law by failing to recognize that prayer no. 24(a) of the Respondent's claim raised constitutional questions that were beyond the jurisdiction of the Magistrate's Court, pursuant to section 8 of the Magistrates' Courts Act [Cap. 10 – Laws of Kenya];
 3. That the learned trial Magistrate misapprehended the nature and legal implications of the Respondent's claim in relation to Article 234(2)(i) of *the Constitution* and sections 85, 86 and 87(2) of the *Public Service Commission Act*, as well as section 77 of the *County Governments Act* and Section 8 of the Magistrates' Courts Act;
 4. That the learned trial Magistrate's failed to properly address his mind to and misapprehended in substantial material respects the meaning and import of Article 234(2)(I) of *the Constitution*; sections 85, 86 and 87(2) of the *Public Service Commission Act* [Cap. 185 – Laws of Kenya]; section 77 of the *County Governments Act* [Cap. 265 – Laws of Kenya] and section 8 of the Magistrates' Courts Act [Cap. 10 – Laws of Kenya]; vis-à-vis the scope of his jurisdictional competence and authority;
 5. That the decision to entertain a suit expressly barred by section 87(2) of the *Public Service Commission Act* was legally untenable, especially in light of section 3 of the *Judicature Act* [Cap. 8 – Laws of Kenya];
 6. That the ruling was per incuriam as the Trial Court's decision to uphold proceedings whose institution is expressly barred in law under section 87(2) of the *Public Service Commission Act* [Cap. 185 – Laws of Kenya] is untenable under section 3 of the *Judicature Act* [Cap. 8 – Laws of Kenya];
 7. That the trial court wrongly assumed jurisdiction contrary to the clear provisions of Article 234(2)(i) of *the Constitution*, sections 85, 86, and 87(2) of the *Public Service Commission Act*, and section 77 of the *County Governments Act*, making the ruling untenable under section 3 of the *Judicature Act*;
 8. That the ruling and resultant orders issued were inconsistent with the fundamental legal doctrine of exhaustion;
 9. The ruling and orders were further inconsistent with the doctrine of stare decisis.
3. On the basis of these grounds, the Appellants sought to have the preliminary objection upheld, the Respondent's suit struck out with costs, and the Magistrate's ruling set aside. They also prayed for the costs of the appeal.
 4. Pursuant to Court's directions of the 19th May 2025 the appeal was canvassed by way of written submissions.

Appellants' Submissions

5. In support of the appeal the Appellants identified the issues for determination as:
 - a. Whether the trial Court has jurisdiction to adjudge the primary claim in light of the express provisions of section 87(2) of the *Public Service Commission Act*;



- b. Whether the trial Court has jurisdiction to adjudge the primary claim in light of the express provisions of section 8(3) of the Magistrates' Courts' Act.
6. On the first issue the Appellants submitted that all employment disputes emanating from the County Government Public Service must, in the first instance, be referred to the Public Service Commission by way of appeal. The Appellants emphasized that where a statute prescribes a clear procedure for redress of grievances, that procedure must be strictly adhered to. Specifically, they pointed to section 87(2) of the *Public Service Commission Act*, which unequivocally bars parties from instituting court proceedings before exhausting the statutory dispute resolution mechanism. Underscoring the centrality of jurisdiction, the Appellants submitted that jurisdiction is fundamental to the legitimacy of any judicial process. They relied on the decision of the Supreme Court in the case of Samuel Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR which affirmed that a court's jurisdiction flows from *the Constitution* or legislation—or both—and that a court cannot arrogate itself jurisdiction not granted by law. To support their position, the Appellants referred to the Respondent's memorandum of claim, which expressly indicated that the dispute stemmed from his employment with the Nyamira County Government. They further relied on Article 234(2)(i) of *the Constitution*, which empowers the Public Service Commission to hear and determine appeals in respect of decisions relating to the County Government Public Service. They also cited section 77 of the *County Governments Act*, which provides for appeals from decisions of the County Public Service Boards to the Public Service Commission, along with sections 85 and 87(2) of the *Public Service Commission Act*, which reinforce the Commission's appellate jurisdiction and prohibit court proceedings unless the appeal process has been exhausted.
7. The Appellants also relied on the Court of Appeal decision in Speaker of the National Assembly v Karume (Civil Application 92 of 1992) [1992] KECA 42 (KLR) (29 May 1992), where the court held that:
- “Where there is a clear procedure for the redress of any particular grievance prescribed by law or an Act of Parliament, that procedure should be strictly followed.”
8. Additionally, they cited the case of Secretary County Public Service Board & Another v Hulbhai Gedi Abdille [2017] eKLR, in which the court stressed the importance of utilizing available and adequate alternative fora for dispute resolution before invoking the jurisdiction of the court. The Appellants submitted that section 87(2) could not be circumvented by clever interpretation or deliberate misreading. They referred to several decisions in which courts declined jurisdiction due to non-compliance with the exhaustion doctrine, including the case of Nicodemus Akumu Nyangeri & 7 others v County Government of Kisii & another [2021] eKLR, where the court, relying on the Hulbhai Gedi Abdille decision, held that it lacked jurisdiction at the first instance to entertain claims by individuals aggrieved by decisions of County Public Service Boards acting within their mandate. The Appellants also rejected the Respondent's argument that section 87(2) applies only to disciplinary matters, contending that such an interpretation is erroneous and unsupported by law.
9. On the second issue, the Appellants submitted that the Magistrates' Court lacked jurisdiction to determine claims seeking compensation for violation of rights under the Bill of Rights. They drew attention to prayers (a) and (d) of the memorandum of claim, where the Respondent sought declarations that the stoppage of his salary amounted to a constitutional violation and sought general damages for infringement of his right to fair labour practices. The Appellants relied on section 8(3) of the Magistrates' Courts Act, which expressly bars Magistrates' Courts from determining claims for compensation arising from the violation or infringement of constitutional rights. They also cited the Supreme Court's decision in Hussein Khalid & 16 others v Attorney General & 2 others



[2019] eKLR, which affirmed that Magistrates' Courts lack jurisdiction to hear and determine claims for compensation for loss or damage suffered due to violation or denial of fundamental rights. In conclusion they urged the court to dismiss the Magistrate's ruling for being per incuriam.

Respondent's Submissions

10. On his part the Respondent urged the Court to be guided by its role on a first appeal, which is to re-evaluate and re-analyse the extracts on record to determine whether the Magistrate's conclusions should stand or not, and give reasons either way, based on the decision in *Abok James Odera T/ A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] KECA 208 (KLR). The Respondent submitted that the Employment and Labour Relations Court (ELRC) possesses unfettered jurisdiction to hear and determine employment disputes. He contended that the doctrine of exhaustion does not oust the court's jurisdiction but merely postpones its exercise. To support this argument, he cited the case of *Mohamud v Wajir County Assembly Service Board (Cause E094 of 2023)* [2024] KEELRC 1813 (KLR) (8 July 2024) (Judgment), where the court held that section 29 of the ELRC Act—empowering the Chief Justice to appoint Magistrates to hear claims involving salaries below Kshs 80,000—did not divest the ELRC of its jurisdiction. He also relied on the decision in *Abdikadir Suleiman v County of Isiolo & another* [2015] eKLR, where it was held that statutory provisions providing for alternative dispute resolution mechanisms do not extinguish the court's jurisdiction but only hold it in abeyance while such mechanisms are pursued.
11. The Respondent submitted that the exhaustion doctrine, as referenced by the Appellants, was inapplicable in the present circumstances. He asserted that the statutory provisions could only be invoked where a dispute had been first lodged with the County Public Service Board and an appeal was contemplated. Since no such dispute had been referred to the Board in this case, he maintained that the relevant provisions were not triggered, rendering the preliminary objection premature. He also asserted that the suit was a fresh claim, not an appeal, and therefore appellate procedures were irrelevant. Lastly, he emphasized that the County Public Service Board's jurisdiction was limited to wage-related disputes, whereas the matter at hand concerned unfair labour practices. In light of the foregoing, the Respondent urged the court to dismiss the appeal with costs.

Disposition

12. The Appellants have raised two issues which fall for determination. The first is whether the exhaustion doctrine is applicable to this instant case. The second issue is whether the Magistrate's Court has jurisdiction to hear and determine claims for compensation for loss or damage suffered due to violation or denial of fundamental rights.
13. The first issue is the exhaustion doctrine. The Appellants asserted that the doctrine of exhaustion is applicable in the suit precipitating the appeal as contemplated under Article 234(2)(i) of *the Constitution* read together with section 77 of the *County Governments Act* and sections 85, 86, and 87(2) of the *Public Service Commission Act*. The Appellants also rejected the Respondent's argument that section 87(2) applies only to disciplinary matters, contending that such an interpretation is erroneous and unsupported by law. The Appellants thus argued that section 87(2) could not be circumvented by clever interpretation or deliberate misreading. In support of arguments relating to the issue of exhaustion, the Appellants cited the case of *Nicodemus Akumu Nyangeri & 7 others v County Government of Kisii & another* (supra) where the court, citing with approval the case of *Secretary County Public Service Board and Another v Hulbhai Gedi Abdille* [2017] eKLR and held that it lacked jurisdiction at the first instance to entertain claims by individuals aggrieved by decisions of County Public Service Boards acting within their mandate.



14. In the case of Secretary County Public Service Board and Another v Hulbhai Gedi Abdille [2017] KECA 643 (KLR), the Court of Appeal allowed the appeal on the basis that the Respondent had failed to utilize the process provided under section 77 of the County Governments Act by filing a judicial Review application to the High Court and stated thus:-

"There is no doubt that the respondent initiated the judicial review proceedings in utter disregard of the dispute resolution mechanism availed by section 77 of the Act. The section provides not only a forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one, specifically tailored by the legislators to meet needs such as the respondent's."

15. The principle of exhaustion of remedies commonly referred to as the exhaustion doctrine, requires a party to first utilize or exhaust all available non-judicial remedies before seeking court intervention. This is especially so where there are statutory instruments providing for the same. The Court is minded that though the available alternative dispute resolution mechanisms are availed, it is not always the case that one must utilise them before resorting to court. There are exceptional instances where the intervention of the Court can be availed because the exhaustion doctrine does not deny courts their jurisdiction. In the case before the Learned Magistrate, the matters could have been articulated as the process for an appeal to the Public Service Commission or the County Public Service Board had not been triggered. As such, on the first issue I find and hold that the Learned Magistrate did not fall in error by rejecting the argument on the exhaustion doctrine.
16. This brings us to the second issue which is that the Learned Magistrate did not have jurisdiction to hear the matter as it sought remedies that the Learned Magistrate could not grant by dint of absence of jurisdiction to hear and determine claims for compensation for loss or damage suffered due to violation or denial of fundamental rights. The Magistrate's Court Act under section 8(3) limits the jurisdiction of the said Court from granting compensation for loss or damage suffered in consequence of violation of constitutional rights such as claimed in the suit. The section provides thus:-
3. Nothing in this Act may be construed as conferring jurisdiction on a magistrate's court to hear and determine claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights.
17. The Respondent had sought the grant of remedies that were beyond the scope of the Learned Magistrate in prayer no. 24(a) of the claim which raised constitutional issues which fell outside the jurisdictional mandate of the Magistrate's Court, contrary to section 8 of the Magistrates' Courts Act, 2015. This Court finds and holds that on that score, the Learned Magistrate fell in error and ought to have declared that the said Court had no jurisdiction to handle the claim as presented. This Appeal therefore succeeds to that extent. The preliminary objection should have been upheld as the claim presented by the Respondent was couched in a manner that divested the Learned Magistrate of jurisdiction despite the issue of deprivation of salaries being one within the scope and competence of the Magistrate's Court. The appeal is allowed and the Appellant will have costs at the Magistrates Court only.

Orders accordingly.

DATED AND DELIVERED AT KISII THIS 17TH DAY OF JUNE 2025

NZIOKI WA MAKAU, MCIArb.

JUDGE

