



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lubengu v Ottichilo & 2 others (Petition E005 of 2023)  
[2024] KEELRC 33 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELRC 33 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA**  
**PETITION E005 OF 2023**  
**JW KELI, J**  
**JANUARY 25, 2024**  
**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 25(C),**  
**27, 28, 29(D), 41, 47, 50, 159, 162, 235, 236, 258, AND 259 OF**  
**THE CONSTITUTION OF KENYA**  
**AND**  
**IN THE MATTER OF OBJECTS AND PRINCIPLES OF DEVOLVED**  
**GOVERNMENT**  
**AND**  
**IN THE MATTER OF CONTRAVENTION OF THE CONSTITUTION OF**  
**KENYA 2010**  
**AND**  
**IN THE MATTER OF CONTRAVENTION OF ARTICLES 1,2,3,25(C),**  
**27,28,29(D),41,47,50,235 AND 236 OF THE CONSTITUTION OF**  
**KENYA(2010)**  
**AND**  
**IN THE MATTER OF THE EMPLOYMENT ACT,2007**  
**AND**  
**IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, NO. 17 OF**  
**2012**  
**BETWEEN**  
**PETITIONER**  
**ELRC PETITION NO. E005 OF 2023 1**



**BETWEEN**

**KENNEDY ECHESA LUBENGU ..... PETITIONER**

**AND**

**WILBER K. OTTICHILO ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF VIHIGA PUBLIC SERVICE**

**BOARD ..... 2<sup>ND</sup> RESPONDENT**

**EZEKIEL MARLEY AYIEGO ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Petitioner filed a Notice of Motion application dated 13<sup>th</sup> October 2023 and a Petition of even date seeking conservatory orders staying and/ or suspending the letter of termination dated 9<sup>th</sup> October 2023 signed by the 3<sup>rd</sup> Respondent, and conservatory orders restraining the 3<sup>rd</sup> Respondent from discharging any duties and or functions of the Office of the County Secretary Vihiga County pending hearing and determination of the application and final disposal of the petition.
2. The Respondents in objection to the Petitioner’s Notice of Motion and Petition dated 13<sup>th</sup> October 2023 filed an answer to the petition dated 26<sup>th</sup> October 2023 and filed on 27<sup>th</sup> October 2023 and the instant Notice of Preliminary Objection dated 26<sup>th</sup> October 2023 and received in court on even date, seeking to strike out the said Notice of Motion and Petition and the costs be provided for, on the following grounds, that:-
  - a. The Honourable court lacks the required jurisdiction to entertain or continue entertaining both the petition and the motion by dint of Section 77 of the [County Governments Act](#) subsections(1) and (2) which are reproduced hereunder for its full import and meaning:

“77. Appeals to the Public Service Commission-

- (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.”
- b. The Petition and the motion grossly violates PART XV of the *Public Service Commission Act* and in particular, Section 87(2) of the said Act reproduced hereunder on the exhaustion principle thereby further ousting the jurisdiction of the honourable Court:
- “87(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.
- c. The Petition before the Honourable Court reveals an employment claim falling under the provisions of the *Employment Act* and related labour laws and do not meet the minimum threshold of Constitutional Petition to warrant the jurisdiction of the Honourable Court in the manner sought or at all.
  - d. The orders sought in the petition whereby the court is invited to determine the fairness or otherwise of the Petitioner’s termination of employment goes against the Mutunga Rules and rules of pleading and renders the Petition incompetent and an abuse of the process of the honourable court.
  - e. The Petitioner lacks the required locus standi to question, through the instant petition, the tenure of the 3<sup>rd</sup> Respondent as the County Secretary.
  - f. The Petition is vexatious and discloses no or no reasonable cause of action against all or any of the respondents.
  - g. The petitioner has failed, going by the pleadings on record, to discharge the burden of proof to warrant a hearing of the Petition.
3. The Petitioner on 30<sup>th</sup> October 2023 withdrew his Notice of Motion application and the court on 20<sup>th</sup> June 2023 directed that the Notice of Preliminary Objection be canvassed first by way of written submissions.
4. The Petitioner’s prayers in the Petition against the Respondents were as follows:-
- a. A Declaration that to the extent that the act of the 3<sup>rd</sup> Respondent of relieving the Petitioner of his appointment as the County Government of Vihiga’s legal and policy advisor vide the letter dated 9<sup>th</sup> October 2023 violated the Petitioner’s right to fair labour practices by failing to accord him a fair hearing before terminating his appointment, the 3<sup>rd</sup> Respondent contravened Article 41, 47 and 50 of *the Constitution* of Kenya and the same is therefore illegal and unconstitutional.



- b. A Declaration that the decision by the 3<sup>rd</sup> Respondent terminating the petitioner's employment as Legal and policy advisor in the County Government of Vihiga is unconstitutional, null, and void.
  - c. A Declaration that to the extent that the decision to terminate the Petitioner's employment was based on his sentiments during the meeting held on 22<sup>nd</sup> January 2023, purported failure to respond to a show cause letter that he was never served with and any other frivolous reason contrary to the provisions of *the Constitution* of Kenya and the *Employment Act* that does not amount to misconduct is discriminatory and the same is null and void and contravenes Article 27 and 236 of *the Constitution* of Kenya.
  - d. A Declaration that the continued occupation of the office of County Secretary of Vihiga County by the 3<sup>rd</sup> Respondent is unconstitutional, illegal and unlawful as his contractual term of service ended on 31<sup>st</sup> May, 2023 and no action has been taken by him to regularize and/or renew his term.
  - e. A Declaration that all acts done by the 3<sup>rd</sup> Respondent as from 31<sup>st</sup> May 2023 to date are null and void.
  - f. A Judicial Review Order do issue quashing the decision of the 3<sup>rd</sup> Respondent acting unlawfully as the County Secretary/Head of the County Service of Vihiga County in terminating the Petitioner's appointment as the County Government of Vihiga's legal and policy advisor vide the letter dated 9<sup>th</sup> October 2023.
  - g. An award of general, exemplary, and punitive damages for the psychological and emotional torture that has been caused upon the Petitioner by the abrupt letter of termination of appointment dated 9<sup>th</sup> October 2023 and authored by the 3<sup>rd</sup> Respondent.
  - h. An Order awarding costs of the Petition to the Petitioner.
  - i. Any other or further orders, writs, and directions this court considers appropriate and just to grant for the purpose of the enforcement of the Petitioner's fundamental rights and freedoms; the enforcement and defence of *the Constitution* pursuant to Article 23 (3) of *the Constitution*.
5. The Respondents' written submissions were filed by James Mukabi, County Solicitor, from the Office of the County Attorney - Vihiga County and were dated the 10<sup>th</sup> of November 2023 and received in court on an even date. The Petitioner's written submissions were drawn and filed by Wamalwa & Echesa Co. Advocates and were dated 22<sup>nd</sup> November 2023 and received in court on 29<sup>th</sup> November 2023.

## Determination

### Issues For Determination

6. The Petitioner and the Respondents did not identify any issues for determination in their respective submissions and both submitted on the grounds raised in the Notice of Preliminary Objection.
7. The Preliminary Objection by the Respondents goes to the question of whether the court has jurisdiction to entertain the Petitioner's Petition and whether the Notice of Preliminary Objection by the Respondent dated 26<sup>th</sup> October 2023 is merited.
8. The question of jurisdiction is cardinal in the determination of disputes as was held in the landmark decision of Nyarangi JA (as he then was) in the case of the Owners of Motor vessel 'Lillian S' v Caltex



Oil Kenya Limited (1989) eKLR to the extent that jurisdiction is everything and without it, the court has no power to make one step and must down its tools.

**Whether the court has jurisdiction to entertain the Petitioner’s Petition and whether the Notice of Preliminary Objection by the Respondent dated 26<sup>th</sup> October 2023 is merited.**

9. The question to determine would be whether the termination of the Petitioner from the position of Legal and Policy Advisor by the County Secretary falls within the matters to be appealed to the Public Service Commission.
10. Section 77 of the County Government Act provides that:-

“77. Appeals to the Public Service Commission

- (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 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. ....”

11. The gist of the Respondents’ objection is that the issues raised in the Petition relate to matters on disciplinary control and retirement and removal of office by the County Public Service Board and which are subject to appeal before the Public Service Commission under the provisions of Sections 77 of the *County Governments Act*, 2012.

**Respondent’s position**

12. The Respondents submit that the issues raised in the Application and petition relate to the employment of persons in the County Governments which are subject to an appeal to the Public Service Commission, and no officer in the public service irrespective of their position has legal support to evade the said route.



13. The Respondents submit that anyone who seeks redress from the court arising from a dispute related to the County Public Service must prove at the first instance to have exhausted the appeal process to the Public Service Commission under Section 87(2) of the [Public Service Commission Act](#) before being granted the right of audience before the court.
14. It is submitted for the Respondents that the petitioner in the instant case has failed on this threshold as a consequence of which this Honourable Court further lacks the requisite jurisdiction to entertain the petition.
15. The respondents submitted that the County Secretary was rightly in office, his terms of service having been revised on 29<sup>th</sup> March 2021, a position that was evidenced by the letter from the Governor of 25<sup>th</sup> April 2023(JA-1).
16. The Respondents submit that the law is clear and the application and petition violate the provision under Section 87 (2) of the [Public Service Commission Act](#) No. 10 of 2017 ('the [Public Service Commission Act](#)') which provides that:-
 

“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”. To buttress this assertion the Respondents relied on the authorities in Secretary County Public Service Board & Another V Hulbhai Gedi Abdille(2017)eKLR; Lukale Moses Sande V Governor, County of Kakamega & 3 other(2022)eKLR and Martin Kabubii Mwangi v County Government of Laikipia(2019)eKLR

### **The Petitioner's position**

17. On the other hand, the Petitioner averred that his purported termination was unfair and unprocedural contrary to Articles 41 and 47 of [the Constitution](#) and that the terminating authority was not the 2<sup>nd</sup> Respondent, the County Service Board, to wit Sections 77 of the County Government Act and Section 87(2) of the [Public Service Commission Act](#) relate to, but that the decision terminating his employment was by the 3<sup>rd</sup> Respondent who is allegedly illegally holding the position of the County Secretary.
18. The Petitioner argues that the 'pleasure doctrine' if at all the same is constitutional should be exercised by the 1<sup>st</sup> Respondent procedurally and fairly without arbitrariness.
19. The Petitioner argues that there is no decision by the County Public Service Board to be appealed to the Public Service Commission, as the decision made was by the 3<sup>rd</sup> Respondent who had no authority in law and who illegally occupies the office of the County Secretary of Vihiga allegedly as his term expired on 31<sup>st</sup> May 2023(KEL-6). To Buttress the above assertions the petitioner relied on the decisions in Robert Khamala Situma & 8 Others V Acting Clerk of the Nairobi City County Assembly(2022)eKLR; Abdikadir Suleiman versus County Government of Isiolo (2015)eKLR and Paul Kimeto Cheruiyot V Governor Narok County & 3 Others (2020)eKLR.
20. The Petitioner submits that his Petition challenges the violation of his fundamental rights and freedoms, which petition is not amenable to the pre-appeal process of the Public Service Commission and relied on the decision in Kenya National Union of Nurses versus Vihiga County Public Service Board(2021)eKLR.



## Analysis and decision

21. The Petitioner was a public officer under the County Public Service, Vihiga County having been appointed as Legal and Policy Advisor in the office of the Governor by the County Public Service Board through the offer of Appointment letter dated 29<sup>th</sup> September 2022(KEL-1).
22. Through a letter dated 9<sup>th</sup> October 2023(KEL-4) the County Secretary -Mr. Ezekiel Ayigo terminated the Petitioner's employment as a Legal Advisor as the Head of the County Public Service.
23. The Court in *Abdikadir Suleiman V County Government Of Isiolo & Another (2015) eKLR* held that:-

“In considering the constitutional and statutory provisions that empower the Commission to hear and determine appeals in respect of county governments' public service, the subject matter is set out in section 77 of the Act, but the decisions the Commission may make are not set out in the Act or *the Constitution*. It is this court's opinion and holding that in appeals to the Commission, the Commission can only make decisions that the County Public Service Board or relevant lawful authority could have made or vary such decision by simply setting it aside or making a decision that was in the Board's or the other relevant lawful authority's jurisdiction to make. The court has guided itself that on appeal the appellate authority applies the same substantive law and facts as applied by the primary authority that made the decision appealed against and generally considers facts as they were presented before the primary authority so that an appellate authority, in absence of anything else, may only set aside the decision appealed against or substitute the decision with any of the remedies that the primary authority was empowered to make. In other words, the appeal process deals with the merits or substance of the case and not procedural or legal propriety of the case.”

24. It flows from this finding that, the Public Service Commission's appellate power is to exercise the powers that are exercised by the Public Service board or a person purporting to exercise the said power, by either varying the decision made or to uphold it.
25. Section 77(2)(e) of the *County Governments Act* unreservedly gives the Public Service Commission of Kenya the mandate to entertain an appeal, including a decision on retirement or removal from the county public service.
26. The provision does not restrict the appellate function to decisions made by a county public service board only.
27. This contrasts with the provision in section 77(1) of the Act, which restricts the appellate power to decisions made by the board or on its behalf in purported exercise of disciplinary control.
28. Section 77(1) provides 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.”



29. The County Secretary in issuing the termination notice stated that:-
- "Consequently, as Head of County Public Service, I now communicate to you the decision of the appointing authority to terminate your employment as the Legal Advisor to H.E. Governor, ....."
30. The operating word is the purported exercise as the Head of County Public Service in the removal of the petitioner from Public Service. The Appeals to the Public Service Commission are not limited only to decisions by the Public Service Board to act, but a person exercising or in the purported exercise of any disciplinary control may also decide on the public service which is appealable to the Public Service Commission, as in this case.
31. The Petitioner in his Petition raises a dispute relating to the termination of his services from the Public Service. He then raised the issue of the party making the decision.
32. The Petitioner alleges that the County Secretary was illegally in office for him to terminate his employment. The issues arising in the Petitioner's petition relate to his termination from the office as a Legal and Policy Advisor made by the person of the purported County Secretary as the Head of the Public Service Board.
33. The instant case relates to the termination from office by the County Secretary whom the Respondents state is the person occupying the said office. The Petitioner states that the 3<sup>rd</sup> Respondent in terminating his services was not properly in office and that the court should stop the County Secretary from acting until the determination of the petition.
34. The holding of office of a County Secretary is provided under Section 44 of the County Government Act, 2012, which provides for the establishment of the office of a County Secretary and how the Officer occupying that office is to be appointed. The Section reads;-
- “ 1) There is established for each county the office of the county secretary who shall be secretary to the county executive committee.
- (2) The county secretary—
- (a) shall be competitively sourced from amongst persons who are university graduates with at least ten years experience in administration and management;
- (b) shall be nominated from persons competitively sourced under paragraph (a) by the governor and, with the approval of the county assembly, appointed by the governor; and....”
35. The Petitioner produced the letter dated 19<sup>th</sup> April 2023(KEL-6 ) which indicates that the term of office of the 3<sup>rd</sup> Respondent (County Secretary) was to lapse by 31<sup>st</sup> May 2023. The Respondents claim the letter was obtained illegally by the Petitioner and criminal proceedings are underway, although no proof is provided.
36. The Petitioner has not shown any further evidence of whether the 3<sup>rd</sup> Respondent held the office illegally. The Respondents provided the letter of 25<sup>th</sup> April 2023(JA-1) in response to the letter of 19<sup>th</sup> April 2023 produced by the Petitioner, where the Governor clarified that the terms of Office of the County Secretary had been revised and the County Secretary was to continue his service. The Respondents submitted that the 3<sup>rd</sup> Respondent's term was revised from three years to five years by



- the Governor, in compliance with a court order issued in Kisumu ELRC Petition No. 34 of 2019 and the Amendment to the [County Governments Act](#), 2020 which fixed the term of the County Secretary at five years.
37. The Petitioner did not respond further to this issue raised by the Respondents on the terms of service of the County Secretary. The Court finds that its jurisdiction is not properly invoked to examine the capacity of the 3<sup>rd</sup> respondent who it was not disputed was in office at the time he authored the letter of termination of the services of the Petitioner. The challenge of the appointment to office again must in the first instance be to the Public Service Commission under section 85 of the [Public Service Commission Act](#).
  38. In the Abdikadir Case(supra) relied on by the Petitioner, in that case, the claimant has alleged that the oral dismissal was illegal, unlawful, and unconstitutional. No decision had been made by either the County Public Service Board or any other person in that case, as the same had been oral and not reduced to writing by a specific officer.
  39. In the instant case, the decision was undertaken by the person purporting to make the said decision as the Head of County Public Service, who is the County Secretary, and the 3<sup>rd</sup> Respondent herein.
  40. The provisions of Section 77(1) of the County Government Act provides that “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 against the decision.”
  41. The position held by the person deciding against a Public Officer under Section 77(1) of the [County Governments Act](#), is “a person in exercise or purported exercise of disciplinary control”(Emphasis added”).
  42. There is no proviso to the said section that only the Public Service board can make the decisions in the public service. The section indicates that decisions appealable to the Public Service Commission are those made by either the County Public Service Board or a person purporting to so act.
  43. Therefore according to Article 234(2)(i) of [the Constitution](#) as read with section 77(2) of the [County Governments Act](#) and section 87(2) of the [Public Service Commission Act](#), the Petitioner’s first port of call should have been through an appeal to the Public Service Commission against the decision of the County Secretary as the person who made the decision.
  44. The Petitioner alleges that the petition raises constitutional violations and thus the pre-appeal process to the Public Service Commission does not apply to his case and relied on the case of Kenya National Union of Nurses versus Vihiga County Public Service Board(2021)eKLR. I looked into the ruling by the court sitting at Kisumu.
  45. In the Petition, the Petitioner alleges that his rights under Articles 41 and 47 of [the Constitution](#) were violated and thus the Public Service Commission cannot determine issues on Constitutional violations. The Petitioner states that he was never called to any disciplinary hearing nor did he receive the notice of intended termination of employment dated 27<sup>th</sup> July 2021(JA-3 ) as alleged by the Respondents before his employment was terminated.
  46. The Respondents on their part stated that the Petitioner was served with the notice of intention to terminate his employment and he received the same personally as evidenced by his signature on the delivery book(JA-2), but the Petitioner failed to respond. That the Petition is an employment matter that has no constitutional violations



47. The Court in Abdikadir Case(Supra) relied on by the Petitioner held that:-

“In the present case, the claimant has alleged that the oral dismissal was illegal, unlawful, and unconstitutional. It is the holding of the court that the jurisdiction to entertain that allegation and to make a primary conclusive finding thereon is vested in the court and the Commission does not enjoy constitutional or statutory jurisdiction to determine that issue and to make appropriate remedy as is prayed for by the claimant in this case. The court considers that the line is thin but clearly sets apart the matters that can go to the Commission as of necessity in the first instance and those that may be urged before the court as of first instance without having to go through the Commission by reason of exhausting the prescribed alternative and statutory procedure and remedy. It is clear that legitimacy or lawfulness of the decisions is not one of the listed appealable subject matter under section 77 of the Act and it has not been shown that such would be a matter in the constitutional or statutory competence of the Commission to decide.”

48. A decision to recruit and remove a person from public service is a decision falling within the mandate of the Public Service Board or persons acting or purporting to act, in making such decisions on behalf of the Board and those decisions are subject to appeal to the Public Service Commission for its review under Section 87 where a person is dissatisfied with the said decision.

49. The jurisdiction of the court may only be invoked under section 87(2) of the [Public Service Commission Act](#), 2017.

50. Section 87 (2) of the [Public Service Commission Act](#) No. 10 of 2017 (‘the [Public Service Commission Act](#)’) provides that:-

“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”.

51. The Public Service Commission has jurisdiction under Articles 234(2) 1 of [the Constitution](#) as read together with Sections 85 &86 of the [Public Service Commission Act](#) to hear and determine Appeals in respect of any decision relating to engagement of any persons in a County Government, including a decision in respect of “ removal from service”.

52. The Court of Appeal in the case of Secretary, County Public Service Board & Another vis- Hulbhai Gedi Abdille (2017) eKLR determined that:-

“Where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime ... in our view, the most suitable and appropriate recourse for the Respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance”.



53. The Employment and Labour Relations Court ( ELRC ) in Sammy Kalundu -vs- Ag. Clerk of the Nairobi City County Assembly ( 2022) eKLR sustained a similar Preliminary Objection with the court holding as follows:-

“(21) From the foregoing, it is apparent there is an elaborate appeal/review mechanism established by the County Government Act and the Public Service Commission Act. More significantly, it is worth noting that the appeal structure flows primarily from the Constitution.

(22) The court further takes note of the provisions of section 87 (2) of the Public Service Commission Act which provides as follows:-

(87 (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)

(23) In view of the foregoing it is therefore apparent that the Applicant has moved the court prematurely as he is yet to exhaust the dispute resolution mechanisms established under the Constitution, various statutes, and the relevant Human Resources Policies and Procedure Manual”.

54. Additionally, in James Akelerio alias Muguu & Another -vs- Moses Kasaine Lenolkilal & 3 Others ( 2014) eKLR the court affirmed jurisdiction of the Public Service Commission and stated as follows:-“ The first port of call before coming to the High Court to seek redress would have been the Public Service Commission. It is apparent that the petitioners did not follow the due process provided by Law”.

55. The court then turns to the issue of whether the failure of exhaustion of the appeal mechanisms before PSC was justified. The Petitioner submits that his Petition challenges the violation of his fundamental rights and freedoms which petition is not amenable to the pre-appeal process of the Public Service Commission and relied on the decision in Kenya National Union of Nurses versus Vihiga County Public Service Board(2021)eKLR. The court compared this decision with the decisions of the Court of Appeal and Supreme Court.

56. The Court of Appeal decision in William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR considered the threshold of determining whether or not exhaustion of the appeal process could be excused. The Court in the decision relied on the decision R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, and stated:- ‘After exhaustively reviewing Kenya’s decisional law on the exhaustion doctrine, the High Court described the first exception thus:

“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.” The Court then concluded:- ‘60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.<sup>61</sup> The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court’s jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.<sup>62</sup> In the instant case, the Petitioners allege a violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.”

57. The foregoing decision was upheld by the Supreme Court in *Abidha Nicholus v Hon Attorney General and Others* (SC Pet. No. E007 OF 2023) where the Supreme Court further adopted its holding in *Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others*; SC Petition No 3 of 2016, [2019] eKLR where it held that: “...even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to 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.”
58. The Supreme court in same decision upheld this position as adopted by the Court of Appeal in *R v National Environmental Management Authority, CA No 84 of 2010*; [2011] eKLR that the Court persuasively relied on its decision in *NGOs Co-ordination Board v EG & 4 others*; *Katiba Institute (Amicus Curiae) (Petition 16 of 2019)* [2023] KESC 17 (KLR) where it stated:”The Court of Appeal ..., observed that; “The principle running through these cases is where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...”.(emphasis given).
59. Applying the foregoing jurisprudence from the Supreme Court, I do find the real issue to be determined in the instant petition was whether the employment of the Petitioner was terminated fairly or not. The Petitioner was a public servant under the County Government’s public service.
60. I am persuaded that the mere citation of constitutional provisions cannot oust the alternative mechanisms. There ought to be a pleading of the violations beyond those of fair termination as stated under the Employment Act failing which this court will invoke the doctrine of constitutional



avoidance and strike out the Petition. I say so taking into account that the provisions of Article 41 of the Constitution are provided for under the Employment Act with remedies for termination of employment being provided for under section 49 of the said Act. I do agree with the decision in Josephat Ndirangu v Henken Chemicals (EA) Limited 2013 e KLR where the court held:- ‘In my view a litigant should not avoid the provisions of the Employment Act regarding unfair termination or wrongful dismissal by going behind the statute and seeking to rely directly on Article 41 of the Constitution on the right to fair labour practices. The purpose of the Constitution is that the right to fair labour practices is given effect in various statutes of which the Employment Act and the Labour Relations Act are primary. The primary legislation should not be circumvented by seeking to rely directly on a constitutional provision. Both the Employment Act and the Labour Relations Act give effect to constitutional rights.’(emphasis mine) I find this was the case in the instant petition.

61. The decision by Court of Appeal William Odual(supra) position was that exception to the exhaustion of existing alternative mechanisms should be restrictive. Otherwise, Constitutional Petitions can be open to abuse to evade statutory processes. I do uphold the jurisprudence by the Supreme Court in the Abidha Nicholus case(supra) to find that the real issue for determination was the fairness of the termination of employment of the Petitioner under the public service of the County Government of Vihiga. I further find there was no case of constitutional violation disclosed outside fairness of the termination of contract which issue is adequately covered by the Employment Act. See Josephat Ndirangu v Henken Chemicals (EA) Limited 2013 e KLR (supra).
62. In the upshot, considering that the issues raised by the Petitioner relate to the issue of termination of his employment, regardless of who made the decision, the said issue falls within the mandate of the Public Service Board and of persons acting or purporting to act on its behalf or undertaking such disciplinary action as the case may be; and under Section 77 of the County Governments Act is appealable to the Public Service Commission as the first instance forum. I found there was no case disclosed of additional violation outside the fairness of the termination. No evidence was placed before me to effect that the appeal mechanism before the Public Service Commission could not provide an effective remedy to the Petitioner or that significant injustice would occur under the said mechanism. It was just a mere citation of constitutional provisions which I have already held that did not justify the exemption from the exhaustion of existing statutory mechanisms.
63. I find there is a case of constitutional avoidance. The Petitioner was mandated to file an appeal with the Public Service Commission relating to the issues raised in the Petition. Consequently, this Court’s jurisdiction was invoked prematurely. The Petitioner ought to appeal to the Public Service Commission at the first instance.
64. In the upshot, the Notice of Preliminary Objection dated 26<sup>th</sup> October 2023 by the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents is upheld and the Petition dated 13<sup>th</sup> October 2023 is struck out for being prematurely brought before the Court.
65. Each party is to bear own costs.
66. It is so Ordered.

**DATED, DELIVERED, AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 25<sup>TH</sup> DAY OF JANUARY 2024.**

**JEMIMAH KELI,  
JUDGE.**

**IN THE PRESENCE OF:-**



**Court Assistant:- Lucy Macheso**

**For Petitioner:- Mr. Godia**

**For Respondent:- Gatwiri Holding Brief for Mr. Echesa**

