



Chebet v County Government of Bomet & 4 others (Petition E008 of 2022) [2024] KEELRC 116 (KLR) (1 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 116 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
PETITION E008 OF 2022
DN NDERITU, J
FEBRUARY 1, 2024**

BETWEEN

MARGARET CHEBET PETITIONER

AND

THE COUNTY GOVERNMENT OF BOMET 1ST RESPONDENT

COUNTY SECRETARY BOMET COUNTY 2ND RESPONDENT

COUNTY PUBLIC SERVICE BOARD - BOMET COUNTY ... 3RD RESPONDENT

COUNTY ASSEMBLY BOMET COUNTY 4TH RESPONDENT

**COUNTY EXECUTIVE COMMITTEE MEMBER FOR ADMISTRATION,
PUBLIC SERVICE AND SPECIAL PROGRAMS 5TH RESPONDENT**

JUDGMENT

I. Introduction

1. The Petitioner through Mugumya & Co Advocates commenced these proceedings by way of a petition dated 19th October, 2022 filed in court on 21st October, 2022 wherein she prays for –
 - a. Pending the hearing and determination of this petition conservatory orders be issued in terms of the Notice of Motion filed herewith.
 - b. A declaration that the Petitioner is an employee of the County Government of Bomet under permanent and pensionable terms.
 - c. A declaration that the notice letter dated the 30th September, 2022 was issued without following due process.



- d. A declaration that a notice letter dated the 30th of September, 2022 is flawed, manifestly unreasonable and violates the petitioner's rights inter alia their right to fair administrative action, fair hearing and therefore null and void ab initio.
 - e. A declaration that the 3rd respondent has abdicated its responsibility of oversight against the 1st respondent.
 - f. That this honourable court do issue an order of injunction restraining the respondents either by themselves, employees, servants or agents from terminating the employment of the petitioner as the said termination is unlawful as it interfered with their rights under the Constitution of Kenya, 2010.
 - g. That the respondents be restrained and prohibited from employing, replacement labour or employees in the same positions to perform the same or similar work as the Petitioner.
 - h. That the honourable court be pleased to declare that the respondents violated the petitioner's rights to fair labour practices namely reasonable working conditions including permanent terms and conditions of service as protected under Article 41(1) of the Constitution and the provisions of the Employment Act, 2007.
 - i. A declaration that the respondents have violated the petitioner's rights to human dignity under Articles 28 of the Constitution and the right not to be subjected to any form of violence or be treated in a cruel, inhuman or degrading manner under article 29(c) and (f) of the Constitution.
 - j. A declaration that the respondents have violated the petitioner's rights to equal benefit of law under Article 27 of the Constitution, right to a fair administrative action under Article 47 of the Constitution, right to a fair hearing under Article 50 of the Constitution and the right to access justice under Article 48 of the Constitution.
 - k. An order for judicial review to quash any decision and determination of the Respondents in issuing the said notice letter dated the 30th of September, 2022.
 - l. An award of general damages for pain and suffering, humiliation and distress visited upon the petitioner and for violation of her rights.
 - m. That this Honourable court be pleased to grant any other orders and/or relief befitting the circumstances.
 - n. Costs of this petition
 - o. Any other or further relief that this Honourable Court considers appropriate and just to grant.
2. The petition is expressed to be anchored on Articles 21, 22, 23(3), 27, 28, 35, 41, 47, 48, and 50(2) of the Constitution.
 3. The petition is accompanied with a supporting affidavit sworn by the Petitioner on even date with several annexures thereto.
 4. The facts and the law relied upon are set out in the body of the petition.
 5. Alongside the petition was filed a notice of motion of even date wherein the petitioner prayed as follows
–
 1. That this Application be certified urgent, service thereof be dispensed with and the same be heard ex-parte in the first instance.



2. That this Honourable Court be pleased to grant an order of stay of the notice letter dated 30th September, 2022 issued by the 2nd Respondent pending the hearing and determination of this application.
 3. That pending the hearing and determination of the application, the Court issues an injunction prohibiting/restraining the Respondents either by themselves, employees, servants and or agents from terminating the Applicant from her employment.
 4. That this honourable Court be pleased to grant an order of stay of the notice letter dated 30th September, 2022 issued by the 2nd Respondent pending the hearing and determination of the petition.
 5. That pending the hearing and determination of the petition, the Court issues an injunction prohibiting/restraining the Respondents either by themselves, employees, servants and or agents from terminating the Applicant from her employment.
 6. That this Honourable court be pleased to grant any other orders and/or relief befitting the circumstances.
 7. That the costs of this Application be provided for.
6. Subsequently, the above application was compromised in favour of hearing of the petition but conservatory orders were granted in terms of prayer 4 staying enforcement of the notice of termination dated 30th September, 2022, pending the hearing and determination of the petition.
 7. Upon service the 1st, 2nd, and 5th respondents entered appearance through Andrew N. Matwere Advocate on 7th November, 2022 and on 10th November, 2022 filed grounds of opposition, notice of preliminary objection, and a replying affidavit sworn by Simon Langat with several annexures thereto.
 8. On its part the 3rd respondent appeared in “person” and responded to the petition by way of a replying affidavit sworn by Peter Kiprono Bii, the chief executive officer, on 26th January, 2023 with one annexure thereto.
 9. The 4th respondent appointed Haron K. Ng’eno Advocate to act for it and responded to the petition by way of a replying affidavit sworn by Cosmas Kipng’etich Korir, the speaker, on 7th February, 2023.
 10. When the petition came up in court for directions on 23rd January, 2023 it was by consent directed that the application be compromised in favour of hearing of the petition but with a conservatory order that the notice of termination to the petitioner dated 30th September, 2022 shall not take effect pending the hearing and determination of the petition, hence maintaining the status quo ante. Further, it was agreed that the petition be canvassed by way of the evidence in the affidavits and written submissions by respective counsel.
 11. Thereafter, counsel for the petitioner and counsel for all the respondents filed their respective written submissions.

II. The Petitioner’s Case

12. The petitioner’s case is based on the filed petition, the supporting affidavit and the annexures thereto, and the written submissions by her counsel and the same is summarized as hereunder.



13. The petitioner was engaged by the 1st respondent as a clerical officer – administration vide a letter of appointment dated 27th October, 2015 for a period of two years with effect from 1st October, 2015. For ease of reference the said letter is in the following wording –

Telephone: 0733225229 P.O. BOX 19-20400

Fax: Bomet, Kenya

Email: info@bometcounty CGB/GN/2/2

Ms. Margaret Chebet 27th October, 2015

ID No.27678221

Dear Margaret

RE: Appointment Of Contract Terms: Clerical Officer

I am pleased to convey the decision of the County Government that you be offered a contract appointment as a Clerical Officer J/G 'E' for a period of two(2) years contract with effect from 1st October, 2015, renewable for another period as may be determined by the County Government.

The salary attached to this scale is Ksh.11,370 x 540 -11,910 x 600 – 12,510 x 630 – 13,140 p.m. Your entry point to the scale is Kshs.11,370p.m. You will be entitled to the following allowances:

1. House allowance - Kshs.3,500 per month
2. Commuter allowance - Kshs.3,000 per month
3. Leave allowance - Kshs.3,000 per month

You will also be entitled to annual leave (30) days per year which you are expected to utilise by 30th June of every year.

Medical Cover: As per the County Government approved medical scheme.

This appointment may be terminated by either party giving one(1) months' notice in writing or on payment of one(1) month's basic wage in lieu of notice.

If you accept this offer with terms and condition stipulated herein, please sign the duplicate copy of this letter to signify our acceptance, then retain the original and return the duplicate copy to the undersigned.

You should report to the undersigned with immediate effect for allocation of duties.

I take this opportunity to congratulate you in this well-deserved appointment.

Yours'

Signed

Emilly Mosonik Sawe

Assistant Director, Human Resources

For: County Secretary/and

Head of Public Service



I Margaret Chebet Signed acknowledge and agree to the terms herein. I will report for duty on 1st October, 2015.

Witnessed by:

Human Resource Officer

Name: Lily Koskei Signed Date: 27.10.2015

14. It is the petitioner's evidence that she continued to work for the next seven years uninterrupted and that a report by the 4th respondent dated 18th October, 2021 recommended that she be confirmed on permanent and pensionable terms. She has annexed the said report as an exhibit.
15. However, in what the petitioner considers to be a strange and utterly shocking twist she was served with a notice dated 30th September, 2022 which purported to terminate her employment. For easy of reference the said notice is reproduced –

Our Ref: 03603828 30th September, 2022

Chebet Margaret

276782221

Thro'

Chief Officer

RE: One Month In Lieu Of Notice

Following the reorganization and restructuring of government structure and functions, you are hereby issued with one-month notice of service with effect from 1st October, 2022. Subsequently, the positions will be advertised and you are encouraged to apply for the post once advertised.

Signed

Simon Langat

Ag. County Secretary and

Head of Country Public Service

Copy to: Ag. Director Human Resource

File Number: 03603828

16. It is the petitioner's position that after serving for a period of over seven years, with or without confirmation, she acquired permanent and pensionable status and urges that she can only be terminated in accordance with the law and not by way of a notice such as the 1st respondent purported to do vide the notice alluded to above.
17. The 2nd, 3rd, 4th, and 5th respondents are accused of being indolent, abdicating their duties and roles, and looking the other way as the 1st respondent blatantly violated petitioner's various constitutional and statutory rights.
18. The petitioner urged that as at the time of filing the petition she was eight and a half months pregnant and that she was being discriminated on that account.



19. It is on the basis of the foregoing that the petitioner has prayed that this court finds in her favour as pleaded in the petition. The submissions by her counsel shall be considered alongside those by counsel for the respondents in the succeeding parts of this judgment.

III. The 1st, 2nd, & 5th Respondents' Case

20. The case for the 1st, 2nd, and 5th respondents is entailed in the replying affidavit of Simon Langat, the acting county secretary, sworn on 8th November, 2022, and the written submissions by their counsel.
21. The deponent alleges that the petitioner was at the time of filing this petition on a three months contract vide a letter dated 30th September, 2022. However, no documents are annexed to authenticate that assertion. It is alleged that the petitioner was always on contract and that at no time was her appointment confirmed to permanent and pensionable terms. It is deposed that the employment relationship created in the letter of 22nd October, 2015 was for a period of two years and the same could be terminated by either party by way of a notice of one month or one month's pay in lieu of notice.
22. It is stated by the deponent that the petition is premature and in violation of the doctrine of exhaustion as the petitioner is alleged not to have exhausted the procedure provided for under Sections 72, 75, 77 of the County Government Act and Section 87 of the *Public Service Commission Act*.
23. However, it is illustrative that no explanation has been offered as to how and under what circumstances the petitioner has continued or remained in the employ of the 1st respondent for over seven years after the expiry of the initial two-year contract created vide the letter dated 22nd October, 2015.
24. It is on the basis of the foregoing that the 1st, 2nd, and 5th respondents are asking this court to dismiss the petition. The submissions by their counsel shall be considered alongside those by the counsel for the Petitioner in the succeeding parts of this judgment.

IV. The 3rd Respondent's Case

25. In the replying affidavit of Peter Kiprono Bii, the chief executive officer, the 3rd respondent alleges that the petitioner was recruited and appointed by persons who had neither the authority nor the legal mandate to do so in the executive arm of the 1st respondent and as such it is alleged that the employment of the petitioner is null and void.
26. It is alleged that the petitioner is one of those employees whose contracts of employment were declared null and void by the court in Kericho ELRC Petition No. 8 of 2016 – Johnstone Chebusit & Another V The Governor Bomet County & 4 Others (Marete J.). However, upon perusing the said judgment the court notes that the court did not declare as alleged.
27. It is deposed that through this petition the petitioner is asking the court to sanction and enforce an illegality as there is no valid contract of employment capable of creating, or being construed as, employer/employee relationship.
28. It is further deposed that the 3rd respondent is wrongly joined in this petition as there is allegedly no cause of action against it and for all the foregoing the court is urged to dismiss the petition.

V. The 4th Respondent's Case

29. In the replying affidavit of Cosmas Kipng'etich Korir, the speaker, the 4th respondent contends that no cause of action has been disclosed against it. It is also stated that by issuing the report dated August,



2021 and the recommendations therein the 4th respondent has demonstrated that it has taken its oversight role seriously and acted as expected.

30. For the foregoing, the court is urged to dismiss the petition which is alleged to have been overtaken by events.

VI. Submissions By Counsel

31. On the one hand, counsel for the petitioner, Mr. Mugumya, summarized the pleadings and the background to the petition in a similar manner as that outlined in the foregoing parts of this judgment.
32. It is submitted that upon filing of the petition the 1st respondent purported to extend the notice of 30th September, 2022 to three months in place of the initial one month. However, it is submitted that upon the notice of 30th September, 2022, which is termed unfair, unlawful, and unconstitutional, the petitioner became apprehensive that the 1st respondent had hatched a plan to terminate her unlawfully and un-procedurally and as such she approached this court through this petition to avert the intended illegal and unconstitutional actions.
33. It is submitted that the other respondents were joined in the petition in their various capacities for failure to advise, stop, nullify, avert, and or take any other action to alleviate the imminent illegal and unconstitutional actions of the 1st respondent.
34. It is submitted that the prolonged employment of the petitioner beyond the original contract of two years confirmed the petitioner to permanent and pensionable status but instead of the 1st respondent formally confirming her as such it has allegedly engaged in unconstitutional and illegal maneuverings in purporting to terminate her through a unilateral notice that is completely unlawful.
35. Counsel for the petitioner identified the following seven issues for determination by the court –
1. Whether the Petitioner is an employee of the County Government of Bomet under permanent and pensionable terms.
 2. Whether the respondents violated the petitioner's right to fair labour practices, right to dignity and right to equal benefit of the law?
 3. Whether an order of judicial review should issue quashing the decision of the respondents to issue the said letter dated 30th September, 2022?
 4. Whether an order of injunction should issue restraining the respondents from terminating the petitioner's employment and or employing replacement labour.
 5. Whether the 3rd respondent abdicated its responsibility of oversight?
 6. Whether the petitioner is entitled to general damages for violations of rights and pain, suffering and humiliation?
 7. Who should bear the costs of the petition?
36. In regard to issue 1 it is submitted that by operation of the law, and more so Section 37 of the *Employment Act* (the Act), the employment of the petitioner ought to be construed as permanent and pensionable considering the unhindered long service of over seven years, and noticeably that she was allowed to continue working after the initial contract of two years expired. Counsel has cited various decisions in support of this argument including *Rashid Odhiambo Allogoh & 245 Others V*



- Haco Industries Limited (2015) eKLR, Kenyatta University V Esther Njeri Maina (2022) eKLR, and Nanyuki Water & Sewerage Company Limited V Benson Mwiti Ntiritu & 4 Others (2018) eKLR.
37. On issue 2 it is submitted that by issuing the unilateral and unlawful notice and purporting to terminate the petitioner as alluded to above the 1st respondent is in violation of the petitioner's right to fair labour practices under Article 41(2) of *the Constitution*. Again, counsel has cited the above decided cases in support of this submission. It is also alleged that the petitioner's right to dignity was violated under Article 28 of *the Constitution* as the purported termination was based on the fact that the petitioner was eight and a half months pregnant.
38. On issue 3 it is submitted that Article 23(3) of *the Constitution* empowers this court to issue an order of judicial review to stop and or quash violation of constitutional rights. It is submitted that the conduct of the 1st respondent in issuing the notice of termination was illegal, irrational, and un-procedural and hence in violation of basic tenets of natural justice. Counsel has cited Pastoli V Kabale District Local Government Council & Others (2008) 2 EA 300 and Republic V Kenya National Commission on Human Rights ex-parte Uhuru Muigai Kenyatta (2010) eKLR among other decisions in support of this argument.
39. On issue 4 it is submitted that this is a suitable case for issuance of a permanent injunction restraining the 1st respondent from terminating the petitioner without due process of the law. The case of Kenya Aviation Workers Union V Kenya Airports Authority & Another – Nairobi ELRC No. 88 of 2017 is cited in support of that proposition.
40. In regard to issue 5 it is submitted that the 3rd respondent has abdicated in its duty and responsibility of overseeing the 1st respondent in accordance with Articles 176 & 185 of *the Constitution* as read together with Section 8(1) of the *County Governments Act*. It is further submitted that a recommendation by the 3rd respondent to the 1st respondent in August, 2021, that all long-serving contractual employees be converted to permanent and pension terms has not been acted upon yet the 3rd respondent is sitting pretty without taking any action.
41. In regard to issue 6 it is submitted that this court has jurisdiction to award damages in compensation for violation of constitutional rights in accordance with Article 23 of *the Constitution*. Further, counsel has cited Nanyuki Water & Sewerage Company Limited V Benson Mwiti Ntiritu & 4 Others (2018) eKLR in support of that proposition.
42. In regard to prayer 7 it is submitted that it is the unlawful and un-procedural actions of the 1st respondent that triggered the filing of this petition coupled with the unmitigated inertia on the part of the other respondents. It is therefore submitted that the respondent should be ordered to meet the costs of this petition. The case of Nanyuki Water & Sewerage Company Limited (Supra) is again cited in support of this issue and prayer.
43. On the other hand, counsel for the 1st, 2nd, and 5th respondents, after summarizing what he considers to be the facts and circumstances leading to this petition, has identified the following issues for determination –
- i. What is the nature of the employment relationship between the Petitioner and the 1st respondent?
 - ii. Whether the 1st, 2nd and 5th respondents breached any of the petitioner's constitutional rights?
 - iii. Whether the petitioner is entitled to the remedies sought.
 - iv. Who is to pay the costs of this suit?



44. It is submitted that the petitioner was engaged on an initial two-year contract as per the letter dated 30th September, 2015 and as such there no longer exists (sic) employer/employee relationship between her and the 1st respondent. It is submitted that the petitioner has not availed any evidence to prove that she is now engaged on permanent and pensionable terms.
45. It is further submitted that by issuing the petitioner with one month's notice the 1st respondent allegedly complied with the law as that was the procedure of termination provided for in the letter of appointment dated 30th September, 2015. It is submitted that this notice allegedly complied with Sections 10(3)(b), 35(1)(c), 44(2), and 45 of the Act.
46. In regard to the remedies sought it is submitted that the issues raised in the petition are ordinary and should have been ventilated by way of an ordinary cause. It is submitted that the alleged breach, violation, and or threat to the constitutional rights of the petitioner have not been proved to the required standard set out in *Anarita Karimi Njeru V Republic* (1979) and the criteria set out in Article 23(3) of *the Constitution*.
47. The court is dissuaded from writing a new contract of employment between the petitioner and the 1st respondent as that shall interfere with the freedom of contracting between the parties. Counsel has cited *Josphat Njuguna V Highrise Self-Help Group* (2014) eKLR in support of his arguments in this regard.
48. In case the court finds that any compensation is awardable to the petitioner, the court is urged to restrict itself to those provided for under Section 49 of the Act. Basing his submission on *Geila V Cassman Brown* (1973) EA 358 as affirmed in many a decision including *Nguruman Limited V Jan Bonde Nielsen & 2 Others* (2014) eKLR it is submitted that the petitioner has not demonstrated that an injunction may issue as prayed for.
49. On his part, counsel for the 3rd respondent has urged that it is the sole body mandated to advertise and recruit on behalf of the 1st respondent yet it never engaged the petitioner as an employee of the 1st respondent and that if she was at all engaged and or employed then it was allegedly done in unlawful manner and hence it is null and void.
50. Counsel identified two issues for determination –
 - i. Whether the petitioner was procedurally employed and who has the mandate thereof.
 - ii. Whether the petitioner is entitled to the remedies sought.
51. It is submitted that under Sections 59 & 86 of the *County Governments Act* it is only the 3rd respondent or its specifically authorized delegate who have authority to advertise and recruit for the 1st respondent and that since the petitioner did not go through such competitive due process her engagement is termed null and void. The court is urged not to enforce an illegal contract and to desist from issuing any of the orders/awards prayed for.
52. It is submitted that it was upon the petitioner to prove that she was indeed lawfully engaged as alleged in line with Sections 107, 108, & 109 of the *Evidence Act*.
53. In regard to claim for breach, threat, or violation of constitutional rights, it is submitted that the petition falls short of the principles set out in *Anarita Karimi Njeru* (Supra).
54. All the respondents are therefore opposed to the petition and pray that the same be dismissed with costs. There are no submissions filed on record for the 4th respondent.



VII. Issues For Determination

55. I have read and understood the various positions taken and postulated by the parties in this petition. From the foregoing summary of the pleadings filed, the evidence placed before the court, and the submissions by respective counsel for the parties, the following issues commend themselves to the court for determination –
- i. Is this petition properly before the court?
 - ii. What is the nature of the employment relationship between the petitioner and the 1st respondent?
 - iii. Is the petitioner deserving of the reliefs prayed for?
 - iv. Costs

VIII. Constitutional Petition Or Ordinary Cause?

56. The respondents have argued that the petition is bad in law and misconceived on two counts. Firstly, that the issues raised in the petition ought to be addressed by way of an ordinary cause as those issues allegedly raise no constitutional issues and, secondly, that the petitioner did not exhaust the mechanism provided for in law before filing this petition in court. The court is thus urged to exercise constitutional avoidance and dismiss this petition. In the same breath the petitioner is accused of violating the doctrine of exhaustion and hence is undeserving of the reliefs sought.
57. This petition was triggered by a notice issued by the 1st respondent on 30th September, 2022 purporting to terminate the employment of the petitioner by the 1st October, 2022. It is on record that the said notice was modified to a period of three months and hence the new notice was to take effect from 1st January, 2023. However, as stated in the introductory part of this judgment the notice was stayed by the court pending the hearing and determination of this petition. That, as far as the court can ascertain, is the status quo obtaining.
58. The nature and substance of a cause is deciphered from the pleadings and the reliefs sought. While the petitioner may have opted to file an ordinary cause seeking to declare the said notice unfair and unlawful, she indeed also had the option of filing a constitutional petition, as she did, seeking various reliefs including remedies for violation, threat, or breach of her constitutional rights. It is clear from the remedies sought that the petitioner is seeking various constitutional remedies. That the petitioner opted to file a constitutional petition as opposed to an ordinary cause is understandable based on the reliefs sought.
59. It is not uncommon nowadays for litigants to bring to court what should be an ordinary employment cause by way of a constitutional petition. This tendency is wrong and may amount to abuse of court process. My observation is that most of such underserving petitions are intended to overmagnify the issues and probably enjoy expeditious disposal of the petition.
60. However, a court of law shall be careful and slow in striking out or dismissing such petitions, as misguided as they may seem, as the court should subject the petition to the laid down tests to establish the veracity of the same. In constitutional petitions the test is that set in *Anarita Karimi Njeru (Supra) V Republic (No. 1) (1979) KLR 154* and *Mumo Matemu V Trusted Society of Human Rights Alliance (2014) eKLR* among other decisions.
61. In this petition, the court observes that the petitioner has alleged various violations of her constitutional rights upon which the reliefs sought are based. It is on this basis that the court shall



- consider this petition, considering the substance rather than the form. The petitioner has alleged various violations of her constitutional rights and is seeking various constitutional remedies and is only fair and just that the petition be considered on merit.
62. On the doctrine of exhaustion, the respondents have taken the view that the petitioner ought to have filed the dispute with the PSC before filing the matter in court. The remedies that the petitioner is seeking are reproduced verbatim in the introductory part of this judgment. These are not remedies that the PSC can issue under the Public Service Act. This petition is not only about the unfair and unlawful notice purporting to terminate her employment, but the petitioner is seeking various remedies based on constitutional violations.
 63. Moreover, the current jurisprudence is to the effect that where the out of court dispute resolution mechanism as provided for in the law is unlikely to yield and adequately remedy the situation, and hence it is likely to delay or result in injustice, a party should access a court of law for an appropriate remedy. In a recent decision - *Abidha Nicholus V The Attorney General & Others – Petition No. E007 of 2023* - the Supreme Court held, inter alia, that – “where there is an alternative remedy, especially where Parliament has provided a statutory appeal procedure, then it is only in exceptional circumstances that the court can resort to any other process known to law” [emphasis added].
 64. In the above decision that concerned a matter arising from the Environment and Land court (ELC) the Supreme Court delineated the jurisdiction of that court and held that the jurisdiction of a court of law is not ousted by the doctrine of exhaustion and more so where the remedies sought are not capable of being legally granted by the alternative or primary mechanism. Good examples of remedies that may not be granted or availed in most primary mechanisms are injunctions, prohibitory or conservatory orders, remedies against violation, breach, or threat to constitutional rights, inter alia.
 65. This court (ELRC) is created under Article 162(2)(a) of *the Constitution* and established under the *Employment and Labour Relations Court Act* (ELRC Act). The jurisdiction of the court and the remedies that it can give are provided for under Section 12 thereof. The law provides that “The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law that extends jurisdiction to the court”.
 66. My understanding of the foregoing, and that is what the Supreme Court held in the decision cited above, is that the exclusive original and appellate jurisdiction of this court in the matters specifically provided for in the law, shall not be ousted by the exhaustion clauses. To put it in some other context, nothing should stop a party from approaching the court for an injunction or a conservatory order pending exhaustion of an alternative mechanism. The bottom-line in my view is that the constitutional and statutory original and appellate jurisdiction of the court shall not be ousted by the exhaustion clauses unless such clauses are anchored in law and specifically provide for exclusion of courts from handling the same. And, such law shall be clear on what remedies the out-of-court mechanism shall provide such that where a party has no remedy in the mechanism shall not waste time and suffer prejudice or injustice while it should simply have approached the court for the clear and unambiguous remedies provided for in the law. In case of ELRC that applicable law is as cited above as read with the *Employment Act* and other applicable and express statutes.
 67. In the circumstances, it is the view of the court that this petition is properly before it and the court shall proceed to determine the same on merit.



IX. Employment

68. It is not in dispute that the petitioner was engaged by the 1st respondent vide a letter of appointment dated 27th October, 2015. The appointment was effective 1st October, 2015 for an initial contract period of two (2) years. For avoidance of doubt, the letter was signed for and on behalf of the county secretary/head of public service.
69. Contrary to the allegations made by the 3rd respondent in its response to the petition, there is no evidence that the said contract was revoked or cancelled for the alleged irregularities or illegalities. There is also no evidence of any action taken by the 3rd respondent towards investigating the alleged irregularities or illegalities in the engagement and appointment of the petitioner and the others. While the 3rd respondent is the only legally and lawfully mandated authority to recruit and appoint employees to work for the 1st respondent, it should equally take the necessary action in nullifying any recruitment or appointment made without due process. It is therefore ridiculously unfortunate and an afterthought for the 3rd respondent to expect the petitioner to prove that she was lawfully engaged by the 1st respondent in this petition yet she has been working for the last seven years without the 3rd respondent raising a finger and or taking any action to rectify the alleged anomaly.
70. The petitioner availed a duly signed letter of appointment and it is not in dispute that she has been working for the 1st respondent for a cumulative period of over the proverbial seven years. There is no evidence that the respondents, or any of them, and more so the 3rd respondent, ever challenged the engagement and or the letter of appointment.
71. Moreover, the petitioner has continuously worked for the 1st respondent from the date of appointment, commencing 1st October, 2015, to this very day. It therefore came as a surprise to the petitioner when she received a notice dated 30th September, 2022 purporting to terminate her employment in 30 days. The said notice, ironically, is signed for an on behalf of the county secretary/head of county public service.
72. What appears to be the case, and that is the evidence before the court, is that after the expiry of the initial two year contract the petitioner continued to work for the 1st respondent without any hinderance or interruption. It is that continued employment and engagement that the court is now requested to interrupt and give a name to it in determining issue 2.
73. In recognition of the above issue, an ad hoc committee of the 4th respondent prepared a report dated August, 2021 whereby in Pg. 41 it was recommended that those employees who had “overstayed” their contracts and were below 45 years of age be engaged on permanent and pensionable basis. It is not disputed that the petitioner is in this category. It also appears that the 1st and 3rd respondent did not act on this report.
74. Now, justice is about fairness and this court’s duty and indeed obligation is to do justice to all and sundry that come before it. The law cited above allows this court to interpret contracts of employment and the terms and conditions thereof. The petitioner did her initial two years contract but then continued to serve and work for the 1st respondent in the same capacity earning her salary and wages as and when the same fell due. It is the view of the court that upon expiry of initial two-year contract the petitioner gained the status of a permanent and pensionable employee. How else and in what capacity has the 1st respondent retained and engaged the petitioner for over seven years? Even if the petitioner was to be terminated, and only in accordance with the law, she is entitled to gratuity or service pay in accordance with the law.



75. It shall be grossly unfair for the 1st and 3rd respondents, after enjoying the services of the petitioner for over seven years to wake up one morning and allege that she has to go home for having “overstayed” her contract. Section 12(3)(viii) of the ELRC Act allows this court to make such orders as it may appropriate to meet the ends of justice in any given cause or circumstances.
76. It is therefore the finding and holding of the court that the petitioner cannot be terminated in any other manner other than in accordance with the law. For that to lawfully happen, the 1st respondent shall have to comply with Sections 35, 40 (in case of redundancy), 41, 43, 44, 45, & 46 of the Act among other provisions of the law.
77. For the foregoing reasons, the court agrees with counsel for the petitioner that the one-month notice issued by the 1st respondent on 30th September, 2022 or indeed any other notice for whatever period of time, including the alleged one of three months, is null and void and it is so declared. The petitioner shall continue working for the 1st respondent on her current or last known terms unless terminated in accordance with the law. It is so held and declared.

X. Reliefs

78. Having found and held that the one-month notice, or indeed any other notice, issued by the 1st respondent on 30th September, 2022, or at any other time, purportedly terminating the employment of the petitioner is bad in law, misconceived, null and void, the court shall now deal with each of the remedies sought.
79. It is illustrative that in *Joel Kiprono Rop V County Government of Bomet & 2 Others (2020) eKLR* Nduma J advised the 1st respondent to confirm those employees already on contract before recruiting others. This advice does not appear to have been heeded to and no wonder a similar issue is recurring in this petition whereby the 1st respondent purports to terminate the petitioner who has worked for it for over seven years to recruit a new person to perform the same work, as ridiculous and ludicrous as that sounds.
80. The court is pushed to comment that this petition brings to the fore the sorry state of public service in many a county government. It seems that there is a misconceived and misguided notion that each administration that comes to power comes with its own new public service and that all employees who served in the previous administration should be sent home by all means. This thinking and approach is not only dangerous but retrogressive as well. One can only imagine what would happen if a similar mind-set was to apply at the national government. Public or civil service is what keeps (and should keep) a county or the country going in delivery of public service and goods even during political turmoil. During electioneering period, for example, it is the public service that keeps the country going. This philosophy and practice should obtain both at national and county levels of governance. It is in the interest of all and sundry that public service be strengthened, affirmed, and stabilized at all levels of governance to bolster delivery of public goods and services for development. The respondents need to fully understand and appreciate this reality if the 1st respondent is to move its citizenry to the next level of development and civilization.
81. For avoidance of doubt, the court issued conservatory orders that the petitioner remains in employment of the 1st respondent pending the hearing and determination of the petition. As far as this court is concerned that is the obtaining status and the court shall proceed to evaluate the remedies sought on that basis. Any other status, other than the afore-stated is null and void. This answers prayer (a).



82. Prayer (b) is for a declaration that the petitioner is an employee of the 1st respondent on permanent and pensionable basis. The court has found as much in a foregoing part of this judgment and it is so restated and declared.
83. Prayer (c) is for a declaration that the notice dated 30th September, 2022 was issued without due process. Prayer (d) is for a declaration that the said notice is null and void as it abuses the rights of the petitioner to fair administrative action and fair hearing. The court agrees with the petitioner and her counsel that the said notice was issued in total abuse of due process and the same is null and void ab initio and it is hereby so held and declared.
84. Prayer (e) is for the court to make a declaration that the 3rd respondent has abdicated its responsibility of oversight against the 1st respondent. The duties and obligations of the 3rd respondent are spelt out under the various statutes governing the operations and governance of the county governments. Likewise, the role of the 4th respondent is spelt out in the said laws. Other than lamenting about alleged unlawful hiring of employees the 3rd respondent ought to take an active role in ensuring that laws and procedures are followed in recruitment and appointment of all employees. The 4th respondent, mutatis mutandis, ought to oversight the 1st respondent in ensuring the laws and procedures applicable are heeded to the letter and spirit. However, since the prayer is in general terms and without specifics the court shall desist from making that general declaration which will otherwise amount to general condemnation. But that said, the 3rd and 4th respondents ought to take all possible steps, including litigation in court, in ensuring that the 1st respondent complies with the law at all times.
85. Prayer (f) has been dealt with exhaustively in the foregoing paragraphs and the court hereby issues the injunction sought restraining the respondents from terminating the petitioner other than in accordance with the law and or engaging employees to do the same or similar work as currently allocated and performed by the petitioner. This order answers prayer (g) as well.
86. In regard to prayer (h) the court finds that by issuing the above notice the 1st respondent threatened the right of the petitioner to fair labour practices. However, the court came to the aid of the petitioner and granted her a conservatory order which remains in force and as such the said offending notice did not take effect although it clearly breached and threatened the petitioner's right to fair labour practices.
87. In regard to prayer (i) there is no evidence and or proof that the petitioner was subjected to any violence or treated in cruel, inhuman, or degrading manner and as such this prayer is misplaced and denied.
88. In regard to prayer (j) it is true and correct that in purporting to terminate the petitioner through the said unlawful notice the 1st respondent denied the petitioner the benefit of the law, fair administrative action, fair hearing, and access to justice under Articles 27, 47, 48, and 50 of *the Constitution*.
89. In regard to prayer (k) and for all the reasons cited above the court hereby issues an order of certiorari quashing the 1st respondent's decision to issue the notice of 30th September, 2022 alongside the said notice itself.
90. In regard to compensation the court finds and holds that by ordering that the petitioner remains in employment on permanent and pensionable terms, and that she can only be terminated in accordance with the law, the petitioner is well and fairly compensated as what she stood to lose was her monthly remuneration and wages. If for whatever reasons her salary is in arrears the same shall be paid in full and up to date within 30 days of the date hereof. In my considered view the orders and declarations issued herein above are adequate compensation in the circumstances.



XI. Costs

91. Costs follow event and the petitioner is awarded costs of the petition as against the 1st respondent who triggered this litigation by issuance of the notice that has been held and declared null and void.

XII. Orders

92. Flowing from the foregoing and in disposal of this petition this court issues the following orders –
- i. A declaration be and is hereby issued that the petitioner is an employee of the 1st respondent on permanent and pensionable terms.
 - ii. A declaration be and is hereby issued that the notice dated 30th September, 2022 is unlawful and antithesis to due process hence null and void.
 - iii. A permanent injunction be and is hereby issued restraining the 1st respondent, its agents, servants, and or others howsoever from acting on the said notice or any other notice unless and until such notice is in strict compliance with the law.
 - iv. A declaration be and is hereby made that in issuing and serving the said notice upon the petitioner purporting to terminate her employment the 1st respondent was in violation of the rights of the petitioner as enshrined in Articles 27, 41, 47, and 48 of *the Constitution*.
 - v. An order for judicial review of certiorari be and is hereby issued quashing the decision by the 1st respondent to issue the said notice and the notice itself.
 - vi. The 1st respondent be and is hereby condemned to meet the costs of this petition.
 - vii. All the other prayers are denied.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 1ST DAY OF FEBRUARY, 2024.

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HON. DAVID NDERITU

JUDGE

