



**Maina v County Government of Nakuru (Cause E034 of 2023)  
[2024] KEELRC 503 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 503 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE E034 OF 2023  
DN NDERITU, J  
MARCH 7, 2024**

**BETWEEN**

**SAMUEL MWANGI MAINA ..... CLAIMANT**

**AND**

**COUNTY GOVERNMENT OF NAKURU ..... RESPONDENT**

**RULING**

**I. Introduction**

1. In a memorandum of claim dated 24<sup>th</sup> July, 2023, through Edwin Omulama & Associates, Advocates, received in court on 26<sup>th</sup> July, 2023, the claimant is seeking the following reliefs against the respondent –
  - a. Declaration that the stoppage of salary and eventual constructive dismissal of the claimant for the subject 23-month duration was null and void ab initio;
  - b. Declaration that the stoppage of salary and eventual constructive dismissal of the claimant for the subject 23-month duration as unlawful and in breach of his contract of employment;
  - c. Compensation for unlawful and wrongful constructive dismissal from office as a Senior Public Health Officer with the Respondent amounting to a maximum of twelve months wages:  
 $\text{Kshs.}123,620 \times 12 \text{ months} = \text{Kshs.}1,483,440/=$   
Grand Total: $\text{Kshs.}1,483,440/=$
  - d. Withheld Remuneration:
    - i. Basic Salary of  $\text{Kshs.}59,120/=$
    - ii. House allowance of  $\text{Kshs.}16,500/=$
    - iii. Commuter Allowance of  $\text{Kshs.}6,000/=$



- iv. Health Risk Allowance of Ksh.2,000/=
- v. Health Workers Extraneous Allowance of Kshs.20,000/=
- vi. Health Service Allowance of Kshs.20,000/=

Gross Pay Kshs.123,620/= per month.

Multiplied by the 23 months over which duration the Claimant's salary was withheld without reason or justification (as from 1<sup>st</sup> January,2021 to 22<sup>nd</sup> November, 2022) the outstanding Gross Pay becomes Kshs.2,843,260/=.

Grand Total: Kshs.2,843,260/=

- e. Kshs.231,224/- being the total costs, penalties and interest imposed by Equity Bank Kenya Limited on the Claimant for defaulting on loan repayments as a direct result of stoppage of salary by the Respondent (That is Kshs.1,153,3326/= at time of reinstatement less Kshs.922,102/= at time of stoppage of salary).
  - f. Kshs.873,499/= being the total costs, penalties and interest by Kenya Commercial Bank Limited (KCB) and Debt Collection charges by KCB's lawyers imposed on the claimant for defaulting on loan repayments as a direct result of stoppage of salary by the Respondent (That is Kshs.3,225,769/= current balance on loan less Kshs.2,898,056/= balance when the last payment was credited by the claimant on 05/022/2021 before stoppage of salary plus Kshs.545,786/= being Debt collection Charges demanded by KCB's Advocates).
  - g. Reinstatement of full medical over as a civil servant with the National Hospital Insurance Fund (NHIF) backdated to 30/06/2021 when the Respondent caused it to be withdrawn.
  - h. Interest on (c) and (d) above as from the date of filing this claim.
  - i. Costs of this cause.
  - j. Any further relief that this Honourable Court May deem just.
2. On 18<sup>th</sup> August, 2023, the respondent filed a response to the claim through the County Attorney, denying liability for the claim and the reliefs sought. Contemporaneously, the respondent raised and notified of a preliminary objection based on alleged lack of jurisdiction of the court to hear and determine this cause.
3. Therefore, alongside the response, the respondent filed a notice of preliminary objection (PO) dated 17<sup>th</sup> August, 2023 raising the following grounds –
- 1. That this honourable courts lacks the jurisdiction to determine this suit and shall at first instance raise a Preliminary Objection, notice of which is hereby given to have the suit struck out for violating the express provisions of Section 77 of the County Governments Act 2012 and Sections 87(2) of the Public Service Commission Act 2017.
  - 2. That the claim is bad in for failure to exhaust all dispute resolution mechanisms by way of preferring an appeal/application for review contrary to part 5.0 of the Discipline Manual for the Public Service 2016.
4. In response to the PO the claimant filed grounds of opposition and an affidavit, sworn by the claimant in support of those grounds, on 23<sup>rd</sup> August, 2023.



5. On 25<sup>th</sup> October, 2023 the court directed that the PO be disposed of first by way of written submissions. Mr. Kihoro for the respondent filed his submissions on 27<sup>th</sup> November, 2023 while Mr. Omulama for the claimant filed his submissions on 27<sup>th</sup> October, 2023.

## II. Pleadings

6. On the one hand, the claimant pleads that he is and has been an employee of the respondent as a senior public health officer since 2013, and that at the material time his monthly gross salary was Kshs.123,620/=.
7. The gist of the claimant's cause is that the respondent, his employer, unjustly and unlawfully stopped, withheld, and or suspended payment of his monthly salary for the period from January, 2021 to November, 2022. It is alleged that as a result of the withholding of his salary the claimant suffered detrimental consequences as can be deciphered from the reliefs sought, beyond the unpaid salary.
8. On the other hand, the respondent alleges that the claimant, unlawfully and without leave, absented and or absconded himself from work for a prolonged period of time and upon investigating the absenteeism it was gathered that the claimant was facing matrimonial and family challenges which kept him out of work for the prolonged period of time. The respondent pleads that it is only by November, 2022 that the claimant was assessed ready to resume duty and his salary reinstated.
9. The respondent is of the view that the issue of the stoppage and or withholding of the claimant's salary is one of those that should be referred or appealed to the Public Service Commission (PSC) for resolution and as such the claim as filed in court is premature and the court lacks jurisdiction to hear and determine the matter in the first instance. It is on this basis that the respondent filed the PO.
10. On the other hand, the claimant filed grounds of opposition to the PO and a replying affidavit in which it is stated that the PO does not meet the threshold set in numerous authorities including *Kenya Breweries Limited & Another v Keroche Breweries Limited* (2020) eKLR.
11. Further, the grounds of opposition state that Articles 162(2)(a), 165(5) & (6), and 22(1) of *the Constitution*, section 12 of the *Employment and Labour Relations Court* vest unlimited original jurisdiction in matters employment and labour relations which supersede the doctrine of exhaustion upon which the PO is premised.
12. It is stated that the PSC has no jurisdiction over the issues raised as contemplated under section 77 of the *County Governments Act*. Further, it is stated that this cause is within the exception to the doctrine of exhaustion in view of the provisions of section 9 of the *Fair Administrative Action Act*.
13. The foregoing position is reiterated in the affidavit in opposition to the PO with several decisions attached thereto besides *Kenya Breweries & Another v Keroche Breweries Limited* (*supra*), including *Ndoli Hynes & 4 Others v Vihiga County Government* (2022) eKLR and *Abdikadir Suleiman v County Government of Isiolo & Another* (2015) eKLR.

## III. Submissions By Counsel

14. Counsel for the respondent submitted that the claimant is in violation of the doctrine of exhaustion for bypassing and ignoring section 77 of the *County Governments Act* and section 87(2) of the *Public Service Commission Act*.
15. It is on the basis of the above statutory provisions that the respondent's counsel insists that this court has no jurisdiction to entertain this cause. Counsel has cited various authorities in support of that



position including *Hussein Wanyama Mulebo & Others v County Public Service Board of Bungoma & Others* (2022) eKLR and *Sofia Mbone Amadi & Others v County Government of Vihiga* (2021) eKLR.

16. Counsel for the claimant in his submission reiterated the forestated contents of the grounds and affidavit in opposition to the PO as alluded to in an earlier part of this ruling. It is submitted that the facts in this cause are not uncontested and or admitted by either party and as such the matter cannot be resolved by way of a PO without the court having the opportunity of hearing the parties and weighing the evidence for and against the claim. It is submitted that the claimant has raised constitutional issues that cannot be resolved in a reference to the PSC.

#### **IV. Analysis & Determination**

17. Manifestly, the PO by the respondent is purely based on points of law cited therein and the factual basis, as demonstrated below, are not contested. It is the finding and holding of the court that the PO meets the applicable threshold – See *Mukhisa Biscuits Manufacturing Limited v West End Distributors Ltd* (1969) EA 696, *Oraro v Mbaja* (2005) eKLR and, *JN & 5 Others v Board of Management of St. George School Nairobi & Another* (2017) eKLR.
18. In the considered view of the court, considering the pleadings filed and submissions by counsel, there is only one issue for determination in the PO – Is the cause properly filed in court or is the same premature and in violation of the provisions of section 77 of the *County Government Act* and section 87 of the *Public Service Commission Act*?
19. It is not contested that the claimant is an employee of the respondent as pleaded and that his salary was stopped and or withheld for about 23 months from January, 2021 to November, 2022. Without prejudice, the court has seen uncontested evidence confirming that the claimant indeed absconded duty for the subject period allegedly for matrimonial or family issues that he was facing. Nonetheless, both parties agree that the monthly salary for the claimant was not paid for the period alluded to above.
20. It is from non-payment of the monthly salary that the claimant alleges that he was not able to service his various loans and or financial facilities as a result of which he suffered penalties and alleged financial embarrassment. In the circumstances, the court finds and holds that the success or failure of award of the reliefs sought shall depend and based on the finding on whether the stoppage or withholding of the salary was unfair, unjust, irregular, or lawful.
21. Payment of salary is a core term and condition in every contract of service. Nonpayment of the same then becomes an employment and labour issue. The question raised in the PO then is – Which is the right forum for the claimant, an employee of the respondent, county government, supposed to lawfully lodge his claim?
22. For the respondent, the right and lawful forum is the PSC under the statutory provisions cited above, while for the claimant the court is the right forum based on the statutory and constitutional provisions cited by his counsel in the submissions and in the grounds in opposition to the PO and the affidavit filed alongside the same.
23. The claimant in paragraph 9 of the memorandum of claim pleads that the stoppage and or withholding of the salary as alleged without affording him a hearing went against the Public Service Commission Discipline Manual.
24. It is admitted that the claimant was reinstated to his job and he admits in his pleadings that he failed to attend work due to matrimonial issues that he was facing leading to a divorce cause. It is not disputed that the claimant is a public servant and subject to the procedures and manuals of the PSC.



25. Section 77 of the [County Governments Act](#) provides as follows –

- “(1) Any person dissatisfied or affected by a decision made by the County Public Service “Board or a person in exercise or purported exercise of disciplinary control against any County Public Officer may appeal to the Public Service Commission (in this part referred to as the “Commission”) against the decision.”
- (2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of—
  - (a) recruitment, selection, appointment and The [County Governments Act](#), 2012 72 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](#);
    - (i) retirement and other removal from service;
    - (ii) pension benefits, gratuity and any other terminal benefits; or
    - (iii) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.
- (3) An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of the Commission, the circumstances warrant it.
- (4) The Commission shall not entertain an appeal more than once in respect to the same decision.
- (5) Any person dissatisfied or affected by a decision made by the Commission on appeal in a decision made in a disciplinary case may apply for review and the Commission may admit the application if—
  - (a) the Commission is satisfied that there appear in the application new and material facts which might have affected its earlier decision, and if adequate reasons for the non-disclosure of such facts at an earlier date are given; or
  - (b) there is an error apparent on record of either decision.
- (6) An application for review under subsection (5) shall be in writing and made within the time prescribed by the Commission in regulations governing disciplinary proceedings, but the commission may entertain an application for



review later if, in the opinion of the Commission, the circumstances warrant it.”

26. While the word may as used above appears to suggest a discretion and choice on the part of an aggrieved employee, section 87(2) of the Public Service Commission Act is couched in mandatory terms as follows –

“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 appeal from County Government Public Service unless the procedure provided for under this Part has been exhausted.”

27. This very court faced a similar situation in Nakuru ELRC Petition Nos. E016 of 2022 - Stephen Michael Oduor Ogutu v The Governor of Nakuru County & 3 Others & E017 of 2022 - Kenneth Odongo v The Nakuru County Public & 5 Others and on appeal the Court of Appeal in Nakuru in Appeal No. CA E136 of 2022 consolidated with E137 of 2022, held that any person aggrieved by the decision of a public service board of a county is subject to provisions of the above cited law and any action filed in court before exhausting the appeal process as provided for is in abuse of the doctrine of exhaustion and as such the court had no jurisdiction over such a matter. This court is bound by that decision.
28. It is therefore the finding of the court, based on the reasoning from the Court of Appeal, that the word may as applied above actually implies and means shall. The claimant in his own pleadings admits the jurisdiction of the PSC over the matter but takes the position that the constitutional and statutory provisions that give this court the original and unlimited jurisdiction to hear and determine employment and labour relations disputes shall not be ousted by the doctrine of exhaustion.
29. This court agrees with the holding of Keli J in Hussein Wanyama Mulebo (*supra*) and that of Radido J in Sofia Mbone Amadi (*supra*) and Christpinus Likuyuni Lumiti & Another v County Chief Officer, Public Service Board, Kakamega County (2021) eKLR.
30. For all the foregoing reasons, the PO succeeds and this cause shall be and is hereby struck out as prematurely and un-procedurally filed in court.
31. Subject to the law of limitation the claimant is free to pursue his claim before the PSC in accordance with the statutory provisions cited above.

#### V. Costs

32. The court notes that the claimant is still an employee of the respondent having been “reinstated” as alluded to elsewhere in this ruling. Litigation between an employee and an employer while the employment relationship subsists is naturally not healthy. It would be advisable for the parties to consider a reasonable settlement for the sake of future relationship and harmony.
33. That said, the PO has succeeded but the court orders each party to meet own costs.

#### VI. Orders

34. This cause is struck out with each party ordered to meet own costs.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 7<sup>TH</sup> DAY OF MARCH, 2024.**

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**DAVID NDERITU**



**JUDGE**

