



**Koech v County Government of Kericho & another (Petition
E004 of 2023) [2024] KEELRC 841 (KLR) (3 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 841 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
PETITION E004 OF 2023
DN NDERITU, J
APRIL 3, 2024**

BETWEEN

CYNTHIA CHERUTO KOECH PETITIONER

AND

THE COUNTY GOVERNMENT OF KERICHO 1ST RESPONDENT

KERICHO COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

RULING

I. Introduction

1. Vide a petition dated 10th July, 2023 filed through Fatah & Co Advocates the petitioner is praying for –
 1. A declaration that by their acts of commission and omission, the respondents have violated the Constitution of Kenya and in particular, Articles 10, 19, 20, 27, 28, 31, 47, 50, 232 and 244.
 2. A declaration that by their acts of commission and omission, the respondents have violated Sections 3, 4, and 5 of the Fair Administrative Actions Act.
 3. A declaration that the purported verification of academic and professional certificates by the 2nd and relied upon a basis which culminated in the petitioners' termination was irregular, illegal and therefore a nullity.
 4. A declaration that her termination from employment was unfair, unlawful and unprocedural.
 5. General damages for breach of the claimant constitutional rights.
 6. Maximum statutory compensation for the unfair, unlawful and unprocedural termination being Kshs.869,640/= being (Kshs.72.479 * 12 months).



7. Payment of the claimant's service gratuity as indicated in the employment contract being Kshs.202,191.3/=.
 8. One month's pay in lieu of notice being Kshs.72,470/=.
 9. Contract of service as per the *Employment Act*
 10. That costs for this petition be provided borne by the respondents
 11. Any other relief that the court shall deem fit and just in the circumstances.
2. The petition is supported with the affidavit of the petitioner sworn on 7th July, 2023 with several annexures thereto.
 3. Upon service the respondents, through SMS Advocates, filed the following grounds of opposition to the petition –
 1. The Petition is incompetent, bad in law, misconceived and an abuse of the court's process.
 2. The order sought in the Petition cannot be sought in then nature of a Petition.
 3. In the circumstances, the Petition is frivolous vexatious and a gross abuse of the court process.
 4. The Petition is defective in law and thus unmerited.
 5. Any other ground to be adduced at the hearing.
 4. Further, the respondents filed a notice of preliminary objection (PO) seeking to have the following preliminary issues considered and determined before the petition is heard –
 1. That this Honourable Court lacks the requisite jurisdiction to adjudicate over this dispute by virtue of the provisions of Section 77 of the *County Governments Act*, 2012 and Section 87(2) of the *Public Service Commission Act*, 2017; and
 2. That this suit should thus be struck out with costs as it is an abuse of process of court.
 5. On 30th October, 2023 the court directed that the PO be heard and disposed of first and that the same be canvassed by way of written submissions. Counsel for the respondents, Miss Tusime, filed her written submissions on 27th November, 2023 while counsel for the petitioner, Miss Jausiku, filed on 14th December, 2023.

II. Submissions By Counsel

6. Counsel for the respondents has submitted that the petition offends the clear provisions of Section 77 of the *County Governments Act* and Section 87(2) of the *Public Service Commission Act*. It is submitted that the dispute and the gist of the petitioner's grievance is that she was unlawfully and un-procedurally terminated or dismissed by the respondents. It is submitted that while the petitioner has every right to seek remedy for what she perceives to be unfair termination, the court is urged not to aid her in violation of the above clear legal provisions pointing towards lack of jurisdiction on the part of this court in the dispute.
7. It is submitted that the decision of the 2nd respondent to terminate the petitioner from the employment of the 1st respondent as communicated in a letter of 8th December, 2022 should have been challenged by way of an appeal to the Public Service Commission (PSC) in accordance with Section 77(1) of the *County Governments Act* as read together with Section 74 of the *Public Service Commission Act*.



Further, it is submitted that Article 234(2) of the Constitution donates to the PSC mandate to hear and determine appeals in respect of county governments and public service.

8. It is submitted that the petitioner is statutorily barred from filing this claim in court by Section 87(2) of the Public Service Commission Act and as such the petitioner is accused of filing the petition in total abuse and violation of the doctrine of exhaustion.
9. It is submitted that in view of the clear lack of jurisdiction this court ought to down its tools, take no more one step, and strike out the petition – See Owners of the Motor Vessel “Lilian S” V Caltex Oil (Kenya) Ltd (1989) KLR 1.
10. Counsel has urged this court to be persuaded by the decision of Keli J in Catherine Gathoni Otenyo V Governor County Government of Kakamega & 3 Others (2022) eKLR and hold that the petition is improperly before the court for lack of jurisdiction.
11. Counsel for the petitioner on the other hand has submitted that this court (ELRC) has unlimited original and appellate jurisdiction in matters employment and labour relations. Counsel has cited Section 12(1) of the Employment and Labour Relations Court Act.
12. Counsel has insisted that this court has the requisite jurisdiction to hear and determine this petition considering the constitutional issues raised in the petition which may not be granted by the PSC.
13. In any event, it is submitted that the PO does not meet the threshold set in Mukhisa Biscuits Manufacturers Ltd V West End Distributors Ltd. It is urged that the petition is bad in law and misconceived and the court is urged to dismiss the same with costs.

III. Determination

14. In my considered view, the issues raised in the petition are of breach of an employment contract resulting in an alleged unlawful termination. Those are issues that come to this court on daily basis by way of ordinary causes. However, the petitioner happens to have been an employee of the 1st respondent, a county government, and hence subject to the provisions of the Public Service Commission Act and the regulations thereunder governing employment in the public service.
15. It is not unusual nowadays for litigants to file in court all claims by way of constitutional petitions even when the subject matter concern issues of breach of an employment contract or unlawful dismissal or termination. Where a petition is filed in court under circumstances and evidence pointing towards intentionally avoiding exhaustion of pre-court alternative system of remedy, the court must be vigilant and disallow such violation or abuse of process. The law deliberately provided for such alternative mechanisms to avoid clogging of the court system with matters or issues that may be best handled by other pre-court statutory bodies or institutions.
16. In my considered view, the PO by the respondents raises pure points of law in regard to whether the petition herein violates specific provisions of the law cited above and more so Section 77 of the County Governments Act and Section 87(2) of the Public Service Commission Act. The court holds that the PO is properly raised and grounded and meets the threshold set in Mukhisa Biscuit (Supra).
17. The petitioner has not demonstrated that she has exhausted the alternative resolution mechanism provided for in the provisions of the law cited above or that that system may not ultimately yield justice and fairness – See the decision of the Supreme Court in Abidha Nicholas V AG & Others Petition No. E007 of 2023.



18. It is the finding and holding of the court that the petitioner is in abuse and violation of the doctrine of exhaustion for her failure to explore and exhaust the alternative justice mechanism as provided in the foregoing provisions of the law and adopting the court as the first port of call.
19. Accordingly, this petition is hereby struck out as the court lacks jurisdiction over the same for the foregoing reasons.
20. Each party shall meet own costs.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 3RD DAY OF APRIL, 2024.

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DAVID NDERITU

JUDGE

