



Union of Kenya Civil Servants (UKCS) v County Public Service Board, County Government of Laikipia & 2 others (Employment and Labour Relations Cause E001 of 2024) [2024] KEELRC 1285 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEELRC 1285 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E001 OF 2024
ON MAKAU, J
MAY 23, 2024**

BETWEEN

THE UNION OF KENYA CIVIL SERVANTS (UKCS) PETITIONER

AND

COUNTY PUBLIC SERVICE BOARD, COUNTY GOVERNMENT OF LAIKIPIA 1ST RESPONDENT

COUNTY SECRETARY, COUNTY GOVERNMENT OF LAIKIPIA 2ND RESPONDENT

COUNTY GOVERNMENT OF LAIKIPIA 3RD RESPONDENT

RULING

1. This ruling determines the Notice of Preliminary Objection by the 2nd and 3rd Respondents dated 20th February, 2024. The respondents pray for striking out of the Petition and the Notice of Motion dated 28th December, 2023 on the following grounds:
 - a. That this Honourable court lacks jurisdiction to entertain this premature petition and the application thereof as the members of the Petitioner ought to have first filed an appeal under the provisions of section 77 of the County Government Act, 2012 before the Public Service Commission.
 - b. That by the Petition and the Application herein, the members of the Petitioner wants to mischievously evade and bypass the available and mandatory alternative employee dispute resolution mechanisms as provided for by the following provisions of law:-
 1. Sections 85(c) and 87(2) of the Public Service Commission Act, 2017 which provides for hearing and determination of appeals in respect of County Government Public



Service by the Public Service Commission and prohibits any legal proceedings in any court of law before exhaustion of the procedure therein.

2. Regulations 10(1)(2) and (3) of the [Public Service Commission \(County Government Public Service Appeals Procedures\) Regulations 2022](#) provides for the procedure and timelines involved in an appeal before the Public Service Commission.
- c. That both the application and the petition in this matter are illegal, premature, misconceived, irregular, misplaced, incurably defective, incompetent and a blatant abuse of the court process and cannot stand the test of legitimacy and legality.
2. The 2nd and 3rd respondents' case is that this court lacks jurisdiction to entertain the suit by dint of section 77 of the [County Government Act](#) and section 85(c) and 87(2) of the [Public Service Commission Act](#). They aver that instead of approaching the court for judicial review, the Petitioner ought to have filed appeal to the PSC in line with the doctrine of exhaustion. They submitted that jurisdiction is everything and this court should down tools since it has no jurisdiction.
3. They further submit that there is a clear statutory procedure through which to seek redress for the grievances. Consequently, they submit that the suit is prematurely before the court. For emphasis, they relied on the case of [Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd](#) [1969] EA 696; [Samuel Kamau Macharia v Kenya Commercial Bank & Another](#) [2012] eKLR, and [Secretary Public Service Board & Another v Hubhai Gedi Abdile](#) [2017] eKLR.
4. The petitioner opposed the Preliminary Objection and prays for it to be dismissed with costs. It submits that the petition challenges administrative action by the County Secretary without legal mandate; that the petition seeks judicial determination of the legality of the administrative action of the County Secretary. It contends that the petition is not concerned with the merit of the decision by the County Secretary but the legality of the decision.
5. It further submits that the decision challenged by the petition is not by the County Public Service Board (CPSB) and as such the court is being urged to determine the scope of applicability of section 77 of the [County Government Act](#). It submits that the petition raises serious questions of violation of rights of the Petitioner's members and the PSC lacks jurisdiction to hear and determine the legality or otherwise of the impugned decision.
6. It also cites the [Mukisa Biscuits Case](#) to urge that the objection herein does not pass the legal muster because the facts of the case are not settled and the court requires to take evidence to dispose the matter. For emphasis reliance was placed on the case of [Abdi v Governor, Kakamega County Government & 2 others](#) (Employment & Labour Relations Court Appeal E004 of 2022) [2022] KEELRC 1155 (KLR) (14 July 2022) (Ruling); [Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others](#) [2015] eKLR and [Mukisa Biscuits Case](#), *supra*.

Issues for Determination

The issues for determination are:

- a. Whether the objection meets the required threshold.
- b. Whether the court lacks jurisdiction to determine the petition and the Motion.
- c. Whether there is an alternative grievance settlement mechanism.
- d. What is the appropriate orders in the circumstances of the case.



Analysis

Threshold

7. The legal threshold was established in the *Mukisa Biscuits Case, supra*, where the court held that:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implications out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertain or if what is sought is the exercise of judicial discretion.”

8. In this case, the objection is basically premised on the ground that the suit is prematurely before the court and as such the court lacks jurisdiction to entertain the suit before the alternative dispute resolution mechanism is exhausted. The petitioner maintains that the petition challenges the legality of the administrative action/decision of which the PSC lacks jurisdiction to determine.

9. I have carefully considered the pleadings and the submissions presented. Guided by the *Mukisa Biscuits Case, supra*, I am satisfied that the objection by the 2nd and 3rd respondent has passed the muster of preliminary objection because it raises pure point of law being jurisdiction of this court.

Jurisdiction

10. The respondent contends that the court lacks jurisdiction in the first instance because there is an alternative dispute resolution mechanism which has not been exhausted. Section 77 of the [County Government Act](#) 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.

(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.
- b. remuneration and terms and conditions of service;
- c.”

11. Section 87(2) of the [PSC Act](#) then 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 the County Public Government Service unless the procedure provided for under this part has been exhausted.”



12. The petition arises from the decision by the County Secretary to change the terms and conditions of service for the Petitioner's members. The decision converted permanent and pensionable employment to fixed term contracts. As a result, the members of the petitioner have lost employment prematurely.
13. Under Article 22, 23, 162(2)(a) and 165(5) of the Constitution this court has jurisdiction to determine petitions and issue judicial review orders where there is allegation of violation of a right in the Bill of rights in the province of employment and labour relations. In this case the petitioner contends that the County Secretary violated their rights to fair labour practices and right to fair administrative action by changing their terms and conditions of service of its members. The said action/ decision was done beyond his powers. If proved to be true, the court would award judicial review orders to quash the same. Consequently, the court is seized with original jurisdiction over this case.

Alternative Remedy

14. The foregoing notwithstanding, section 9 of the Fair Administrative Actions Act, provides as follows:
 - “1. Subject to Subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.
 2. The High Court or a Subordinate Court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
 3. The High Court or a Subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
 4. Notwithstanding subsection (3), the High Court or a Subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”
15. The foregoing provision affects my holding above, that this court has the necessary jurisdiction to review the impugned administrative action. I say so because there is a mandatory alternative appeal procedure set out under section 77 of the County Government Act and section 87(2) of the PSC Act which must be exhausted, unless the applicant satisfies the court that the obligation to exhaust the alternative remedy ought to be waived.
16. I am alive to the fact that the PSC has no jurisdiction to grant conservatory orders. Regulation 13 of the Public Service Commissions (County Appeals Procedures) Regulations, 2022 falls short of affirming whether the commission can grant interlocutory orders, and if so, which ones. It states that:
 - “(1) A party may apply to the commission for directions or orders pending the hearing and determination of the appeal.
 - (2) An application under this regulation shall be in writing and shall be served upon the other party or parties within seven days.



- (3) a party served with an application shall respond by way of a replying affidavit or grounds of objection within seven days of receipt of the application.
- (4) Where the commission determines that there is need for parties to file written submissions, the provision of Regulation 15(4) shall apply.
- (5) The commission shall upon close of pleadings referred to in sub-paragraph (3), consider and determine the application within fourteen days.”

17. The foregoing regulation has a gap and therefore, I am satisfied that the officers contemplated by section 77 of the *County Government Act* cannot find adequate remedy before the PSC at the interlocutory stage. Consequently, I hold that the petitioner was justified to seek remedy from the court. However, I am satisfied that the PSC can determine the appeal on merit and award appropriate remedy to the petitioner.

Appropriate Orders

18. Having found that there is an alternative remedy provided by statute law, I will stay further proceedings in this petition to give the alternative mechanism a chance to resolve the dispute as contemplated under Article 234 of the *Constitution* and Section 77 of the *County Government Act*. In the meantime, the conservatory/interlocutory orders made by this court on 24th January, 2024 shall remain in force pending the final determination of the appeal process before the PSC.

Finally, the petitioner is given 30 days of today to move the PSC for leave to file appeal. The petition shall be mentioned on 18th September, 2024.

DATED, SIGNED AND DELIVERED AT NYERI THIS 23RD DAY OF MAY, 2024.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

