



**Mudi v County Government of Kakamega & 3 others (Employment and Labour Relations Cause E022 of 2023) [2024] KEELRC 1546 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1546 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E022 OF 2023**

**JW KELI, J  
JUNE 20, 2024**

**BETWEEN**

**DR BONFACE IMBALI MUDI ..... CLAIMANT**

**AND**

**COUNTY GOVERNMENT OF KAKAMEGA ..... 1<sup>ST</sup> RESPONDENT**

**THE SECRETARY, KAKAMEGA PUBLIC SERVICE BOARD, KAKAMEGA  
COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**KAKAMEGA PUBLIC SERVICE BOARD ..... 3<sup>RD</sup> RESPONDENT**

**CECM FOR PUBLIC SERVICE AND ADMINISTRATION KAKAMEGA  
COUNTY ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant on 16<sup>th</sup> November 2023 filed the Memorandum of Claim dated 14<sup>th</sup> November 2023 supported by the verifying affidavit dated 11<sup>th</sup> November 2023, seeking: -
  - a. A declaration that the termination of the Claimant's employment was unfair, wrongful, unprocedural, and ultimately unlawful,
  - b. A declaration that the respondents are in contempt of Section 89(2) of the Public Service Act.
  - c. An order directing the Respondents to reinstate the Claimant as sub-County Administrator as per the decision of the Public Service Commission delivered at Nairobi on 19<sup>th</sup> June 2023.
  - d. An order directing the Respondents to pay the Claimant accumulated salary arrears, allowances and other benefits from the date of termination to reinstatement.
  - e. Costs of this suit be awarded to the Claimant with interest thereon at Court rates from date of filing this claim.



- f. Any other relief this Honourable Court may deem fit to grant.
2. The Claim was accompanied by the Claimant's list of witnesses dated 14<sup>th</sup> November 2023, the Claimant's undated witness statement, a list of documents dated 14<sup>th</sup> November 2023 and his bundle of documents (BIM -1a, 1b, 2a, 2b, 3, 4, 5a & b, 6, 7, 8a, 8b, 8c, 9, & 10).
  3. The Respondents in objection to the Claim on 11<sup>th</sup> March 2024 filed a Memorandum of Response dated 9<sup>th</sup> March 2024, accompanied by the witness statement of Catherine Gathoni Otenyo dated on an even date, and the list of documents of an even date and one document enclosed being an extract of the Auditor General's Report for the year ending 30<sup>th</sup> June 2022.
  4. The Claimant filed a further affidavit sworn on 13<sup>th</sup> March 2024 in answer to the Respondents' Memorandum of Response.

### **Claimant's Case**

5. The Claimant was appointed as sub-County Administrator on 30<sup>th</sup> September 2014 via a letter Ref: CGK/HR/APP/9/VOL.1(5) (BIM2a) and was placed on probation for six months from 1<sup>st</sup> November 2014 and confirmed thereafter as an employee on permanent and pensionable basis (BIM2b). He had earlier been released from teaching service by the Teachers Service Commission on 1<sup>st</sup> November 2014(BIM3).
6. On 15<sup>th</sup> March 2022, he was appointed Chief Officer for Public Service in the Department of Public Service and County Administration, Office of the County Governor effective 16<sup>th</sup> February 2022 to 31<sup>st</sup> December 2022(BIM4), which appointment was to terminate on the appointment of new Chief officers according to Section 45(10)(a) and (b) of the [County Governments Act](#) or by effluxion of time whichever was earlier.
7. On 16<sup>th</sup> March 2022, the Claimant wrote to the County Public Service Board seeking clarification on the fate of his permanent and pensionable position on his accepting the position of Chief Officer on a contract basis. The board on 19<sup>th</sup> May 2022 informed the Claimant he would revert to his previous position if he opted to, at the end of the contract as Chief Officer (BIM5b).
8. The Claimant asserted that he served exemplarily as a Chief officer (BIM6) and on 29<sup>th</sup> September 2022, having served for 7 months as Chief Officer, the elected Governor terminated his contract and his salary and remuneration were stopped immediately(BIM7).
9. The Claimant on the 30<sup>th</sup> September 2022, wrote to the County Public Service Board to be redeployed to his permanent and pensionable position (BIM 8a) and thereafter followed up on the same issue through the follow-up letter of 5<sup>th</sup> December 2023(BIM 8b).
10. The Board through a letter dated 15<sup>th</sup> February 2023 and received on 17<sup>th</sup> February 2023, responded to the Claimant, declining to redeploy the Claimant to his position as sub-County Administrator (BIM9).
11. The Claimant considered the Policy Letter by the Board of 16<sup>th</sup> April 2021 to mean that the employees engaged on a permanent and pensionable basis who were appointed on a contractual basis to senior positions would revert, if they opted to, to their previous position on the termination of the contract engagement in the more senior positions (BIM10).



12. The Claimant appealed against the decision by the Board of 15<sup>th</sup> February 2023, for violating the EACC'S Circular EACC 7/10/1/VOL IV (8) of 22<sup>ND</sup> September 2022 on the management of existing county staff, new recruitment, and pending bills in the county by incoming governors (BIM11).
13. The Claimant's appeal to the Public Service Commission was successful and the Respondents refused to reinstate him (BIM 1a and 1b).
14. The Claimant states that he is aware that despite the respondents' assertions that the county has an over-established staff, the county has about Seven Thousand employees against the approved staff establishment of Fourteen Thousand.
15. The Claimant stated that the Respondents, in defiance to the PSC's order, have misrepresented that the 35% quoted in the Auditor General's report is a representation of the county Revenues which he claims the same is a representation of the combined County Assembly and the County Governor and its employees' share of allocation from the Exchequer.
16. The Claimant stated that the County has employed different persons even after the alleged report in the period between 19<sup>th</sup> November 2022 to 19<sup>th</sup> January 2024 as evidenced by many job advertisements (BI M2a and BIM2b).
17. The Claimant asserted that he was not a Ward Administrator but a Sub-County Administrator, and in fact, five sub-counties currently have no sub-County Administrators namely Butere, Lugari, Matungu, Mumias West, and Khwisero.
18. The Claimant states that he was a permanent and pensionable employee and the reasons for Budgetary constraints advanced by the Respondents are not legal reasons to deny his reinstatement.
19. The Claimant asserts that the court has jurisdiction to determine his claim.

### **Respondent's Case.**

20. It was the Respondents' case that, they were still reconsidering the Claimant's reinstatement when he appealed to the Public Service Commission.
21. They are unable to enforce the PSC's decision to reinstate the Claimant due to budgetary constraints, as once the Claimant took over the Chief Officer's position, the Respondents filled the role of Ward Administrator and there is no vacancy existing presently.
22. That the Claimant cannot be reinstated without an adequate budget for his remuneration going by the economic constraints facing the national and County governments.
23. The respondents assert that owing to the report of the Auditor General which they state determined that the 1<sup>st</sup> Respondent had an over-established staff in the year ended 30<sup>th</sup> June 2022, resulting in a huge wage bill, contrary to the Public Finance Management ([County Governments Act](#)), Regulations 2015, they are constrained to reinstate the Claimant.
24. The Respondents aver that they can compensate the Claimant for his services accordingly.
25. The respondents assert that the court lacks jurisdiction to determine the prayers (a), (b) and (d) of the Claim to wit:-(a)A declaration that the termination of Claimant's employment was unfair, wrongful, unprocedural, and ultimately unlawful, (b)A declaration that the respondents are in contempt of Section 89(2) of the Public Service Act and (d)An order directing the Respondents to pay the Claimant accumulated salary arrears, allowances and other benefits from the date of termination to reinstatement."



26. The Respondents seek that the claim be dismissed.

### **Written Submissions**

27. The parties consented and the court directed that the Claim be canvassed by way of written submissions. The parties complied. The Claimant's written submissions dated 1<sup>st</sup> April 2024 were filed by Malalah & Company Advocates on 3<sup>rd</sup> April 2024. The Respondents written submissions dated 3<sup>rd</sup> May 2024 were filed by Lutta & Company Advocates on 5<sup>th</sup> May 2024.

### **Determination**

#### **Issues for determination**

28. The Claimant identified the following issues for determination in the claim: -

- a. Was the Claimant a permanent and pensionable employee of Kakamega County.
- b. Was the termination of his employment lawful.
- c. Is the Claimant entitled to the reliefs sought.

29. The Respondent identified the following issues for determination in the claim: -

#### **Preliminary issues**

- a. Whether the Claimant's further affidavit dated 13<sup>th</sup> March 2024 is defective.
- b. Whether this Honourable has jurisdiction to grant orders not granted by the Public Service Commission.  
Substantive issue
- c. Whether the Claimant is entitled to remedies sought.

30. The Claimant was a sub-County Administrator of the Respondents effective 1<sup>st</sup> November 2014 on permanent and pensionable terms, when on 16<sup>th</sup> March 2022, he was appointed as Chief Officer on a contract basis. On the 29<sup>th</sup> September 2022 his services as Chief Officer were terminated by the newly elected Governor. On the 30<sup>th</sup> September 2022 he applied to revert back to his previous position as sub-County Administrator in the county public service. The Respondent rejected the Claimant's request following which he appealed to the Public Service Commission which in its decision dated 19<sup>th</sup> June 2023 allowed his request for reinstatement to the position of sub-County Administrator. The Respondents refused to reinstate him leading to the instant claim.

31. I find this suit similar to suit Kakamega ELRC Claim No. E023 of 2023 between Joseph Agingu Sweta and the Respondents in terms of facts of both Claimants having been appointed as Chief officers while in employment in other positions in the County Public Service and the PSC having decided on their appeals according to section 77 of [County Governments Act](#).

32. The legal representation was also the same. I find it is a waste of judicial time to reconsider the facts and the law and consequently adopt my decision in Kakamega ELRC Cause No. E023 of 2023 Joseph Agingu Sweta versus the County Government Of Kakamega and others to apply in the instant claim, to address the following issues:-

- i. Whether the Claim is properly before the Court.



- ii. Whether this Honourable Court has jurisdiction to grant orders not granted by the Public Service Commission.
- iii. Whether the Claimant is entitled to remedies sought.

**Whether the Claim is properly before the Court**

- 35) As stated above, the cause of action was based on the refusal by the Respondents to reinstate the Claimant back to the position of Works Officer 1 held in the County Government before he was appointed as Chief Officer. There was no appeal against the decision of the Public Service Commission which ordered the reinstatement.
- 36) Section 77 of the County Government Act provides: ‘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;(e)retirement and other removal from service; or any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard. (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.’ There was no evidence of such application for review of the Commission decision. The decision of the Commission remains valid.
- 37) Section 88(4) of the Public Service Commission provides: ‘(4) Despite the right of appeal or the right to apply for review in accordance with this Part, the implementation of the decision shall not be deferred or suspended pending the determination of the appeal or the application for review.’
- 38) The enforcement of the decision of the Commission is as provided for under section 89 of the *Public Service Commission Act* to wit: ‘89. Enforcement of appeal decision (1) Any person who is affected by the decision of the Commission made under this Part may file the decision for enforcement by the Employment and Labour Relations Court provided for under Article 162(2)(a) of *the Constitution*. (2) Any person who refuses, fails or neglects to implement the Commission's decisions is liable to disciplinary action in accordance with the applicable laws including removal from office.’
- 39) Consequently, I hold and determine that the Public Service Commission (PSC) having exercised its statutory mandate and determined the cause of action with finality and there being no appeal, it was resjudicata to file a similar cause before this Court. Under the doctrine of exhaustion and Article 159 (2)(c) of *the Constitution* to wit:- ‘alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);’ The Court is obliged to respect and promote alternative dispute



resolution mechanisms. The mandate of PSC to determine disputes under the *County Governments Act* has been recognized by the court. The superior courts of Kenya have unanimously upheld the decision Court of Appeal in the Speaker of the National Assembly v James Njenga Karume [1992] eKLR that:-“where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.” The mandate of PSC to determine disputes under section 77 of the *County Governments Act* is an alternative justice system. The Court is obliged to respect that system under Article 159 (2)(c) of *the Constitution*(supra). The Court of Appeal in the case of Secretary, County Public Service Board & Another v Hulbhai Gedi Abdille [2017] eKLR in allowing an appeal against a vdecision of the High Court which had assumed jurisdiction held 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”. This is just but one of the numerous decisions to the same effect.

- 40) The Court holds that consideration of the merits of the reinstatement order in the absence of an appeal would be tantamount to undermining the statutory mandate of PSC. The Court will thus stay away from considering the merits of the reinstatement in this judgment for lack of jurisdiction.

**Whether this Honourable has jurisdiction to grant orders not granted by the Public Service Commission**

- 41) Having held the claim was improper, the actual cause of action having been determined by a body with the statutory mandate, I have no jurisdiction over the same cause of action and/or to grant orders outside what the Public Service Commission granted after consideration of the complaint by the Claimant.

**Whether the Claimant is entitled to remedies sought.**

- 42) The Claimant has sought the following reliefs:-
- a. A declaration that the termination of Claimant 's employment was unfair, wrongful, unprocedural, and ultimately unlawful.
  - b. An order directing the Respondents to reinstate the Claimant as Works Officer I as per the decision of the Public Service Commission delivered at Nairobi on the 28<sup>th</sup> July 2023.
  - c. An order directing the Respondents to pay the Claimant accumulated salary arrears from the date of termination to reinstatement date.
  - d. A declaration that the respondents are in contempt of Section 89(2) of the Public Service Act.
  - e. Costs of this suit be awarded to the Claimant with interest thereon at Court rates from date of filing this claim.
  - f. Any other relief this Honourable Court may deem fit to grant.



- 43) The enforcement of the decision of the PSC is as provided for under 89 of the PSC Act to wit:- '89. Enforcement of appeal decision (1) Any person who is affected by the decision of the Commission made under this Part may file the decision for enforcement by the Employment and Labour Relations Court provided for under Article 162(2) (a) of *the Constitution*. (2) Any person who refuses, fails or neglects to implement the Commission's decisions is liable to disciplinary action in accordance with the applicable laws including removal from office.'"(emphasis added) The Claimant ought to have approached the Court for enforcement of the decision of the Commission as provided for under section 89 of the PSC Act and not by way of a new cause with new prayers on the already determined dispute.
- 44) The Court holds that it has no jurisdiction over such cause of action pursuant to section 77 of the *County Governments Act* or to grant any remedy outside the unchallenged decision of PSC. The Court can only exercise enforcement jurisdiction under section 89 (4) of the PSC Act to wit; '89. Enforcement of appeal decision (1) Any person who is affected by the decision of the Commission made under this Part may file the decision for enforcement by the Employment and Labour Relations Court provided for under Article 162(2)(a) of *the Constitution*. (2) Any person who refuses, fails or neglects to implement the Commission's decisions is liable to disciplinary action in accordance with the applicable laws including removal from office.'
- 45) The Court perused the PSC Act and found that the procedure of enforcement of the PSC decision is not provided. The Employment and *Labour Relations Act* (Procedural) Rules provides in Rule (7)(3):- "Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court .'
- 46) The Claimant among the many prayers, sought for an order of enforcement of the decision of PSC as follows: " An order directing the Respondents to reinstate the Claimant as Works Officer I as per the decision of the Public Service Commission delivered at Nairobi on the 28<sup>th</sup> July 2023."
- 47) In response to the issue, the Respondent vide witness statement of Catherine Otenyo, admitted that they had failed to implement the PSC decision and relied on the Report the Auditor General for the year 2022 stating the County Government was dealing with inflated wage bill. The Court finds that this issue was not raised before the PSC which heard and determined the case. On page 2 of the decision, the Respondents' case before PSC and the Court noted the issue of inflated wage bill was not raised. This is an afterthought defense. Again there is no appeal against the PSC's decision before me on the merits of the reinstatement.
- 48) Applying rule 7 (3) of Employment and *Labour Relations Act* (Procedural) Rules, I find that the prayer for an order directing the Respondents to reinstate the Claimant as Works Officer I as per the decision of the Public Service Commission delivered at Nairobi on the 28<sup>th</sup> July 2023 was available to the Claimant under the claim.
- 49) The Court adopts the decision of the Public Service Commission Dated 28<sup>th</sup> July 2023 as a judgment of the Court.



- 50) The Respondents are ordered to comply with the reinstatement Order and ensure that the Claimant is reinstated to the position of Works Officer 1 within 7 days of this Judgment.
  - 51) Costs to the Claimant payable by the Respondents.
  - 52) All other prayers are disallowed. ‘’
33. I adopt my above decision in Kakamega ELRC Claim No. E023 of 2023 Joseph Agingu Sweta v County Government of Kakamega and Others to apply mutandis mutandis in determination of the instant claim and in conclusion, in order to enforce the decision of the Public Service Commission dated 19<sup>th</sup> June 2023 on the appeal by Dr. Boniface Imbali Mudi (C-BIM1b) namely:- ‘.. the Commission allows the appeal and directs that the appellant be reinstated to the position of Sub-County Administrator, which position he held prior to appointment as Chief Officer.’’ The PSC decision dated 19<sup>th</sup> June 2023 is hereby adopted as a judgment of the Court.
34. The Respondents are ordered to comply with the reinstatement Order that the Claimant is reinstated to the position of Sub-County Administrator in their public service within 7 days of this Judgment.
35. Costs of the claim are awarded to the Claimant payable by the Respondents.
36. All other prayers in the claim dated 14<sup>th</sup> November 2023 are disallowed.
37. It is so Ordered.

**DATED, SIGNED, AND DELIVERED VIRTUALLY FROM MOMBASA THIS 20TH DAY OF JUNE 2024.**

**J.W. KELI,**

**JUDGE.**

**VIRTUALLY IN THE PRESENCE OF:**

**For Claimant: - Ms. Mburu**

**For Respondents: - Absent (Law firm of Lutta & Company advocates logged in and silent)**

