



REPUBLIC OF KENYA



KENYA LAW
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**Wambua v South Eastern Kenya University & 3 others (Petition
4 of 2021) [2024] KEELRC 2324 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2324 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
PETITION 4 OF 2021
MA ONYANGO, J
SEPTEMBER 25, 2024**

**IN THE MATTER OF: ARTICLES 1,2,3(1),10,21,22,23(1),27(4)(6) &
(3),56,232 AND 258(1) OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF: RULES 11,12,13,20 AND 21 OF THE
CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS) AND PROCEDURE RULES,2013**

AND

IN THE MATTER OF: EMPLOYMENT ACT 2007

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF
ARTICLES 2,3,10(1),(2)(C),(28,41(1),(47(1, 50, 159(1)(2) AND (E)
(A)AND 258(1) OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

CHRISTINE MALONDO WAMBUA PETITIONER

AND

SOUTH EASTERN KENYA UNIVERSITY 1ST RESPONDENT

SEU SAVINGS AND CREDIT CO-OPERATIVE SOCIETY

LTD 2ND RESPONDENT

PROF. FRANCIS WACHIRA 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT



RULING

1. Before me for determination are two notices of preliminary objection filed by the Respondents. The preliminary objection dated 20th December 2021 was filed by the 1st and 3rd Respondents and seek the dismissal of the Petitioner's Petition and the Application dated 16th November 2021 on the following grounds: -
 - a. That the Petitioner has not exhausted the 1st and 3rd Respondents' internal disciplinary mechanisms, which amounts to abuse and disregard of the 1st and 3rd Respondents governing legal and institutional framework.
 - b. That the court ought to dismiss the Notice of Motion Application and the Petition by the Petitioner dated 16th November 2021 with costs to the 1st and 3rd Respondents as they are defective on this basis.
2. The second notice of preliminary objection was filed on 17th February 2022 by the 2nd Respondent and seeks dismissal of the petition on grounds that:
 - a. In so far as the Petition and the Interlocutory application seek relief relating to the Petitioner's membership to the 2nd Respondent's Sacco and outstanding loan sums, the court lacks jurisdiction.
 - b. The Petitioner has not exhausted the contractual and statutory mechanism provided for addressing her grievances. Accordingly, on account of the doctrine of exhaustion, this court should decline jurisdiction to deal with the matter.
 - c. The Petition does not disclose any constitutional issues to be decided as a constitutional matter.
3. On the 25th February 2022, the court directed that the two preliminary objections be canvassed together by way of written submissions.

The preliminary objection dated 20th December 2021

4. From the record, only the 1st and 3rd Respondents filed their written submissions on 9th March 2022. They submitted that Part VII of the the University Statutes establishes the Disciplinary Committee for Members of Staff in Grade 7 to 15, its membership and terms of reference inter alia, "to hear and determine disciplinary cases referred to it in regard to Senior Staff in grade 7 to 15 as per the established Code of Conduct."
5. The 1st and 3rd Respondent further contends that Part VII of the same statutes establishes the Staff Appeals Committee, its membership and terms of reference being inter alia "to hear and determine appeals made to it by staff from decisions of the Senior and Junior Staff Disciplinary Committees, which appeals may be made against a finding and/or sentence; the decision of the Staff Appeals Committee shall be final."
6. According to the 1st and 3rd Respondents, the Petitioner appeared before the 1st and 3rd Respondents' Senior Staff Disciplinary Committee. That in line with the 1st and 3rd Respondent's Statutes, if the Petitioner was aggrieved by the decision of the Senior Staff Disciplinary Committee, she was expected to file an appeal challenging the decision of the Senior Staff Disciplinary Committee before the Staff Appeals Committee for determination.



7. It is therefore the 1st and 3rd Respondents' submissions that the Petitioner declined to file an appeal for determination by the Staff Appeals Committee, which was a clear case of disregard of the 1st and 3rd Respondents internal disciplinary procedures.
8. It is on this basis that the 1st and 3rd Respondents submitted that even though this court has jurisdiction to deal with the Petitioner's complaints, the Petition before the court is premature and defective as the Petitioner has not exhausted the 1st and 3rd Respondents internal disciplinary procedures that provide for dispute resolution mechanisms.

The Preliminary objection dated 16th February 2022

9. The 2nd Respondent filed submissions on its preliminary objection on 28th March 2022 while the Petitioner's submissions were filed on 22nd June 2022.
10. In its submissions the 2nd Respondent avers that the dispute between the Petitioner and the 2nd Respondent relates to membership, shareholding, loan acquisition and liability to repay funds paid to the Petitioner in her capacity as a member of the 2nd Respondent's Sacco.
11. The 2nd Respondent in its submissions urged the court to decline assumption of jurisdiction over the Petition herein in view of the fact that the law establishes a specialized tribunal to deal with a dispute of this nature under section 76 of the *Co-operative Societies Act*.
12. According to the 2nd Respondent, in order to determine the dispute between the Petitioner and the 2nd Respondent, the court will be called upon to interrogate and establish whether the debt of Kshs. 2,307,673.85 is due to the 2nd Respondent from the Petitioner. It is also averred that the Petition is asking the court to restrain the 2nd Respondent from removing the Petitioner from its membership and that in view of section 76 of the Co-operatives Act, the jurisdiction to determine the dispute lies with the tribunal.
13. The 2nd Respondent submitted that it is now an established constitutional principle that where parliament, through a Statute has established a mechanism for dispute resolution, such mechanism ought to be resorted to in the first instance. In support of this position, the 2nd Respondent cited the decision in *Savraj Sing Chana v Diamond Trust Bank (Kenya) Limited & Another (2020) eKLR*.
14. The 2nd Respondent submits that the principle or doctrine of exhaustion provides that a party ought to first exhaust a dispute resolution mechanism established in law before approaching courts for a remedy or relief.
15. The court was urged to dismiss the Petition with costs to the 2nd Respondent.
16. On her part, the Petitioner identified five issues for determination namely:
 - i. Whether the Notice of Preliminary objection meets the threshold set in *Mukhisa Biscuits v West End Distributors (1973) EA*
 - ii. Whether the instant requires the establishment of facts,
 - iii. Whether this court has jurisdiction to determine the matter,
 - iv. Whether the doctrine of exhaustion and the exceptions thereto are applicable to the instant case,
 - v. Whether upon the disposal of the instant, then the reliefs sought in the Notice of motion dated 16th November 2021 avail.



17. On the first issue, the Petitioner submitted that the Preliminary objection before court relates to facts which have been disguised as the law and have erroneously been pleaded. The Petitioner submitted that the 2nd Respondent's preliminary objection is bad in law and should be dismissed.
18. With regard to the second issue, the Petitioner submits that this court has both original and appellate jurisdiction to hear and determine disputes relating to employment and labour relations. The Petitioner further submitted that the human rights violations pleaded in the Petition arise from the nature of the relationship between the Petitioner and the Respondents. According to the Petitioner, the issues founding the petition fall within the ambit of this court's jurisdiction and therefore are properly before this court.
19. The Petitioner argued that this matter cannot be within the jurisdiction of the Corporative Tribunal or other considered alternate source as it is an issue of summary dismissal by the university, through illegally originated claims and a collusion between two independent institutions and the welfare association through its organ the Sacco of the Petitioner.
20. As to whether the doctrine of exhaustion applies and if there are exceptions availing, the Petitioner submitted that the doctrine of exhaustion does not apply as a blanket rule, and that a party may be exempted from the requirement to exhaust available remedies where exceptional circumstances arise as held in the case of Cortec Mining Kenya Limited vs Cabinet Secretary Ministry of Mining and 9 Others (2017)eklr and Kenya Revenue Authority and 5 others vs Keroche Industry Limited [CA No. 2 of 2008](#).
21. In this regard, the Petitioner contends that the Petition concerns extreme violation of labour rights such as violation of right to fair trial under Article 47, 48, 49 and 50 of [the Constitution](#), unfair administrative action, unavailability and obstruction to pursue forum and mischief by the Respondents.
22. The Petitioner urged the court to dismiss the Preliminary objection dated 16th February 2022 with costs.

Determination

23. I have considered the preliminary objections raised and the submissions filed together with the authorities relied upon by the parties. The issue in both preliminary objections is whether this court has jurisdiction to determine the instant petition.
24. The 1st and 3rd Respondents' have argued that this court does not have jurisdiction to determine the Petition herein as the Petitioner has not exhausted the internal dispute mechanisms in place before instituting this Petition. They have argued that the Petitioner did not file an appeal for determination by the Staff Appeals Committee as provided for in Part VII of its Statutes.
25. It is trite that where there is an internal dispute resolution mechanism provided in [the Constitution](#), statute or agreement whichever is applicable, an aggrieved party is duty bound to exhaust such process before seeking Court's intervention.
26. The Black's Law Dictionary 10th Edition, defines the doctrine of exhaustion as follows:

“Exhaustion of remedies: The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary.”



27. In Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR a 5-judge bench of the court expressed itself on the position of internal dispute mechanism as follows:
52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.”
28. In support of the preliminary objection the 1st and 3rd Respondents filed copies of what they refer to as the Statutes of South Eastern Kenya University. They however only filed the cover with the title but included only Part VII: Schedules. A perusal of the same reveals that it contains the composition of various committees of the University. There is no indication of what has been pleaded by the 1st and 3rd Respondents in their preliminary objection in the documents attached. What they should have attached is the provisions relating to the process of discipline, not the composition of a disciplinary committee.
29. From what is on record, there is no proof that the Petitioner is obligated to file an appeal before approaching this court on a dispute relating to termination of her employment by the 1st Respondent.
30. I thus find the preliminary objection dated 20th December 2021 not proved with the result that the same is dismissed with costs to the Petitioner.
31. The next issue is whether this court lacks jurisdiction as raised by the 2nd Respondent in its preliminary objection dated 16th February 2022. In determining whether the court has jurisdiction to adjudicate the petition with regard to the issues raised by the Petitioner against the 2nd Respondent, it is imperative that the court considers whether the said issues concern the business of the co-operative society.
32. The 2nd Respondent in its submissions maintained that the dispute between the Petitioner and itself relates to membership, shareholding, loan acquisition and liability to repay funds paid to the Petitioner in her capacity as a member of the 2nd Respondent's Sacco.
33. Section 76 of the *Co-operative Societies Act* provides for the disputes which fall within the jurisdiction of the Co-operative Tribunal. It stipulates:
- (1) If any dispute concerning the business of a co-operative society arises—
 - (a) among members, past members and persons claiming through members, past members and deceased members; or
 - (b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or
 - (c) between the society and any other co-operative society, it shall be referred to the Tribunal.
 - (2) A dispute for the purpose of this section shall include—
 - (a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demands admitted or not; or



- (b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;
- (c) a claim by a Sacco society against a refusal to grant or a revocation of license or any other due, from the Authority.

34. The prayers sought by the petitioner are the following:

- a. A declaration that the act of the 1st Respondent and 3rd Respondents in relieving the Petitioner of her duties is a breach of the latter's constitutional rights under Articles 27(1), (2) & (3), 28,41(1), 47 & 50(1) of *the Constitution* of Kenya and that the same is null and void for all intent and purposes.
 - b. An order of Certiorari to remove into this Honourable court and quash the decision of the 1st Respondent relieving the Petitioner of her duties as a permanent and pensionable employee of the 1st Respondent.
 - c. An order mandamus compelling the Respondents to reinstate the Petitioner position and all her benefits whereof.
 - d. An order of prohibition to prohibit the Respondents from creating a vacancy, advertising, interviewing or filling the position originally held by the petitioner with the 1st respondent.
 - e. In alternative and without prejudice to prayer (d) above, an order of payment of all dues to the petitioner in the period she was suspended, dismissed, 12 months of compensation and other costs the court may deem fit.
35. From the prayers sought by the Petitioner it is clear that her issues against the Respondent relate to her dismissal from service on grounds that she embezzled the funds of the 2nd Respondent.
36. Section 76 of the *Co-operative Societies Act* specifically provides for the business of a cooperative society as expressly set out in sub-section 76(1) while sub-section 76(2) expound on the nature of the disputes referred to in sub-section 76(1) which are claims by a cooperative society or claims by a member.
37. The petition herein does not relate to any of the claims set out in section 76 of the Cooperative Act. They relate to the termination of employment of the Claimant. The prayers are exclusively in the realm of employment remedies that have nothing to do with the business of a cooperative society.
38. A case of termination of employment cannot be heard by the Cooperatives tribunal. Such a suit is within the exclusive jurisdiction of this court.
39. I thus find the preliminary objection dated 16th February 2022 filed by the 2nd Respondent to be baseless and dismiss the same with costs to the Petitioner.
40. The upshot is that both applications are without merit and are dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 25TH DAY OF SEPTEMBER, 2024

MAUREEN ONYANGO

JUDGE

