



**Republic v Migori County Assembly Service Board; Ogutu (Exparte Applicant) (Judicial Review E046 of 2023) [2024] KEELRC 2259 (KLR) (23 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2259 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
JUDICIAL REVIEW E046 OF 2023  
CN BAARI, J  
SEPTEMBER 23, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**MIGORI COUNTY ASSEMBLY SERVICE BOARD ..... RESPONDENT**

**AND**

**CPA, EVANS OUMA OGUTU ..... EXPARTE APPLICANT**

**JUDGMENT**

1. Pursuant to leave granted on 18<sup>th</sup> December, 2023, the Ex Parte Applicant seeks the following Judicial review orders.
  - i. Spent.
  - ii. Spent.
  - iii. The Honourable court be pleased to grant any further or consequential orders necessary to give effect to the justice of the matters herein, including expeditious disposal of this proceedings.
  - iv. The Honourable court be pleased to grant an order of judicial review of certiorari, to remove to this honourable court for purposes of quashing the impugned decision of the Respondent herein reposed in the letter of the Migori County Assembly Service Board dated 1<sup>st</sup> December 2023 and ref: MCA/DL/VOL.1.001 and all consequential actions and proceedings thereon.
  - v. The Honourable court be pleased to grant an order of judicial review declaring that the impugned decision reposed in the letter of the Migori County Assembly Service Board dated 1<sup>st</sup> December 2023 and ref: MCA/DL/VOL.1.001, and all consequential actions, decisions



and proceedings thereon, is in breach of the Ex-parte Applicant's rights in contravention of *the Constitution* and the law.

- vi. That the costs of the Judicial Review Proceedings herein be borne by the Respondent on a full indemnity basis.
2. The motion is premised on the grounds that:
- i. The Applicant is a young professional and career accountant/auditor working for Migori County Assembly having been employed by the Migori County Assembly Board as a Principal Finance Officer on permanent and pensionable terms.
  - ii. The Applicant relies on the employment to earn a living, and in the discharge of his professional duties, he is entitled to protection under Article 236(a)&(b) as read with Articles 27(1), (2) & (4); 41(1)&(2); 47 and 50(1) of *the Constitution*.
  - iii. The summary dismissal of 1<sup>st</sup> December, 2023 is unlawful and ripe for setting aside as he was absolved off the criminal charges by the EACC, DCI and DPP which operate on a higher standard of proof.
  - iv. The dismissal was characterised by manifest bad faith and failed to take into account relevant considerations as Vincensia Kioge who signed the letter was a key prosecution witness in the case together with the Applicant.
  - v. The events forming the reasons for dismissal took place way back in 2019, and since then he has been serving with distinction as evinced by his promotion to Principal Finance Officer.
  - vi. The Clerk and the Deputy Clerk were the ones mandated with authorization of IFMIS payments up to August, 2019, not the Applicant.
  - vii. The National Treasury and the Central Bank have the valid details of the IFMIS approvers which information they can share with the DCI.
  - viii. The Respondent was patently biased as the allegations in the Notice to Show Cause and those in the summary dismissal were different.
  - ix. On 1<sup>st</sup> December, 2023 there were restraining orders in place issued in ELRC (KSM) PET NO. E032 OF 2022 barring interference with the Applicant's employment
  - x. The dismissal was unreasonable and irrational as whereas the Respondent anchors their decision on extrapolation of the incident that resulted in the prosecution in KISUMU ACECA E002 OF 2020 Republic v Boaz Okoth & others, and, a supposed failure to obey a lawful command no plausible evidence subsists to rationally connect the two.
  - xi. The application concerns the arbitrary contravention and threatened further contravention of *the Constitution* as the Applicant was deprived off gainful employment in violation of the right to fair labour practices as protected by Article 41(1) of *the Constitution*, deprived of the right to equal protection and equal benefit of the law in abrogation of Article 27(1), (2) & (4), of *the Constitution*, subjected to psychological torture via constant hounding and unending disciplinary processes contrary to Article 29(d) of *the Constitution* and deprived of fair hearing under Article 50(1).
  - xii. The court has power to issue judicial review orders even where the decision has been fully implemented based on R(H) v Ashworth Special Hospitality Authority [2003] 1 WLR 127, Dyson L.J, and locally on *Taib A Taib v Minister for local Government and Others, Mombasa*



3. The Respondent opposed the application via a replying affidavit dated 3<sup>rd</sup> May 2024 sworn by Vicensia Awino Kionge.
4. It is deponed for the Respondent that the court lacks jurisdiction on account of the exhaustion principle. The Respondent asserts that the application offends Article 234 (2) (i) of the Constitution, Section 85 of the County Governments Act and Section 77 of the Public Service Commission Act.
5. The Respondent affirms that the issues raised in the application are within the ambit of a normal claim not a judicial review application. It stresses that if granted, the orders would contravene Section 17(10) of the Employment and Labour Relations Court (procedure) Rules 2016 which prohibit courts from allowing applications that reinstate a dismissed employee.
6. The Respondent further avows that the application is res judicata, the issues herein having been conclusively determined in ELRC Cause NO. E072 OF 2023.
7. The Respondent further avers that the Applicant has drifted into the merits of the decision which is not within the purview of judicial review.
8. In response to the existence of restraining orders against interference with the Ex-parte Applicant's employment, it is deponed that the Applicant wholly withdrew Petition No. E032, and cannot therefore rely on orders issued therein.
9. Parties canvassed the motion through written submissions. Both parties filed their submissions.

#### **The Ex-Parte Applicant's Submissions**

10. It is the Ex-parte Applicant's submission that the decision to summarily dismiss him was biased, irrational, made in excess of jurisdiction, and characterized by bad faith. It is submitted that the Respondent failed to adhere to the provisions of Article 10 of the Constitution on national values and principles of governance.
11. The Ex-parte Applicant contends that the dismissal was antithetical to the investigative powers conferred upon the Director of Public Prosecution and the Inspector General of Police by Articles 157(4) & (6) and 245 (4)(a) &(b) of the Constitution. He asserts that the decision to dismiss him despite the knowledge that the DPP had absolved him pointed to outright malice.
12. On the dismissal being actuated by bias, the Ex-parte Applicant submits that the summary dismissal letter quoted different reasons for dismissal from those in the notice to show cause.
13. On the jurisdiction of the Court, the Ex-parte Applicant reiterates the provisions of Article 162(2) (a) of the Constitution as read with Section 12 (1) of the Employment and Labour Relations Court Act on the court's jurisdiction to determine all disputes relating to employment. He submits that judicial review is one of the reliefs this court is empowered to grant as per the provisions of Section 12(3)(vii), of the ELRC Act and Section 11(1) of the Fair Administrative Actions Act.
14. In opposition to the violation of the exhaustion doctrine, the Ex-parte Applicant submits that there exist exceptional circumstances such as gross violations of the Constitution and the absence of an efficacious statutory remedy under the PSC to arrest further violations.
15. The Ex-parte Applicant further submits that the existence of an alternative dispute resolution mechanism does not oust the jurisdiction of the court, but only defers it. He relies on the Court of



Appeal decision in Kenya Revenue Authority & 2 others v Darasa Investments ltd [2018] eKLR for the holding that: -

“availability of an alternative remedy is not a bar to judicial review proceedings...the court may in exceptional circumstances and on application by the party exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

16. He further cites the Supreme Court’s decision *Abidha Nicholus v The Attorney General & others, SC Pet E007 of 2023* where the court stated:

“where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes adoption of a nuanced approach, as we have stated. (to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine appropriateness). What must matter at the end is that a path is chosen that safeguards a litigant’s right to access justice...requires a case-by-case assessment by considering issues such as nature of dispute and the adequacy of the alternative dispute mechanism.”

17. In asserting this court’s jurisdiction, the Ex-parte Applicant submits that in cases where the issues border on constitutional interpretation the court should refrain from deferring jurisdiction. He quotes the case of *R v IEBC and others ex parte National Super Alliance* to buttress this position.
18. In respect of violation of Rule 17(10) of the Employment and Labour Relations Court Procedure Rules 2016, the Ex-parte Applicant reiterates that it only applies to instances of ex-parte reinstatement upon consideration of an application.
19. On whether the matter herein is res-judicata, it is submitted that the dismissal of 1<sup>st</sup> December, 2023, had never been the subject of any court proceedings. He contends that the two cases, KSM ELRC Cause E072 OF 2023 and KSM ELRC E032 of 2022, preceded the dismissal subject of this suit and the show cause letter of 6<sup>th</sup> October, 2023.
20. It is the Applicant’s submission that the scope of interrogating the exercise of administrative action has since been expanded to include a merit review of the decision, and not just the procedure of arriving at the decision. He had reliance in *Edwin H.D Dande & Others v Inspector General of Police & others Pet. No. 6 (E007) of 2022 Consolidated with Pet. No. 4(E005) & 8 (E010) of 2022*, where the court at paragraph 78 observed that the entrenchment of judicial review in *the Constitution* elevated it from a strict administrative law remedy to a constitutional fundamental right as per the provisions of Article 47 of *the Constitution*.

### **The Respondent’s Submissions.**

21. It is the Respondent submission that the suit offends the Article 234 (2) (i) of *the Constitution*, Section 77 of the *County Governments Act* and Section 85 of the Public Service Act. It avows that the Ex-parte Applicant should have approached the Public Service Commission before filing suit. It cites *Republic v National Environment Management Authority ex parte Sound Equipment Ltd (2011) eKLR*, for the holding that: -

“... Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and



judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it ...”

22. The Respondent submits that the Ex-parte Applicant has not demonstrated any exceptional circumstances to warrant exemption from the exhaustion doctrine. In illustrating what constitutes exceptional circumstances the Respondent cites *R v Independent Electoral and Boundaries Commission (IEBC) and others Ex Parte the National Super Alliance Kenya* where it was stated that: -

“What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. ...the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This Filed on: 2024-05-16 16:06:27+03 - BY: C.Obiero & Associates Advocates - Reference: E3FDZXHP - KSH. 75.00 exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake.”

23. The Respondent avows that the Ex-parte Applicant’s dismissal does not touch on public interest and thus is strictly a private right. It relies on *Humphrey Makokha Nyongesa & another v Communications Authority of Kenya & 2 others (2018) eKLR* where the court held that the public would not suffer while the Interested Party was on compulsory leave as his position would be adequately covered by another person acting on his behalf.
24. In further submitting against exemption from the exhaustion doctrine, the Respondent avows that the suit does not touch on interpretation or application of *the constitution*. It draws this court’s attention to the dismissal of *Petition no 32 of 2022 Evans Ouma Ogutu verses County Assembly of Migori* on account of failure to abide by the exhaustion doctrine.
25. In respect of the Ex-parte Applicant being dismissed in disregard of an existing court order, the Respondent submits that the court had by a ruling delivered on 6<sup>th</sup> October 2022 dismissed the application dated 4<sup>th</sup> July 2022 in which the temporary orders had been issued.
26. The Respondent submits that the Applicant was given a fair hearing having been issued with a notice to show cause dated 6<sup>th</sup> October, 2023, which he responded to vide on 23<sup>rd</sup> October, 2023, and further attended a disciplinary hearing on 13<sup>th</sup> November, 2023.
27. In conclusion, the Respondent submits that the orders have already been overtaken by events.

### **Analysis and Determination**

28. Upon a careful analysis of the application, the replying affidavit and the written submissions, the issues that arise for determination are: whether this court is possessed of jurisdiction to hear this suit and if so whether the Ex-parte Applicant is entitled to the orders sought.
29. The major point of contention between the parties in this suit is whether this court has jurisdiction to entertain the motion on the premise that there are available alternative dispute resolution mechanisms



that the Applicant ought to have exhausted before invoking the jurisdiction of this court, otherwise known as the doctrine of exhaustion.

30. The Ex-parte Applicant's assertion is that there are exceptional circumstances such as gross violation of rights that exempt this suit from strict adherence to the exhaustion doctrine. On its part, the Respondent refutes the existence of any exceptional circumstances and denies infringement on the Ex-parte Applicant's constitutional rights.
31. On matters jurisdiction, this court is guided by the timeless words of Nyarangi JA in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR. wherein he opined: -

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence.”
32. This court is further guided by the Supreme court decision in *Suleiman Mwamlole Warrakah & 2 others v Mwamlole Tchappu Mbwana & 4 others* [2018] eKLR where upon finding that its jurisdiction had not been invoked properly, downed its tools and struck out the petition.
33. It is not in dispute that the Ex-parte Applicant being an employee of the Migori County Assembly is a public officer subject to the exhaustion doctrine provided under Article 234 (2) (i) of *the Constitution*, Section 77 of the *County Governments Act* and Section 85 of the *Public Service Commission Act*, 2017.
34. Section 9(2) of the *Fair Administrative Action Act*, further provides that where there exist internal mechanisms for the resolution of a dispute, the Court will not review the administrative action until the internal dispute mechanism has been exhausted.
35. The Applicant's has not denied being bound by the provisions of Article 234 (2) (i) of *the Constitution*, Section 77 of the *County Governments Act* and Section 85 of the *Public Service Commission Act*, 2017, on the requirement to lodge an appeal before the PSC prior to invoking the jurisdiction of this court. His only contention is that he is exempt from the exhaustion doctrine on account of blatant violation of his rights, and the Public Service Commission's incapacity to interpret violation of constitutional rights, and to make a declaration on the same.
36. The Supreme Court of Kenya in *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* [2023] KESC 113 (KLR), had this to say on the doctrine of exhaustion: -

“.....the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. (emphasis own).

This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court.”



37. It is trite law that where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure ought to strictly be followed. (see the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR).
38. Additionally, in the case of Daniel N. Mugendi v Kenyatta University & 3 Others [2013] eKLR, the Court of Appeal was of the opinion that *the Constitution* had to be read together with other laws and should not be construed to be disruptive of them. The court then went ahead to state that the parties should make use of the normal procedures under the various laws to pursue their remedies instead of moving to the constitutional court and making constitutional issues of what is not.
39. The Ex parte Applicant was taken through an administrative disciplinary process where he was issued with a show cause letter and accorded a hearing before the Respondent's disciplinary committee, which hearing resulted in his dismissal from service. Section 77 of the County Government 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 qualifications attached to any office;
- (b) remuneration and terms and conditions of service;
- (c) disciplinary control.....”
40. The Applicant's motion did not raise any question of the interpretation or application of *the Constitution*, and does not also demonstrate how his rights were violated in a manner that cannot be redressed through available alternative remedies. Further considering the purpose for which the Applicant seeks relief, granting of constitutional reliefs is not appropriate.
41. In the upshot, I find and hold that the Ex-parte Applicant should have lodged an appeal before the Public Service Commission, and not having done so, ousts the jurisdiction of this court to hear and determine this matter in the first instance. The court thus lacks jurisdiction and the motion is struck out with no orders on costs.
42. It is ordered.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2024.**

**CHRISTINE N. BAARI**

**JUDGE**

Appearance:

Mr. Lusi present for the Ex parte Applicant



Mr. Obiero present for the Respondent

Ms. Anjeline Wanjofu-CA.

