



Ngetich & another v Uasin Gishu County Public Service Board & 2 others (Petition E010 of 2023) [2024] KEELRC 2286 (KLR) (25 September 2024) (Ruling)

Neutral citation: [2024] KEELRC 2286 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
PETITION E010 OF 2023**

MA ONYANGO, J

SEPTEMBER 25, 2024

IN THE MATTER OF RULE 4 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS & FUNDAMENTAL FREEDOMS) PRACTICE RULES, 2013

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLES 3,10,20,22,23,27,28,30,35,26,41,47,50 & 235 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

PETER KIPCHIRCHIR NGETICH 1ST PETITIONER

IRENE JEPKEMBOI MALEL 2ND PETITIONER

AND

UASIN GISHU COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT

THE GOVERNOR, UASIN GISHU COUNTY, BII CHELILIM 2ND RESPONDENT

THE COUNTY SECRETARY, UASIN GISHU COUNTY, EDWIN BETT 3RD RESPONDENT

RULING

1. The Petitioners filed the petition dated 26th December 2023 seeking the following orders: -
 - i. A declaration that the actions of the Respondents of altering Petitioners terms of employment, changing the title of the Petitioners, changing the title of the petitioners for the directors to deputy directors after serving in the position for more than three years and changing the title for the deputy directors to assistant directors after serving in the position for more than three years is in a breach of the petitioners' rights under Articles 27(1)(2) & (3), 28, 35, 41,47 and 50 of [Constitution of Kenya, 2010](#) and the same is null and void for all intents and purposes.(sic)



- ii. An order of injunction to be issued restraining the Respondents from altering terms of employment of the Petitioners and/or terminating the petitioners before expiry of the petitioners term thereof without due process.
 - iii. A declaration that the Respondents staff establishment of August 2023 is null and void.
 - iv. An order of judicial review of certiorari be issued to remove into the honourable court for quashing the implementation of the Respondents staff establishment of August 2023.
 - v. A declaration that the Respondents are bound to recognize the Petitioners as permanent employees having worked for the Respondents for over 6 years.
 - vi. Declaration that the Respondents underpaid the Petitioners who were supposed to be in job group R as per the SRC requirement and the petitioners should be compensated Kshs. 1,175,660 each as calculated under paragraph 30 in the petition hereto.
 - vii. Declaration that deployment without job designation is unlawful
 - viii. Damages, exemplary damages
 - ix. Costs of the Petition.
2. Upon service the Respondents filed a preliminary objection dated 22nd January 2024 on the following grounds:
1. The jurisdiction of this Honorable Court has been prematurely invoked for the reason that the Petitioners have not exhausted the statutorily available remedies given that:
 - a. The issues raised in the Petition i.e. the alleged alteration of terms of employment, the illegality of the Staff Establishment, alleged underpayment by the Respondents and alleged unlawful deployment fall within the purview of conditions of service and appointments that ought to be resolved by the Public Service Commission pursuant to Section 77 of the County Government Act;
 - b. The Petitioners, on their own admission, have appealed to the Public Service Commission and not granted the Commission the opportunity to deliberate on the issues raised prior to invoking this Honourable Court's jurisdiction;
 2. The suit offends Rule 7(2) of the Employment and Labour Relations Court (Procedure) Rules which dictate that any person that wishes to institute judicial review proceedings ought to do so in accordance with Sections 8 & 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules;
 3. The Petitioners did not plead with precision how Articles 27, 28, 35, 41, 47 & 50 were violated by the Respondents and as such the Petition lacks specificity on the alleged violation of the Constitution by the Respondents in carrying out their statutorily endorsed mandate thus violating the principles set out in Anarita Karimi Njeru v Republic (1979) eKLR and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR.
 4. The 2nd and 3rd Respondents have been improperly and wrongly joined to the Petition in light of Section 133 of the County Government Act that exempts any members of staff of the County Government in service of the County Government from civil liability for acts done in good faith under the direction of the County Government;



5. The Application does not meet the threshold for grant of conservatory orders for the reasons that:
 - a. The conservatory orders are overtaken by events for the reason that the County Staff Establishment as admitted by the Petitioners was operationalised in August,2023;
 - b. The conservatory orders affect not only the Petitioners but all employees of the County Government of Uasin Gishu and granting of such orders shall affect parties not before this Honorable Court which is akin to condemning a party unheard;
 - c. The grant of the conservatory orders as sought shall amount to summary determination of the matter depriving the Respondents from arguing their case on merit.
3. As directed by the court on 23rd January 2024, the Preliminary objection was disposed of by way of written submissions. Both parties filed their submissions.

The Submissions

4. The Respondents in their submissions filed in court on 19th February 2024 submitted that the jurisdiction of this court has been prematurely invoked for the reason that the Petitioners have not exhausted the statutorily available remedies. It is the Respondents' submission that the issues raised in the Petition fall within the purview of conditions of service and appointments that ought to be resolved by the Public Service Commission pursuant to section 77 of the County Government Act and also, that the Petitioners on their admission have appealed to the Public Service Commission and not granted the Commission the opportunity to deliberate on the issues raised prior to invoking this court's jurisdiction.
5. The Respondents have also submitted that the Petitioners did not plead with precision how Articles 27,28, 35,41,47 & 50 were violated by the Respondents and that as such, the Petition lacks specificity.
6. It is also the Respondents submissions that the 2nd and 3rd Respondents have been improperly and wrongly joined in the petition. According to the Respondents, the Hon Bii Chelilim and Mr. Edwin Bett cannot under the section 133 of the County Governments Act, be personally liable to any civil liability for any act, matter or thing done or omitted to be done, if that act, matter or thing was done, shall if that act, matter or thing was done or omitted in good faith in the execution of a duty or under direction, render that member or person personally liability to any civil liability. The 2nd and 3rd Respondents maintain that they have been unprocedurally sued in their personal capacity and as such the Petition against the two should be dismissed with costs.
7. The Petitioners on their part submitted that the critical issue for consideration was whether the court had jurisdiction in the circumstances in which they had approached the court. They contended that they appealed to the Respondents by letters dated 14th November, 2023, 17th November, 2023, 1st March, 2023 and 21st November, 2023 but no communication had been forthcoming from the Respondents. That the time of appeal to the Public Service Commission is reckoned from the time they receive responses from the Respondent. That the Respondents can therefore not plead the doctrine of exhaustion as a defence, relying on the decision in Zacharia Kipkoros T/A Riverside Bar v County Chairman Liquor Licencing Committee-Uasin Gishu & 2 Others.
8. They further submitted that the issue whether their letters were responded to or not is a matter of fact for proof at the hearing of their petition.



9. It was further submitted that the petition falls under the exceptions permissible in section 9(4) of the *Fair Administrative Action Act*. That the Respondents are estopped from pleading exhaustion as was held in *Phillipines v Carlito Lacap* quoted with approval in *Republic v Kenya School Of Law & 2 Others Ex Parte Kgaborone Tsholofelo Wekesa* [2019] eKLR.
10. They submitted that this court has jurisdiction to hear the petition and that the preliminary objection has no merit and should be dismissed with costs.

Determination

11. Having considered the pleadings, submissions herein this Court finds the issue that arises for determination to be whether the Preliminary Objection dated 22nd January 2024 is merited.
12. The threshold of a preliminary objection was set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696* as follows:

“...a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit.”
13. The Preliminary Objection in this matter is founded on the ground that the Petitioners have failed to exhaust the dispute resolution mechanism as provided for under section 77 of the County Government Act.
14. The Court of Appeal has recently had an opportunity to pronounce itself on the question of interpretation of section 77 of the *County Governments Act*, 2012 in the case cited by the Respondents, *Secretary County Public Service Board and Another v Hulbhai Gedi Abdulla (2017) eKLR* where the court observed:

“There is no doubt that the Respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by Section 77 of the Act. The Section provides not the only forum through which the Respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one specifically tailored by the legislators to meet needs such as the Respondent’s. 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.”
15. I have noted from the Respondent’s submissions that the Petitioners have lodged appeals before the Public Service Commission which appeals are yet to be determined.
16. It is imperative that the procedure in section 77 of the *County Governments Act* be exhausted before this court’s intervention is invoked.
17. Consequently, I find that this Court lacks the jurisdiction to entertain the Petition filed by the Petitioners as there exists another dispute resolution mechanism provided for under section 77 of the *County Governments Act* which has been invoked but which is still pending for determination.
18. I therefore find that the Preliminary Objection dated 22nd January 2024 is merited and uphold the same. The upshot is that the Petition herein together with the application dated 20th December 2023 are accordingly struck out with no order as to costs.



19. It is clarified for the record that should the Petitioners not be satisfied by the decision of the Public Service Commission they will be free to approach this court in a fresh suit.

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

MAUREEN ONYANGO

JUDGE

