



**Koinange v County Government of Busia & another (Constitutional Petition E001 of 2024) [2024] KEELRC 2599 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2599 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CONSTITUTIONAL PETITION E001 OF 2024**

**JW KELI, J**

**OCTOBER 24, 2024**

**IN THE MATTER OF ARTICLES 21(1), 22,23,41,4, 159(2) (E), 162 AND  
165 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY  
JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND  
FREEDOM OF THE INDIVIDUAL) HIGH COURT PRACTICE AND**

**PROCEDURE RULES, 2013**

**AND**

**BETWEEN**

**GEORGE WAMBUGU KOINANGE ..... PETITIONER**

**AND**

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

**COUNTY GOVERNMENT OF BUNGOMA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

(On Notice of Preliminary Objection dated 24<sup>th</sup> May 2024 by the 1<sup>st</sup> Respondent)

1. On the 19<sup>th</sup> March 2024, the Petitioner, an employee of the County Government of Bungoma, working as a clinical officer of Kimilili District Hospital, following his transfer from Busia County Government, and being aggrieved by the failure of Busia County Government to transfer his IPPD information and personal file to the new employer, Bungoma County Government, and the



subsequent stoppage of his salary and non-allocation of duties, filed a petition of even date against the two county governments seeking the following reliefs:-

- a. A declaration that the respondent's failure to forward to the 2<sup>nd</sup> Respondent IPPD information and personal file immediately upon the transfer of the Petitioner contrived Article 41 of the Constitution of the Republic of Kenya and violates the petitioners right to fair labour practices and the right to reasonable working conditions.
  - b. A declaration that the failure by the 2<sup>nd</sup> Respondent to reimburse the 1<sup>st</sup> Respondent salaries paid to the petitioner while working for the 2<sup>nd</sup> respondent is unfair labour practice that violates Article 41 of the Constitution and violates the petitioners right to fair labour practices, to fair remuneration and the right to reasonable working conditions.
  - c. An order of mandamus be issued compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents do comply with their obligation and ensure that the petitioners IPPD informational and personal file is handed over to 2<sup>nd</sup> Respondent within 30 days from the date of the(sic) and the 2<sup>nd</sup> respondent do place the petitioner on its payroll and reassign the petitioner duties forthwith.
  - d. An order of mandamus be issued compelling the Respondents to jointly pay the Petitioner salary arrears for the month of June 2018-December and 2019 and salary arrears from the month of June 2022.
  - e. In the alternative of prayers (c) and (d) herein the respondents be condemned to pay the petitioner salary arrears for the month of June 2018 to December 2019 and further compensation in terms of gross salary at the rate of Kshs. 98,000 per month from July 2022 up to 2037 being the year that the Petitioner is expected to retire.
  - f. The respondent be condemned to pay costs of this petition to the petitioner.
  - g. Any other relief this honourable Court may deem fit to grant.
2. The 1<sup>st</sup> Respondent on receipt of the petition filed the instant Notice of Preliminary Objection on the following grounds:-
- a. That to the extent that the petition is concerned with the alleged failure to transfer the Petitioner's IPPD information and forward his personal file this Court lacks jurisdiction to hear and determine this matter in the first instance as Petitioner had not exhausted the remedies available to him under section 77 of the County Governments Act which provides that a person dissatisfied with a decision of the County Public Service Board should appeal to the Public Service Commission.(emphasis by objector)
  - b. That this Court lacks jurisdiction to hear this matter in view of the doctrine of exhaustion of statutory remedies and dispute resolution and enforcement mechanisms.
  - c. That to the extent that the petition is concerned with a contract of or for service of employment this Court lacks jurisdiction to hear and determine this matter as it is time barred under section 90 of the Employment Act which provides that such a matter should be commenced within 3 years next after the act.
  - d. The petitioner petition does not meet the constitutional threshold enunciated in Anarita Karimi Njeru v Republic (9976-1980)KLR 1272 hence it lacks justifiable cause of action against the 1<sup>st</sup> Respondent and should be dismissed in limine.



3. The 2<sup>nd</sup> Respondent only filed notice of appointment of advocate through the law firm of Saende Law Advocates.
4. The Court directed that the Notice of Preliminary Objection be disposed of first by way of written submissions. The petitioner and the 1<sup>st</sup> Respondent complied. The 1<sup>st</sup> Respondent filed written submissions dated 1<sup>st</sup> July 2024 through its County Attorney received in Court on the 22<sup>nd</sup> July 2024. The Petitioner filed his written submissions through R.E. Nyamu & Company advocates which were dated 20<sup>th</sup> September 2024 and received in Court on even date.

### **Determination**

5. The Notice of Preliminary Objection raised 3 issues for the Court to determine in limine.
  - a. Whether the Court lacks jurisdiction to hear this matter in view of the doctrine of exhaustion of statutory remedies and dispute resolution and enforcement mechanisms.
  - b. Whether to the extent that the petition is concerned with a contract of or for service of employment this Court lacks jurisdiction to hear and determine this matter as it is time barred under section 90 of the Employment Act which provides that such a matter should be commenced within 3 years next after the act.
  - c. Whether the petition meets the constitutional threshold enunciated in *Anarita Karimi Njeru v Republic (9976-1980)KLR 1272*.

### **Whether the Court lacks jurisdiction to hear this matter in view of the doctrine of exhaustion of statutory remedies and dispute resolution and enforcement mechanisms.**

6. The 1<sup>st</sup> Respondent states that to the extent that the petition is concerned with the alleged failure to transfer the Petitioner's IPPD information and forward his personal file this Court lacks jurisdiction to hear and determine this matter in the first instance as the Petitioner had not exhausted the remedies available to him under section 77 of the County Governments Act which provides that a person dissatisfied with a decision of the County Public Service Board should appeal in the first instance to the Public Service Commission.
7. The 1<sup>st</sup> Respondent relied on the landmark decision in *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd (1969) EA 696* on the definition of preliminary objection (in part) to wit: "..... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.." The 1<sup>st</sup> Respondent further relied on the decision by the Court of Appeal in *Owners of Motor Vessel Lilian 'S' v Caltex Oil(Kenya) Ltd (1989)* to the extent that a Court without jurisdiction ought to down its tools.
8. The 1<sup>st</sup> Respondent submits that the petitioner has not exhausted the remedies available to him under section 77 of the County Governments Act which provides that a person dissatisfied with the decision of the County Public Service Board should appeal in the first instance to the Public Service Commission. That section 77 amplifies and brings into operation Article 234(2)(i) of the Constitution and a violation of section 77 is a violation of the said Article of the Constitution. That section 77 ousts or restricts the jurisdiction of the Court.
9. The 1<sup>st</sup> Respondent further relied on the provisions of section 59 of the County Governments Act which provides for the function and powers of the County Public Service Board and further relied on section B.23(1) of the County Public Service Human Resource Manual 2013 on transfer of service to wit:-



- “1. Transfer of service to and from one county public service to another or other administration shall be approved by the Public Service Commission and or county public service board as the case may be.” They submit that the petitioner ought to have exhausted the existing remedies failing which the petition was premature.
10. To buttress their foregoing submissions the 1<sup>st</sup> respondent relied on the several authorities all to effect of exhaustion of existing remedies under section 77 of the County Governments Act and upholding the landmark decision of the Court of Appeal in Speaker of the National Assembly v James Njenga Karume [1992] eKLR to wit: -“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. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.” The foregoing authority was upheld in authorities enforcing section 77 of the County Governments Act and relied on by the 1<sup>st</sup> Respondent to wit:- James Tinai Murete & Others v County Government of Kajiado and others and Martin Kabubii Mwangi v County Government of Laikipia(2019)e KLR.
  11. The petitioner in response submissions submits that the provisions of section 77 of the County Governments Act are not mandatory and cannot oust the original and appellate jurisdiction of the Court granted to it by Article 162(2) of the Constitution. The Petitioner relied on the decision in Achuti & 27 others v County Government of Nakuru & another (2023) where the Court in dismissing a preliminary objection stated in part:- “my reading of subsection 1 above shows that the provision is not couched in mandatory terms . In any case this provision cannot oust this Court's original and appellate jurisdiction granted to it by Article 162(2) of the Constitution.”
  11. The petitioner further submits that before the Court is a constitutional petition seeking declaratory orders under the Constitution for infringement his rights and it was only the Court that could make the declarations.

## Decision

12. The petitioner filed a petition seeking for the following declaratory orders:-
  - a. A declaration that the respondent’s failure to forward to the 2<sup>nd</sup> Respondent IPPD information and personal file immediately upon the transfer of the Petitioner contrived Article 41 of the Constitution of the Republic of Kenya and violates the petitioners right to fair labour practices and the right to reasonable working conditions.
  - b. A declaration that the failure by the 2<sup>nd</sup> Respondent to reimburse the 1<sup>st</sup> Respondent salaries paid to the petitioner while working for the 2<sup>nd</sup> respondent is unfair labour practice that violates Article 41 of the Constitution and violates the petitioners right to fair labour practices, to fair remuneration and the right to reasonable working conditions.
13. The Declaratory Orders are sought against two county governments following transfer of service of the Petitioner from Busia County Government to Bungoma County Government. The Petitioner was still in employment. Whereas the dispute can still fall under section 77 of the County Governments Act, before the Court is a constitutional petition seeking declaratory orders under Article 41 of the Constitution. The Court agreed with the petitioner that only the Court can make such declaratory orders. The Court upholds the decision in Abdikadir Suleiman V County Government of Isiolo & Another (2015) eKLR where Justice Byram Ongaya observed that:-

“...In the instant case, looking at the alleged claims of illegality, unconstitutionality, breach of constitutional rights and the remedies as prayed for, it is difficult to find that the cited



alternative procedure and remedy under section 77 of the Act was available to the claimant. Even if it is said that it was a case of mixed jurisdiction of the Commission and the Court, it is the Court's opinion that the legitimate path was to invoke the Court's jurisdiction to hear and determine the intertwined issues, that being the most efficient and effective manner of disposing the dispute."

14. The Court upholds the decision by Justice Ongaya(supra) to apply in the instance case and further holds that the Public Service Commission forum under section 77 of the County Governments Act not suitable to resolve the instant petition which raises constitutional issues and claims affecting two counties. The Court is persuaded by the decision in Mohamed Ali Baadi & Others v Attorney General & 11 others(2012) where a bench of 4 judges of the High Court held the alternative fora did not oust the original jurisdiction of the Court. The Court held at paragraph 338(a):-
  - ii. The Court similarly found that there is a narrow class of cases where the exhaustion doctrine in environmental-related controversies does not mandatorily oust the jurisdiction of this Court as the first port of call for litigants. This is so where the alternative fora do not provide an accessible, affordable, timely and effective remedy."
15. In the upshot the Court returns that it has jurisdiction to determine the constitutional petition and that the alternative forum of the Public Service Commission under section 77 of the County Governments Act was not suitable this being a Constitutional Petition.

**Whether to the extent that the petition is concerned with a contract of or for service of employment this Court lacks jurisdiction to hear and determine this matter as it is time barred under section 90 of the Employment Act which provides that such a matter should be commenced within 3 years next after the act.**

16. Section 90(now Section 89 under Rev. Ed 2024) of the Employment Act reads:-<sup>o</sup> 89. Limitations Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof."
17. The 1<sup>st</sup> Respondent submits that the cause of action as per the petition, being the alleged mismanagement of the petitioner's transfer and declining to transfer and or release his IPPD information and personal file, occurred in 2018. It was their case that the suit being in respect of an employment contract ought to have been filed within 3 years from the cause of action being by 2021. That the petitioner circumvented the timelines by filing a constitutional petition 6 years later hence an abuse of Court process and relied on the decision in Satya Bhama Gandhi v Director of Public Prosecutions & 3 others (2018)e KLR where the Court held to be abuse of Court process the filing of a judicial review application on issues that ought to have been brought by way of Petition.
18. The petitioner in response submissions submits that neither of the two counties had terminated his services and the petition concerned transfer issues hence section 90 of the Employment Act was not operational. It is the finding of the Court that the nature of grievance against the two employers being failure to manage the Petitioner's transfer and consequent issues of stoppage of his salary and lack of duty allocation amounted to continuing injury. Secondly, in case of continuing injury claims time runs from the time of stoppage of the act /injury or on termination of service. This was not the case herein. The Court of appeal in The German School Society & another v Ohany & another (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA 894 (KLR) (24 July 2023) (Judgment) Neutral citation:



[2023] KECA 894 (KLR) adopted the Supreme Court of India decision where continuing injury was defined as follows:- The Supreme Court of India in Balakrishna S.P. Waghmare v Shree Dhyaneswar Maharaj Sansthan AIR 1959 SC 798 explained the concept of continuing wrong (in the context of the Indian Limitation Act) as follows:

“It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection, it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury.” The Court of Appeal further stated: “38. Also relevant is M. R. Gupta v Union of India, (1995) (5) SCC 628, in which the appellant approached the High Court in 1989 with a grievance in regard to his initial pay fixation with effect from 1.8.1978. The claim was rejected as it was raised after 11 years. The Supreme Court of India applied the principles of “continuing wrong” and “recurring wrongs” and reversed the decision. It held: “ The appellant’s grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules.” The instant grievance is of an employee who continues to suffer lack of salary and stoppage of allocation of duties while still in service. The limitation falls under continuing injury.

19. Applying the foregoing authorities, on prima facie basis, the Court returns that the continued failure by the respondents to complete the transfer procedures of the petitioner and failing to pay his salary while still in service amounts to continuing injury hence the claims are not time barred.

**Whether the petition meets the constitutional threshold enunciated in Anarita Karimi Njeru v Republic (9976-1980)KLR 1272.**

20. The 1<sup>st</sup> Respondent last ground of the Notice of Preliminary Objection was that the petitioner’s petition does not meet the constitutional threshold enunciated in Anarita Karimi Njeru v Republic (9976-1980)KLR 1272 hence it lacks justifiable cause of action against the 1<sup>st</sup> Respondent and should be dismissed in limine.
21. The constitutional petition threshold to be met by a petitioner enunciated in the Anarita Karimi Njeru v Republic (9976-1980)KLR 1272 case was:- “Where a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”
22. The Court perused the Petition dated 19<sup>th</sup> March 2024 and found that under clause B, the petitioner listed acts complained of in the petition as relates to the transfer, failure by the 1<sup>st</sup> Respondent to release his IPPD details and personal file to the 2<sup>nd</sup> respondent on transfer, the stoppage of salary and the failure of the 2<sup>nd</sup> Respondent to place him on its payroll among others complaints. The petition cited infringement of Article 47 of Constitution and sought for declaratory orders under Article 41 against the Respondents. The Court consequently returns that, on prima facie basis, the Petition meets the threshold in Anarita Karimi Njeru v Republic (9976-1980)KLR 1272.



## **Conclusion**

23. The Court finds no merit in any of the grounds raised in the Notice of Preliminary Objection dated 24<sup>th</sup> May 2024 and the same is dismissed with costs to the Petitioner.
24. Mention before the Judge on the 6<sup>th</sup> of November 2024 for directions on the disposal of the Petition.
24. It is so Ordered.

**DATED SIGNED AND DELIVERED IN OPEN COURT VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> DAY OF OCTOBER 2024.**

**JEMIMAH KELI,**

**JUDGE**

**IN THE PRESENCE OF**

C/A Caleb

Petitioner- Absent

1<sup>st</sup> Respondent – Mabachi

2<sup>nd</sup> Respondent – Tazita h/b Kagongo – To issue Mention Notice to the Petitioner.

