



Ketter & 5 others v Nandi County Public Service Board & 3 others (Petition E012 of 2024) [2024] KEELRC 13252 (KLR) (21 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 13252 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
PETITION E012 OF 2024**

MA ONYANGO, J

NOVEMBER 21, 2024

**IN THE MATTER OF ENFORCEMENT OF ARTICLES
1,2,3,6,10,19,20,21,22,23,27,28,40,47,73,174,175,176,232,235,258(1)
AND 259(1) OF THE CONSTITUTION OF KENYA;**

**AND IN THE MATTE OF ALLEGED VIOLATION AND
INFRINGEMENT OF THE RIGHTS OF FREEDOMS IN ARTICLES
19,20,21,22,23,27,28,40,47,73,174,175,176,232,235 OF THE CONSTITUTION OF KENYA;**

AND

**IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT
OF SECTIONS 55,59,60,61,63,71,75,76,85, AND 42(1) OF THE COUNTY
GOVERNMENTS ACT NO. 17 OF 2012 OF THE LAWS OF KENYA;**

AND

**IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT
OF SECTIONS 3,4,5,6, AND 12 OF THE FAIR ADMINISTRATIVE
ACTION ACT NO. 4 OF 2015 OF THE LAWS OF KENYA;**

AND

**IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF SECTIONS
5,26,35,41,43,45 AND 48 OF THE EMPLOYMENT ACT, 2007 OF THE LAWS OF KENYA**

BETWEEN

**ZEDDY CHEPTANUI KETTER 1ST PETITIONER
EMMANUEL KIPLAGAT TANUI 2ND PETITIONER
EDWIN MASWAI 3RD PETITIONER
EMMANUEL KIRWA 4TH PETITIONER
FAITH JERUTO 5TH PETITIONER**



FRANCIS KIPKOSGEI 6TH PETITIONER

AND

THE NANDI COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT

THE GOVERNOR, NANDI COUNTY 2ND RESPONDENT

PUBLIC SERVICE COMMISSION 3RD RESPONDENT

THE NANDI COUNTY ATTORNEY 4TH RESPONDENT

(Before Hon. Lady Justice Maureen Onyango)

RULING

1. Vide an application dated 22nd September, 2024 the Applicants seek the following orders:
 1. That the application be certified as urgent and be heard Ex-parte at the first instance.
 2. That pending the hearing and determination of this Application, the honorable court be pleased to issue an order of injunction against the 1st Respondent whether by themselves agents and servants and whomsoever acting under his authority or instruction from purporting to terminate the employment services or in any way interfere with the employment and earnings of the Petitioners.
 3. Any other relief that this honorable court may deem fit and just to grant in the interest of justice.
 4. That costs be provided for
2. The ground in support of the application as set out on the face of the application and in the supporting affidavit of Zeddy Cheptanui Ketter are that:
 - a. On 15th September 2024, the 2nd Respondent issued a public communique alleging the existence of ghost and irregularly hired workers in Nandi County affecting thousands of employees whom he intimated will be fired and removed from office unlawfully with immediacy, captured in the following words:
 - i. "In line with the recommendations of PSC, the Nandi County Public Service Board notifies the general public that, any appointment letter issued or obtained unprocedurally and fraudulently to any one is a nullity, and, consequently, the responsible department has expunged any entry in the payroll. "
 - b. That in the said communique, the 2nd Respondent stated that for reasons of high wage bill they had engaged the Public Service Commission, the 3rd Respondent, to conduct a comprehensive audit on human resources, personnel practices and staff payroll.
 - c. On or about 16th September 2024 the 1st Respondent communicated to all Nandi County Staff to pick various letters which happened to be termination letters, in such a way that no one knew if they were on the list or not, or how those to be terminated was picked.
 - d. The Petitioners were shocked to find that they were on the list yet none of the Respondents had sought to hear from them on how they got their employment letters or on boarded to



payroll for all these years even taking loans and working from the county offices including the head office without any complaints.

- e. In the backdated termination letters dated 27th August 2024, the 1st Respondent revoked the Petitioner's employment letters one page among others the following words verbatim.
 - i. "... by the powers conferred upon the County Public Service Board by Section 75 of the County Governments Act 2012 the said (appointment) letter is revoked on account of irregularity..."
- f. The immediate consequence of it is that the Petitioners are simply by arbitrary and unlawful actions declared out of employment in a public office which has high constitutional standards and procedures for termination of any employment in the public service.
- g. Further, the natural consequence of the violation of the Petitioner's rights is the immediate problems of meeting financial obligations that they pegged on the permanent and pensionable terms of up to 2047 which will now put them at the risk of financial ruin and delinquency by the arbitrary actions of the Respondents.
- h. The Petitioners contend that they were all lawfully employed in accordance with the laid down internal procedures and standards and also in line with all the laws of Kenya and therefore the Respondents have no right to arbitrarily terminate the services of the Petitioners without good individual reasons and due process.
- i. Further, the 1st Respondent purports to fire thousands of employees and masses yet each employee deserves a right to be heard and personal written reasons of a disciplinary process or otherwise communicated in accordance with the laws of Kenya.
- j. It is the Petitioners contention that the 2nd and 3rd Respondents have no legal mandate to determine any of the issues governed by the Nandi County Public Service Board which is a constitutionally independent body delinked from the national public service and the county executive.
- k. It is therefore surprising that the 2nd Respondent in his public communique of 5th September 2024 purports to engage the services of the 3rd Respondent to arrogate itself the mandate of the 1st Respondent which is then acting unlawfully.
- l. The effect is that the real decision maker is the 2nd Respondent who is legally an alien to the management of public service employees in Nandi County, and not the 1st Respondent which is a mere pawn in dereliction of its lawful mandate by giving effect to the illegal wishes of the 2nd Respondent on the unsolicited advisory of the 3rd Respondent.
- m. The 3rd Respondent is not an auditor recognized for conducting comprehensive audits and at best its advisory is a mere administrative cooperation between the national government and the county government, and at worst as it is an illegality of a national government entity interfering with the operations of a county government against the Constitution of Kenya.
- n. The 4th Respondent being the County Attorney has failed to offer sound legal advice to the 1st and 2nd Respondents on such obvious points of law that the Petitioners are now grappling on negative life changing events by the dereliction of duty under the Office of the County Attorney Act, 2016.
- o. At no time has the Respondents sought out the Petitioners to get their opinion and comply with all the applicable laws and procedures including the Constitution of Kenya, the Fair



Administrative Action Act, the Employment Act and all the rights protected of Kenyans and specifically public officers in the course of their employment.

- p. The 1st and 2nd Respondents are also intimidating and threatening the Petitioners of surcharge and forceful refund plus other measures in the name of illegal appointments yet the Petitioners have been offering services for many years without any complaints or questions regarding their employments for more than seven years, essentially that the Respondents intend on further violating the rights of the Petitioners in the indefinite future without due process.
 - q. The Petitioners are legitimately apprehensive that the Respondents will continue with these excesses of sanitizing the sham and unlawful process which involves external alien actors in the form of the 2nd and 3rd Respondents plus many procedural and legal lapses.
3. Zeddy Cheptanui Ketter avers in the affidavit that the 2nd and 3rd Respondents have no legal mandate to determine any of the issues of human resources in terms of appointment or revocation which is exclusively vested independently on the Nandi County Public Service Board, an independent constitutional body delinked from the national public service and the county executive.
 4. It is further her contention that it is surprising that the 2nd Respondent in his public communique of 5th September 2024 purports to engage the services of the 3rd Respondent to arrogate itself the mandate of the 1st Respondent which is then acting unlawfully.
 5. She deposes that the effect of this arrangement is that the real decision maker is the 2nd Respondent who is legally an alien to the management of public service employees in Nandi County, and not the 1st Respondent which is a mere pawn in dereliction of its lawful mandate by giving effect to the illegal wishes of the 2nd Respondent on the unsolicited advisory of the 3rd Respondent.
 6. It is the Petitioners' contention that the 3rd Respondent is not an auditor recognized in any laws of Kenya for conducting comprehensive human resource audits and at best its advisory is a mere administrative cooperation between the national government and the county government, and at worst, an illegality of a national government entity interfering with the operations of a county government assaulting the Constitution of Kenya.
 7. The Petitioners further aver that the 1st Respondent is not properly constituted in accordance with section 58(1) of the County Governments Act which requires a mandatory composition of a chairperson and not less than three members and a secretary which is not the case presently. The 1st Respondent therefore has no right to transact any business including issuing the termination letters.
 8. The Petitioners contend that the conduct and involvement of the 1st Respondent and 3rd Respondent in the unlawful predetermined process renders the entire appeal process under sections 75 and section 77 of the County Governments Act 2012 ineffective and a sham thus necessitating the immediate court's protection as envisaged in section 9(4) of the Fair Administrative Action Act 2015 for direct intervention in lieu of internal and appeal processes.
 9. The petitioners further contend that the Respondents did not seek their opinion on the circumstances of their employment contrary to the Constitution of Kenya, the Fair Administrative Action Act, the Employment Act and all their rights protected specifically as public officers, in the course of their employment, yet they were affected by their arbitrary decision.
 10. That besides revoking their employment contracts the 1st Respondent has an additional threatened them with arrest and prosecution for various unknown and undisclosed offences or recovery measures.



11. That unless restrained by an order of this honorable Court, the Respondents will permanently violate the Petitioners core fundamental rights to dignity plus thousands of other loyal and dedicated public officers of many years' standing who are now permanently disadvantaged by failure of the Respondents to adhere to the express statutory and constitutional requirements for termination of employment.
12. That if not restrained by this court the consequences of the decision terminating the employment of the Petitioners will be permanent and irremediable and thus prejudicial to their constitutional and employment rights.

1st and 2nd Respondents Response

13. Upon being served with the application the 1st and 2nd Respondents filed a notice of Preliminary Objection on grounds that:
 - a. the instant suit is improperly before this Court as the Petitioners have failed to exhaust statutory remedies as the question of revocation of appointment is subject to:
 - i. Review before the County Public Service Board and;
 - ii. Appeal before the Public Service Commission under Section 77 of the County Governments Act, 2012 and Section 85 of the Public Service Commission Act, 2017 and therefore this Honourable Court lacks jurisdiction over the instant suit.
 - b. That the instant suit offends the Common Law principle of Ex turpi causa non oritur actio as adopted under Section 3 of the Judicature Act, Capture 8 Laws of Kenya as the Petitioners seek to have this court enforce illegal contracts.
14. The 1st and 2nd Respondents further filed a replying affidavit of CS Jeruto Nancy, Acting Secretary to the County Public Service Board in which she deposes that there is no proof of employment relationship between the petitioners and the Respondents.
15. Ms. Jeruto further deposes that the genesis of the dispute herein is the letter dated 8th February, 2024 from Salaries and Remuneration Commission to Council of Governors convening the 3rd National Wage Bill Conference for purposes of developing inter-governmental policies and action plans aimed at reducing the wage bill to 35% of revenue in line with the provisions of the Public Finance Management Regulations, 2012 (PFM) by the year 2028.
16. That at the 3rd National Wage Bill Conference held between 15th and 17th April, 2024 one of the resolutions passed was that all County Executive Committee Members (CECM) should refine the strategies and action plans and that County Governments take action on fake certificates.
17. That the Office of the County Secretary consequently wrote to the 3rd Respondent, the Public Service Commission requesting it to conduct an independent staff and payroll audit as the first step to actualizing the 35% wage bill requirement.
18. That after productive engagement and negotiation, the 2nd Respondent retained the services of the 3rd Respondent to conduct an independent human resource audit to ensure that the 2nd Respondent's policies, practices, procedures and strategies comply with the best practices and in overall ensure that county human resource services are tenable and updated.
19. Ms. Jeruto further avers that the 3rd Respondent conducted a full Human Resource Audit for the period between 1st July 2022 and April 2024 and published a report of its finding dated 1st August 2024.



20. That the report gave a detailed snapshot of the human resource status of Nandi County including a number of persons who were receiving salaries on the integrated personnel and payroll database (TPPD) but were not captured or recognized as employees in the register provided IT county departments,
21. Ms. Jeruto states that the audit further revealed that there was massive manipulation of the system with some employees receiving allowances they are not authorized to such as hardship allowance and that some employees had unjustifiably enhanced salary entry points among other irregularities that further balloon the wage bill of the County Government of Nandi.
22. The states that the audit report under its Appendices crystalizes all the officers receiving payments under the IPPD system vis avi a segmented list of the officers receiving payments irregularly from the system. That the report conclusively pinpoints personnel receiving payment without proper authorization, dubbed “ghost Workers”.
23. Ms. Jeruto avers that the 1st Respondent carried out preliminary investigations and noted that a number of persons were in the payroll irregularly as it did not authorize the issuance of appointment letters to the said persons. That invoking its powers under Section 75 of the *County Governments Act*, the 1st Respondent revoked the resultant appointment letters and communicated the same to the County.
24. That in the revocation letters issued, the persons affected were informed of the reason for revocation and that they had an option/platform to review the revocation upon filing a review with the board within 14 days of receipt of the letters.
25. Ms. Jeruto averred that the actions of the Respondents in revoking the fictitious employments of the Petitioners immediately expunging them from the Nandi County payroll on account of employment irregularities pending any filed review and/or appeal is in line with developing jurisprudence cemented in the case of Samwel Onyango Ongow v Agriculture and Food Authority & 18 others; COACA E 604 of 2023.
26. Ms. Jeruto states that the Petitioners' assertion that they were not accorded an opportunity to be heard before their employment letters were revoked cannot stand as the 2nd Respondent established that the Petitioners' employment letters were irregularly issued and as such, there was need to revoke their appointment letters first to avoid further loss of public funds.
27. Ms. Jeruto further deposes that the Petitioners misunderstood the contents of the letters by the 1st Respondent revoking their appointments as the letter were explicit that any person dissatisfied with the decision would be accorded a review within 14 days.
28. That the 1st Respondent was properly constituted at the time of revoking the appointments as it had five (5) members being the secretary, Vice Chairman who was acting Chairman and three (3) members.
29. Ms. Jeruto avers that the Petitioners did not exhaust the statutory remedies under section 77 of the County Government Act and section 87 of *Public Service Commission Act*.
30. She further avers that the 2nd Respondent did not take any active role in the decision to revoke the appointment of the Petitioners.
31. She denied any knowledge of threats and intimidation of the Petitioners by the 1st and 2nd Respondents.
32. The 2nd Respondent also filed a replying affidavit of Francis Kipkemboi Sang, the County Secretary and Head of County Public Service, Nandi County in which he states that the 2nd Respondent has wrongly been joined to these proceedings as it plays no role in the appointment and revocation of employment



in the County Public Service. That pursuant to section 59A of the County Government Act the 1st Respondent is independent from the 2nd Respondent and participation of the 2nd Respondent is limited to the instances expressly provided in the statute.

33. He deposes that the genesis of the dispute herein is the letter from SRC dated 8th February, 2024 convening the 3rd National Wage Bill Conference at which a resolution was made that county governments take action on fake certificates.
34. Mr. Sang reiterates the averments of Ms. Jeruto about the engagement of the 3rd Respondent to conduct a human resource audit for the county and its report which revealed that 1,731 persons who were receiving salaries on the Integrated Personnel and Payroll Database (IPPD) were not captured or recognized employees in the register provided by the county departments. That there were also manipulations of the IPPD system with some employees receiving allowances and enhanced salaries they were not authorized, all of which contributed to the ballooning of the wage bill.
35. Mr. Sang deposes that the audit report by the 3rd Respondent conclusively pinpoints personnel receiving payment without authorization dubbed “ghost workers” which the 1st Respondent acted on to revoke the appointment letters that is the subject of the suit herein.
36. It is the averment of Mr. Sang that the 1st Respondent did not require to hear the Petitioners before revoking their appointment letters based on the report of the 3rd Respondent and its own investigations.
37. The 3rd Respondent filed the Replying Affidavit of Paul Fwamba, its Secretary and Chief Executive Officer in which he admits receiving a request from the County Government of Nandi to assist in undertaking an independent staff and payroll audit for the period July, 2022 to 30th April, 2024.
38. That the audit established inconsistencies in the number of staff in the IPPD register, the IPPD payroll and information provided by the departments and recommended that a headcount be conducted by the county government to establish the actual number of employees, that the county government determines the fate of 557 employees whose terms were converted from contract to permanent and pensionable and 230 employees serving on contract but reflected as permanent in IPPD payroll.
39. That the 3rd Respondent only made findings and left the action to be taken by the county government in compliance with due process.

The 3rd Respondent’s Reply

40. Mr. Fwamba deposes that the 3rd Respondent is not aware:
 - a) Whether the County Government conducted a head count to determine the correct number of staff it has.
 - b) Whether the Claimants(sic) were issued with show cause letters informing the affected staff of the intention to revoke their contracts for whatever reasons.
 - c) Whether the Claimants(sic) were granted an opportunity to be heard before the revocation was made.
 - d) The reasons for termination as there was no recommendation by the 3rd Respondent that the contracts be terminated



4th Respondent's Response

41. The 4th Respondent filed Grounds of Opposition as follows:
- i. That this application and the claim are incuratively defective, misconceived, frivolous, incompetent and an abuse of the court the same is untenable and devoid of substance and full of misrepresentations of facts tailored to this Honourable Court.
 - ii. That the Petition and the application are incuratively defective, misconceived, frivolous, incompetent and an abuse of the court process as this Court has no jurisdiction to entertain them in the first instance.
 - iii. That the application and the petition are misconceived, mischievous, bad in law and are gross abuse of the court process and the same ought to be struck out with costs to the Respondents.
 - iv. That, there is no proper petition or the application before the court by the 2nd to 460th Applicants/Petitioners.
 - v. That, the application and the petition offend the mandatory provisions of Order Rule 13 (2) of the Civil Procedures as the Authority to plead was not by all the purported Applicants/Petitioners.
 - vi. That the claim and the application dated 23rd August, 2024 offend the provisions of Article 234(2)(i) of the Consultation as read with section 77 of the County Governments Act, Sections 85, 86, 87(2) and 88 of the Public Service Commission Act and Section 9(2) of the Fair Administrative Action Act as the petitioner has or neglected to exhaust the available dispute resolution mechanism provided for therein.
 - vii. That Claim and the Application offend the doctrines of exhaustion and constitutional avoidance by failing or neglecting to adhere to internal dispute resolution mechanisms provided by Section 77 of the County Governments Act, Sections 86 and 87(2) of the Public Service Commission Act before resorting to this Honourable Court,
 - viii. That the prayer sought by the applicants herein is overtaken by events as the decision has already been implemented as all the appointments irregularly issued have been revoked pursuant to Section 75 of the County Governments Act.
 - ix. That the appointments of the applicants herein were in violation of Article 232 of the constitution and section of the County Governments Act and therefore null and void from inception and therefore incapable of protection by law.

Rejoinder by the Petitioners

42. Upon being served with the Replying affidavits of the 1st, 2nd and 3rd Respondents the Applicants filed a Further Affidavit of ZEDDY CHEPTANUI KETTER. They also filed a Replying Affidavit in response to the notice of preliminary objection.
43. Directions were issued that the preliminary objection and application be heard together. The parties were heard and made oral submissions on the application and preliminary objection on 6th October, 2024. The parties also filed skeleton submissions.
44. The Petitioners/Applicants was represented by Mr. Daniel Chumba appearing alongside Mr. Rotuk and Mr. Muten instructed by Kipkorir, Kipkorir CK & Co Advocates. The 1st and 2nd Respondents were represented by Ms. Msando instructed by Prof. Tom Ojienda & Associates appearing alongside



Mr. Kimeli holding brief for Mr. Tororei. The 3rd Respondent was represented by Mr. Isebe. Mr. Leting alongside Mr. Kogo and Ms. Chebet appeared for the 4th Respondent.

45. Having considered the application, preliminary objection and the written as well as oral submissions made by the parties, it is my considered view that the issues arising for determination by the court are the following:
- a. Whether the preliminary objection is merited, and
 - b. Whether the Petitioners are entitled to the orders sought in their application.
46. It was the submission of the Respondents that the petition has been filed prematurely before exhausting the statutory dispute resolution machinery set out in section 77 of the County Government Act and section 87 of *Public Service Commission Act*. They relied on the decisions in *Secretary County Public Service Board & Another v Hulbhai Gedi Abdulla* [2017] and *Nyaoga v Chairman Kisii County Assembly & 3 Others*. They further relied on the decision in *Samuel Kamau Macharia & Another v Kenya Commercial Bank* [2012]
47. It was their submission that the letter of revocation of employment of the Petitioners provided for an avenue of reviewing the said decision before the 1st Respondent within 14 days from the date of receipt of the letter but the Petitioners disregarded and bypassed the same and filed suit in court.
48. They submitted that in *Hussein Wanyama Mulebo & 5 Others v County Public Service Board & 2 others* [2022] and *Ismael Noo Onyango & Another v Siaya County Public Service Board and Another* [2018] the courts declined to assume jurisdiction in suits filed against County public service boards without first complying with the procedure under section 77 of the County Government Act. They submitted that this court is bereft of jurisdiction to determine the petition.
49. The Respondents further submitted that section 3 of the *Judicature Act* provides that jurisdiction of courts is exercised in conformity with *the Constitution*, all other laws and the common law in that order.
50. They further submitted that the contracts of the Petitioners were illegal and cannot be enforced by this court. That the principle of *ex turpi causa non oritur actio* is a common law principle to the effect that no court should enforce an illegal contract nor allow itself to be made an instrument of enforcing obligations that arise from illegal transactions. For emphasis on this point they relied on the decision in *Scott v Brown, Denning & McNab Company (3)* [1892] 2QB 724 as cited in *County Government of Uasin Gishu v George Njoroge* [2019] eKLR where Lindley LJ stated:
- “*Ex turpi causa non oritur actio*. This old and well known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality.”
51. They submitted that the appointments of the Petitioners were marred with irregularities and illegalities. That the Petitioners cannot seek redress in court on an action founded on illegalities relying on the decision in *Trans Mara Sugar Co Ltd & Another v Ben Kangwana Ayiimba & Another*.
52. They submitted that from the audit report of the Public Service Commission, it was clearly established that the Petitioners were some of the employees that benefitted from irregular recruitment through fraudulent and illegal acquisition of appointment letters and cannot seek to have the court rubberstamp and enforce an action that was illegal in the first instance.



53. For the Petitioners it was submitted that even though section 77 of the County Government Act provides for exhausting the internal review and the appeal to the Public Service Commission, there are unique facts that have been extensively outlined in the petition that require interrogation by the court to establish if they warrant to fall under the exceptions to the exhaustion rule.
54. The Petitioners submit that the exceptions to the exhaustion rule have been litigated in the courts for many years as recently affirmed in the court of appeal decision in Secretary County Public Service Board & Another v Hulbhai Gedi and by the Environment and Land Court in Republic v National Environment Management Authority Ex Parte Sound Equipment Ltd where the court stated
- “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.”
55. The Petitioners submit that in the present situation there was lack of legal authority by the 1st Respondent which according to the Petitioners, was not properly constituted and lacked capacity to make the decision to terminate the employment of the Petitioners.
56. It is submitted that the legal authority of the 1st Respondent is provided for in section 58 of the County Government Act as follows:
58. Composition of the County Public Service Board
- (1) The County Public Service Board shall comprise—
- (a) a chairperson appointed in accordance with section 58A;
 - (b) at least three but not more than five members appointed in accordance with section 58A;
 - (c) a certified public secretary of good professional standing nominated and appointed by the governor, with the approval of the county assembly, who shall be the secretary to the board.
57. The Petitioners submit that at the time of making the impugned decisions the County Public Service Board was manned by strangers in the name of Acting Chairperson and Acting Secretary. That this is an issue that requires determination by the court and would constitute an exception to the exhaustion rule.
58. The second reason advanced by the Petitioners to warrant the exception of the exhaustion principle is that the decision taken by the 1st Respondent was in contravention of section 76 of the County Government Act which prohibits punishment contrary to *the Constitution* as follows:
76. Prohibition of punishment contrary to *the Constitution*
- (1) In exercising its disciplinary powers, the County Public Service Board shall observe the principles of natural justice.
 - (2) No public officer may be punished in a manner contrary to any provision of *the Constitution* or any Act of Parliament.



59. The Petitioners submit that the decision of the 1st Respondent having been a direct violation of the section 76 of the County Government Act, it is a matter that cannot be adjudicated by the 3rd Respondent, the Public Service Commission, because it lacks legal authority to do so.
60. Thirdly, it is the submission of the Petitioners that the impugned decision to revoke the letters of appointment of the Petitioners was made by the 2nd and 3rd Respondents but only rubberstamped by the 1st Respondent. That this was made clear from the communique made by the 2nd Respondent dated 5th September, 2024 and the 3rd Respondent's audit report which facts the court needs to investigate.
61. The fourth issue raised by the Petitioners to support exception to the exhaustion rule is that the body mandated to handle the appeals, the Public Service Commission, has already made a determination and cannot handle the issue in court which contests its own decision.
62. The Petitioners further submit that since they are contesting that there was any decision made by the Public Service Board, there is no decision to be subjected to the appeal before the Public Service Commission. That section 77 provides for appeals to the Public Service Commission against the decisions of the Public Service Board which in this case is non-existent since the decision they are contesting was made by the 2nd and 3rd Respondents.
63. It is further the submission of the Petitioners that the issue being contested is not part of the matters that are subject to appeal to the Public Service Commission which is mandated to hear appeals in respect of recruitment, selection, appointment and qualifications attached to any office, remuneration and terms and conditions of service and disciplinary control.
64. The Petitioners submit that the mandate of the Public Service Commission is limited to questions of fact and not determining questions of law or constitutional rights which are in the exclusive jurisdiction of courts under Article 159 of *the Constitution*. That the Public Service Commission does not have jurisdiction in the matters raised in the petition, thus the petition is within the exceptions to the exhaustion rule.
65. The Petitioners urged the court to find that the petition herein falls within the exclusions to the exhaustion rule and to dismiss the preliminary objection.
66. It is not in dispute that the County Government Act and the *Public Service Commission Act* both provide for appeals against decisions of county public service boards to be heard by the Commission in the first instance.
67. What I have to determine is whether the circumstances of this case fall within the exceptions to the exhaustion rule.
68. The Courts have on numerous occasions stated 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. In the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR, the Court of Appeal stated:

“In our view, there is considerable merit in the submission 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. We observed without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions....”



69. Similarly, in Republic v National Environment Management Authority exparte Sound Equipment Ltd, [2011] eKLR, the Court of Appeal held:

“.....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....”

(Emphasis added)

70. In the instant case the Petitioners have listed several factors which according to them qualify the instant suit as an exception to the exhaustion principle. They have stated that the 1st Respondent was not properly constituted at the time of making the decision to revoke their appointments which would render the decision null and void meaning that there is no valid decision against which an appeal can be preferred to the Public Service Commission as provided in the statutes. Secondly, that the decision of the 1st Respondent was in direct violation of the section 76 and that this is a matter that cannot be adjudicated by the 3rd Respondent. Thirdly, that the body mandated to handle the appeals, the Public Service Commission, has already made a determination and cannot handle the issue which is contesting its own decision. Fourth, that the mandate of the Public Service Commission is limited to questions of fact and not determining questions of law or constitutional rights which are in the exclusive jurisdiction of courts under Article 159 of *the Constitution*.
71. Although I may not agree with all the grounds listed by the Petitioners to justify the exclusion of the exhaustion principle in the instant suit, it is a fact that the Public Service Commission participated in the decision leading to the issuance of the revocation of appointment letters in dispute in the instant suit. Although the Public Service Commission has denied advising the 1st and 2nd Respondents to issue the letters, the 1st and 2nd Respondent have insisted that they acted on the advice of the 3rd Respondent. The issue whether or not the 1st and 2nd Respondents acted on the advise of the 3rd Respondent cannot be decided by the 3rd Respondent. It is a matter for determination by this court as between the 1st and 2nd Respondents on the one hand and the 3rd Respondent on the other hand.
72. There is also the fact that the 3rd Respondent which is the body that the appeal should been preferred to, has been joined as a party to this suit by virtue of the fact that it is accused of having been the one who advised the 1st and 2nd Respondents to issue the impugned letters of revocation of appointment.
73. It is a cardinal principle of law that a person cannot be an arbiter in a dispute where it is implicated. (Nemo iudex in causa sua – no one may be a judge in his own cause).
74. There is also the issue whether there is a valid decision for which an appeal can lie to the 3rd Respondent. This is an issue that turns on the interpretation of the County Government Act which can only be determined after the court takes evidence from the parties and which this court cannot determine as an interlocutory point.
75. I thus agree with the Petitioners that the facts of the instant petition present unique circumstances that justify the matter being an exception to the exhaustion principle.
76. I therefore find that this court has jurisdiction to hear and determine the instant petition under the exceptions to the exhaustion rule. The preliminary objection is accordingly dismissed.



77. The second issue is whether the Petitioners are entitled to the orders sought in their application. The principles for grant of interim injunctions were articulated in the celebrated case of *Giella v Cassman Brown* (1973) E A 358, where the Court expressed itself in the following terms:

“Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience

78. The Petitioners submit that they have a prima facie case with high probability of success. What amounts to a prima facie case was defined by the Court of Appeal, in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123 where the court held as follows:

“A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

79. In this case the Petitioners have questioned *the constitution* of the County Public Service Board and the validity of the decision to revoke their employment. They have submitted that they were never heard before the revocation of their contracts. The Respondents through the affidavits of CS Nancy Jeruto and Francis Kipkemboi Sang have admitted that they did not give a hearing to the petitioners before revoking their employment contracts.

80. It is my finding that the Petitioners have demonstrated that they have a prima facie case with high chances of success given the admissions of the 1st and 2nd Respondents that the Petitioners were dismissed without a hearing.

81. On prejudice the Petitioners have demonstrated that they will suffer great financial hardship should this court not grant the orders sought in the application. The balance of convenience therefore favours granting of the orders in the application.

82. The arguments by the 1st and 2nd Respondents that the orders have been overtaken by events or that they acted to save public funds are not valid. In the first place, the law would not permit them to revoke an employment contract without giving the employee a hearing on the grounds of saving public funds. Secondly, no evidence has been adduced before this court that the positions the Petitioners held for several years are no longer available. Thirdly, this court on 25th September, 2024 made orders that status quo obtaining on that date be upheld.

83. For the forgoing reasons, I find merit in the petitioners’ application dated 22nd September 2024 and make the following orders:

- i. The orders of status quo made on 25th September, 2024 are hereby confirmed.
- ii. Any employee who had not received a letter of revocation of employment as at 25th September, 2024 shall be deemed to be in employment as if such letter had not been issued.
- iii. For employees who had already received the letters, the said letters are suspended pending hearing and determination of the petition herein.
- iv. The Preliminary objection by the 1st and 2nd Respondents is dismissed.



v. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 21ST DAY OF NOVEMBER, 2024

MAUREEN ONYANGO

JUDGE

