



REPUBLIC OF KENYA



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**Mallah v Migori County Public Service Board & another (Petition
E030 of 2024) [2024] KEELRC 13174 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13174 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E030 OF 2024**

JK GAKERI, J

NOVEMBER 21, 2024

**IN THE MATTER OF THE ILLEGAL RE-DESIGNATION OF COUNTY
DIRECTORS IN MIGORI COUNTY GOVERNMENT CONTRARY TO
SECTION 69 OF THE COUNTY GOVERNMENTS ACT, NO.17 OF 2012**

AND

**IN THE MATTER OF THE SUBSEQUENT ADVERTISEMENT OF THE POSITIONS
OF COUNTY DIRECTOR OF EDUCATION, COUNTY DIRECTOR OF HUMAN
RESOURCE MANAGEMENT AND COUNTY DIRECTOR OF PUBLIC HEALTH
AS ADVERTISED BY THE MIGORI COUNTY PUBLIC SERVICE BOARD**

AND

**IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 10, 19, 20, 21, 22, 10,
23, 73, 232, 233 AND 234 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT, NO. 1A OF 2015,
PUBLIC SERVICE CODE AND PUBLIC SERVICE SCHEME OF SERVICE, LAWS OF KENYA**

AND

**IN THE MATTER OF THE COUNTY PUBLIC SERVICE COMMISSION,
HUMAN RESOURCE MANUAL AND THE POLICY FRAMEWORK
FOR MANAGEMENT OF RE-DESIGNATION IN THE CIVIL
SERVICE PUBLISHED BY THE PUBLIC SERVICE COMMISSION**

AND

BETWEEN

PHILIP OTIENO MALLAH PETITIONER

AND



MIGORI COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT

MIGORI COUNTY GOVERNMENT 2ND RESPONDENT

RULING

1. The Petitioner herein filed a Notice of Motion dated 4th September, 2024, seeking various orders pending the hearing and determination of the application and/or the Petition and costs of the application.
2. When the matter came up on 6th September, 2024, no interim or temporary orders were decreed but the Petitioner was directed to serve and inter partes hearing was scheduled for 9th October, 2024, when Counsel for the Respondents informed the Court that he had filed grounds of objection, including a Preliminary Objection (herein after PO) dated 7th October, 2024 and additionally filed and served written submissions.
3. The Petitioner was accorded 14 days to file and serve submissions on the Preliminary Objection.
4. This ruling addresses the Respondent's grounds of objection.
5. The Respondent state that;
 1. The subject matter of the current dispute was the subject matter in Kisumu ELRC Petition No. E032 of 2024 against the Respondent where Hon. Lady Justice Christine N. Baari delivered a considered ruling on 26th September, 2024 and determined that the 1st instance jurisdiction on issues of advertisements, recruitment, selection, possible appointment and purported exercise of disciplinary proceedings relating to engagement of persons in County Governments rests with the Public Service Commission not this Court.
 2. Applicant had not complied with Rule 49 of the Employment & Labour Relations Court (Procedure) Rules 2024 and the Notice of Motions is a non-starter.
 3. The Court of Appeal has held and the Supreme Court affirmed that disputes relating to recruitment, selection, nomination and appointment of employees and advertisement for positions and jobs are not an Employment and Labour Relations issues and the Court has no jurisdiction.
 4. The issues raised by the Petition fall within the jurisdiction of the High Court under Article 165(1) of *the Constitution*.
 5. The Petitioner/Applicant is not an employer, employee trade union, employers organization, federation, Registrar of trade unions, the Cabinet Secretary or any office established under any written law for such purpose and thus has no Locus Standi to move the Court for the grant of the orders sought in the motion and Petition.
 6. The Petition offends the doctrine of exhaustion in light of the provisions of Articles 234(2)(4) and 159(2) of *the Constitution* of Kenya, Section 77 (1) and (2) of the *County Governments Act* and Sections 85-88 of the *Public Service Commission Act* and the Public Service Commission (County Appeals) Regulations 20222 and the Court lacks jurisdiction to hear and determine instant dispute.



7. The proceedings offered the provisions of Section 9(4) of the [Fair Administrative Action Act](#) and the Courts jurisdiction is deferred given the circumstances.
6. The Respondents are challenging the Court's jurisdiction on the premises that the instant Petition and Notice of Motion are res judicata, non-compliant with the Courts rules and jurisdiction of the Court in the context of the doctrine or principle of exhaustion.

Respondents Submissions

7. As to whether the Preliminary Objection is merited, the Respondents contend that it is on account that a similar matter was heard and determined by Hon. Lady Justice Christine Baari who held that the issues being litigated by the Petitioner ought to be filed before the PSC and Rule 49 of the rules had not been complied with as the applicant did not file submissions.
8. Counsel submits that the Court lacks jurisdiction to hear and determine the suit and cites the sentiments of the Court in Samuel Kamau Macharia & Another V Kenya Commercial Bank & Another [2012] eKLR, Kenya Revenue Authority & 2 others V Darasa Investments Ltd [2002] IKLR 577, Attorney General & 3 Others V Okiya Omtata & 14 Others [2020] eKLR, Nick Githinji Ndichu V Clerk Kiambu [2014 eKLR among others to urge that there is no employer-employee issue before the Court as the Petitioner is not an employee of the Respondent and the Court lacks jurisdiction by dint of Section 12 of the [Employment and Labour Relations Court Act](#).
9. Counsel, further submits that there exists an alternative remedy and no exception has been provided to justify the instant Petition and Notice of Motion.
10. Reliance was made on the Court of Appeal decision in Geoffrey Muthiga Kabiru & 2 Others V Samuel Munga Henry & 1756 Others [2015] eKLR on the place of the doctrine of exhaustion to urge that the Petitions did not exhaust the appellate procedure contemplated by Article 234(2)(1) of [the Constitution](#) of Kenya and the provisions of the County Government Act and the [Public Service Commission Act](#), couched in mandatory terms.
11. That subject matter before the Court has an alternative resolution process prescribed by law and only the High Court has jurisdiction to hear and determine the issues herein.

Petitioners Submissions

12. As regards the merits of the Preliminary Objection the Petitioner submits that the Court has jurisdiction to hear and determine the suit before it and the alternative mechanism does not oust the jurisdiction of the Court but only defers it and cites the decision in Benedict Mtuto Mwathi V County Public Service Board Taita Taveta County [2018] eKLR to reinforce the submissions.
13. Counsel urges that the alternative remedy was not a bar to judicial review in exceptional circumstances as held in KRA & 2 other V Darasa Investment Ltd (Supra) and Nicholus V Attorney General & 7 Others; National Environmental Complaints Committee & 5 Others (Interested Parties) 2023 KEJC 113 (KLR).
14. Counsel submitted that the doctrine of exhaustion has exceptions such as gross violation of [the Constitution](#) and absence of an efficacious statutory remedy under Section 9(2) of the [Fair Administrative Action Act](#) as the Respondents action is likely to cause imminent and irreparable harm to the redesignated officers.
15. Counsel urges that the instant petition is based on the enforcement of fundamental freedoms and rights as the Respondents conduct was unfair.



16. I have considered the Notice of Motion and its supportive documents herein, the grounds of objection and the submissions by Counsel.
17. The salient issues for determination are;
 - i. Whether the Petitioner has standing to file the instant suit.
 - ii. Whether the Petitioner has violated the doctrine of exhaustion and res judicata.
18. Contrary to the Respondents vociferous argument that the Petitioner lacks standing and the various judicial decisions cited notwithstanding, the Court is of a different persuasion by dint of the provisions of the Articles 22 and 23 of *the Constitution* of Kenya.
19. Article 22(1), which to a large extent liberizes standing is clear that;

Every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.
20. Equally, Article 22(2) provides that a person may institute a suit in their own interests but proceedings may be instituted by a person in the interest of another person who cannot act in their own name, as a member of or in the interest of a group or class of persons, in the public interest as is the case herein or by an association.
21. Article 23(3) of *the Constitution* of Kenya itemises the reliefs a Court may grant in a suit commenced by dint of Article 22(1) of *the Constitution* of Kenya.
22. These articles of *the Constitution* of Kenya - are not subject the provisions of Section 12(1) of the *Employment and Labour Relations Court Act* or any other statute or judicial pronouncement owing to the pre-eminent character of *the Constitution* of Kenya as ordained by Article 2(1) of *the Constitution* of Kenya itself.
23. There is sufficient judicial authority on the place of *the Constitution* of Kenya vis-à-vis other laws of the land; including international law.
24. The Court is not prepared to hold that the Petitioner/Applicant herein had no standing to file the instant Petition and Notice of Motion.
25. Concerning compliance with Rule 49 of the Employment & Labour Relations Court (Procedure) Rules 2024, the rule states that;

Every interlocutory application to the Court shall be filed together with written submissions and shall, unless the Court otherwise directs be determined by way of written submissions.
26. Although the Rule is couched in mandatory terms and the Respondents contend that the suit before the Court is a non-starter, the failure by the Petitioner/Applicant to comply with this rule, is in the Court's view not fatal to the Notice of Motion as it is a procedural mis-step capable of being remedied vide the provisions of Article 159(2)(d) of *the Constitution* of Kenya as Courts are enjoined to sustain, not dismiss or strike out suits before they are heard on merit, as such a step is deemed draconian and could occasion hardship.
27. Similarly, it is also arguable that since the Petitioner/Applicant is relying on violations of *the Constitution*, and specifically Articles 23, 27, 41 and 47 among others which deal with rights and fundamental freedoms, Legal Notice No.117 dated 28th June, 2017, *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga



- Rules) apply as Rule 10(1) of the Employment & Labour Relations Court (Procedure) Rule 2024 specifically provide for the application of Mutunga Rules 2013 in Petitions filed under the Rules.
28. From the foregoing, it is discernible that the Court is not satisfied that the Respondents have made a cogent case for striking out of the Petitioner/Applicants notice of motion for non-compliance with Rule 49 of the Employment and Labour Relations Court (Procedure) Rules, 2024.
 29. On whether the Petition and Notice of Motion violate the doctrine of exhaustion, both Counsels submitted vociferously on the issue with the Respondent's maintaining that the Court had no jurisdiction. The Petitioner submitted that the Court retains jurisdiction, as it is only deferred.
 30. Article 234(2)(1) of *the Constitution* of Kenya provides that the Commission (Public Service Commission) shall (1) hear and determine appeals in respect of County Government's Public Service.
 31. Clearly persons aggrieved by decision of the County Government Public Service Board are constitutionally required to appeal to the Public Service Commission before taking further steps.
 32. The Employment and Labour Relations Court has no appellate jurisdiction in such matters.
 33. Section 85 of the *Public Service Commission Act* expounds on the powers of the PSC to hear appeals. It provides that the Commission shall in order to discharge its mandate under Article 234(2)(i) of *the Constitution* of Kenya hear and determine appeals in respect of any decision relating to engagement of any person in a County Government, including a decision in respect of;
 - a. recruitment, selection, appointment and qualification attached to any office;
 - b. remuneration and terms and conditions of service;
 - c. disciplinary control;
 - d. national values and principles of governance;
 - e. retirement and other forms of removal from the public service;
 - f. pension benefits, gratuity and other terminal benefits; or
 - g. any other decision the commission considers to fall within its constitutional competence to hear and determine an appeal in that regard.
 34. The foregoing provisions are further fortified by the provisions of Section 77 of the *County Governments Act* that:
 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 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...."
 35. Additionally, sub-section (5) provides for review of the decision in case the person is dissatisfied or affected by the decision.
 36. These are essential internal dispute resolution mechanisms provided by law to facilitate resolution of disputes in the Public Service before the jurisdiction of the Court is invoked.
 37. It is common ground that the Petitioner herein instituted the Petition before the decisions being challenged were placed before the Public Service Commission, the body constitutionally mandated



to hear and determine appeals from the County Public Service on matters employment, retirement, pension and many others.

38. Section 9(2) of the *Fair Administrative Action Act* provides that

The High Court or a subordinate Court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

39. Relatedly, Section 9(4) of the Act provides the circumstances in which a Court may, on application exempt a person from the obligation to exhaust any remedy.

40. In the instant case no application for exemption has been made under Section 9(4) of the *Fair Administrative Action Act* or exceptional circumstances demonstrated.

41. In pith and substance of the Petition and the Notice of Motion is that the Petitioner is dissatisfied with the manner in which the County of Migori Public Service Board is recruiting directors of Public Health and Sanitation, Trade, Lands and Housing, Human Resource Management, Education and Internal Audit services, as well as the re-designation of the officers who held the position as Director Administration and both are employment issues and the Court has jurisdiction to hear and determine the suit.

42. Judicial authority is unambiguous that where *the Constitution* of Kenya or any other written law prescribes a redress mechanism for a grievance(s) the mechanism is binding and must be complied with.

43. In the instant case the Petitioner/Applicant invoked the Courts jurisdiction before due compliance with the provisions of Article 234(2)(i) of *the Constitution* of Kenya, Section 85 of the *Public Service Commission Act*, Section 77 of the *County Governments Act* and Section 9(2) of the *Fair Administrative Action Act* and having further found that no application for exemption has been made or exceptional circumstances demonstrated; the Petitioner/Applicant had no justification to ignore the foregoing provisions of law by by-passing the Public Service Commission.

44. The appellate and review mechanisms are important internal procedures to be complied with before the Courts jurisdiction is invoked.

45. The Court finds that Petitioner's conduct offends the doctrine of exhaustion and the Petition and Notice of Motion are unsustainable.

46. In the end, the irresistible conclusion is that the Petition and the Notice of Motion were filed prematurely and are accordingly struck out with no orders as to costs.

47. The foregoing conclusion notwithstanding, it essential for the Court to determine whether the subject of the Petition and Notice of Motion was the subject matter in Kisumu ELRC Pet. No. E033 of 2024 Ougo Lazarus Kaylemba V Migori County Public Service Board County Secretary Migori County & Andrew Okach Ochola, as alleged by the Respondents.

48. In summary, ELRC Petition E032 of 2024 was challenging the advertisement for positions by the 1st Respondent and the redesignation of directors in the County Government of Migori and sought orders to Quash the advertisement in the newspaper, Facebook, social media page and website portal, prohibition of the Respondents from implementing or effecting the advertisements and all consequent actions, decisions and proceedings recall of the advertisement and all consequent actions, decision and proceedings, declaration that the decisions, actions and proceedings were ultra vires, unlawful and in contravention of *the Constitution* and the law among other prayers.



49. In ELRC Petition No. E030 of 2024 Philip Otieno Mallah V Migori County Public Service Board and Migori County Government, the Petitioner is challenging the advertisement of positions of directors by the Respondents and the redesignation of the previous holders of the position as Director of Administration or Director of Administration.
50. The Petitioner prays for a declaration that the re-designation was null and void, declaration the advertisement of vacancies based on the re-designation is invalid, Quashing of the re-designations of the positions of directors re-designated, and Quashing of the advertisement among other prayers.
51. The foregoing summary of the two petitions is intended to demonstrate that although the petitions are not identical they striking similarities and are indisputably based on the same concatenation of events namely re-designation of directors and the advertisement by the Respondents.
52. The pith and substance of the two petitions and notices of motion, is in the Court's view substantially the same.
53. Section 7 of the *Civil Procedure Act* provides that:
- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by the same court.
54. In *John Florence Maritime Services Ltd & Another V Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR the Court pronounce itself as follows:
- "The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases...
- It promotes stability of Judgments by reducing the possibility of inconsistency in Judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law..."
55. Similarly, the Supreme Court of Kenya gave a detailed explanation of the doctrine of res judicata in *Kenya Commercial Bank V Muiru Coffee Estates Ltd* [2016] eKLR.
56. Significantly, the Supreme Court laid it bare that the doctrine of res judicata applies in respect of all categories of matters including issues of constitutional rights.
57. However, for res judicata to be invoked, the following elements must be satisfied conjunctively as held by the Supreme Court in *Independent Electoral & Boundaries Commission V Maina Kiai & 5 Others* [2017] eKLR
- (a) The suit or issue was directly and substantially in issue in the former suit.
 - b. The former suit was between the same parties or parties under whom they or any of them claim.
 - c. Those parties are litigating under the same title.
 - d. The issue was heard and finally determined in the former suit.



- e. The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised”
58. Relatedly, and as held by the Court of Appeal in *Accredo AG & 3 Others V Steffano Uccelli & Another* [2019] eKLR,
The foregoing elements apply in equal measure to applications”
59. In ELRC Petition No. E032 of 2024, the Notice of Motion dated 4th September sought conservatory orders to suspend the Respondent’s advertisement of vacancies, orders suspending the re-designation, redeployment and termination of the advertised positions, held by substantive officers implementation of the advertisement.
60. In ELRCC Petition E030 of 2024, the Notice of Motion dated 4th September, 2024 seeks orders barring further interviews, shortlisting or appointment of persons to the 5 position of directors and stay of the re-designation exercise.
61. In sum the two applications raise similar or substantially similar issues, the Petitioners/Applicants are both in litigating the suit under the banner of public interest and the suit is against the same parties; the judge who delivered a ruling on 26th September, 2024 and had jurisdiction to hear and determine the instant application.
62. Flowing from the foregoing, the Court is satisfied and finds that the Notice of Motion dated 4th September, 2024 is res judicata.
63. There shall be no orders as to costs.

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

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

