



**Githinji v County Government of Tharaka Nithi (Employment and Labour Relations Cause E020 of 2023) [2024] KEELRC 2754 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2754 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E020 OF 2023  
ON MAKAU, J  
NOVEMBER 8, 2024**

**BETWEEN**

**CEASAR GITHINJI ..... CLAIMANT**

**AND**

**COUNTY GOVERNMENT OF THARAKA NITHI ..... RESPONDENT**

**RULING**

**Background**

1. The Claimant was dismissed from employment by the Tharaka Nithi County Public Service Board (CPSB) vide a letter dated 30<sup>th</sup> August 2023. The reason for the termination was gross misconduct including desertion, negligence of duty and insubordination. He filed a Statement of Claim dated 23<sup>rd</sup> October 2023 alleging that he was dismissed without reasonable cause and without being given a hearing. By the suit he sought judgement against the Respondent as follows:
  - a. A declaration that the Claimant’s termination was wrongful & unfair and contrary to the *Employment Act*.
  - b. Twelve (12) months salary being damages for wrongful & unfair termination.
  - c. General damages for defamation of the Claimant’s character and reputation.
  - d. One (1) month’s salary in lieu of notice.
  - e. Unpaid salary arrears for the period between April 2023 and June 2023 and 1<sup>st</sup> September to 18<sup>th</sup> September.
  - f. Unpaid 34 annual leave days (30 days for the fiscal year 2022-2023 plus 4 days balance carried forward) and 6.5 annual leave days for the fiscal year 2023-2024.



- g. An order do issue compelling the Respondent to remit PAYE for the Claimant from 2016 until termination.
  - h. An order do issue compelling the Respondent to promptly settle all outstanding deductions including Afya Sacco share contributions and Kenya Commercial Bank check-off loan repayments for the period spanning from April 2023 to June 2023.
  - i. Costs of the suit.
  - j. Interest on b, c, d, e, f and i above.
  - k. Such further or other relief this Honourable Court may deem fit.
2. The Respondent objected to the Claim vide a Notice of Preliminary Objection dated 9<sup>th</sup> April 2024 contending that the Court lacks jurisdiction to entertain the Claim as the Claimant had not exhausted all available dispute resolution avenues thus offending section 86 of the Public Service Act CAP 185 of the Laws of Kenya.

### Submissions

3. The Respondent submitted that this Honourable Court lacks jurisdiction to entertain the matter in light of the statutory requirement for internal appeal mechanisms; and that the Claimant's failure to exhaust the appeal process prescribed under Section 77 of the *County Governments Act* 2012, renders the suit premature and untenable. It cited Article 159 (2)(c) of *the Constitution*, and Section 9(2) of the Fair Administrative Actions Act, to submit that the doctrine of exhaustion ensures that administrative bodies have the first opportunity to correct their own errors.
4. It submitted that the statutory framework under Section 88 of the PSC Act and Regulation 24 of PSC (County Appeals Procedure) Regulations 2022 was intended to ensure that all internal administrative remedies were exhausted before a matter was escalated to judicial review. It argued that by the failure of compliance, this Court lacked jurisdiction. Reliance was placed on Owners of the Motors Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR and Republic v National Environment Management Authority [2011] eKLR.
5. It further submitted that the Public Service Commission (PSC) has the jurisdiction to award compensation for unlawful termination of employment. It relied on the case of Daniel N. Mugendi vs Kenyatta University & 3 others [2013] eKLR and section 77 of the *County Governments Act* 2012, where the Court of Appeal held that the PSC can award compensation. Therefore, it urged the court to dismiss the suit with costs.
6. The Claimant opposed the objection by the respondent urging that only this Court was the appropriate forum to hear and determine the Claimant's claim on basis of section 87(1&2) of the *Employment Act*. It was submitted that the PSC lacked the jurisdiction to either declare that the termination was wrongful and unfair or to grant the 12 months' salary as compensation for the same since that is exclusively within the Court's jurisdiction.
7. It was submitted that section 87(2) of the *Employment Act* precluded any other body including the PSC from determining claims on rights and liabilities arising from a contract of service. He submitted that it would be improper to oust the jurisdiction of the Court for a forum that would not adequately address the Claimant's grievances. Further that, declining jurisdiction is tantamount to denying the claimant the right of access to justice to agitate for his constitutional rights.



8. Reliance was placed on the case of *Abdikadir Suleiman v County Government of Isiolo & Another* [2015] eKLR and the case of *Fazal Dharamshi & Company Limited v Kenya Revenue Authority* [2024] eKLR in support of the arguments. Further reliance was placed on the case of *Robert Khamala Situma & 8 others v Acting Clerk of the Nairobi City County Assembly* [2022] eKLR. Therefore, the Court was urged to find that it has original and unlimited jurisdiction to hear and determine the claim thereby dismiss the preliminary objection with costs.
9. It was further submitted that the claim discloses exceptional circumstances that necessitate this Court's intervention. He submitted that the termination letter not only wrongfully and unfairly dismissed him but it also severely harmed his reputation. It was therefore submitted that issue of defamation meant that his claim went beyond the scope of a typical employment dispute to be handled by PSC.
10. To buttress the foregoing submission reliance was placed on Chief Justice and President of the Supreme Court of Kenya & Another v *Khaemba* [2021] KECA 322 and *Fleur Investment Limited v Commissioner of Domestic Taxes & another* [2018] eKLR where the court intervened despite the existence of alternative method of resolving dispute due to exceptional circumstances.

### **Determination**

11. Having considered the Claim, the Preliminary Objection, the submissions by the parties, the Authorities cited and the law, the issue that arise for determination is whether this Court lacks jurisdiction to hear and determine the suit before appeal mechanism provided under section 77 of the County Government Act has been exhausted.
12. This Court's jurisdiction to hear and determine employment disputes is donated by Article 162(2) (a) and 165 (5) of *the Constitution* and section 12 of the *Employment and Labour Relations Court Act*. Section 12 (1) provides that:

“ 12. Jurisdiction of the Court

1. The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including-
  - a. disputes relating to or arising out of employment between an employer and an employee;
  - b. disputes between an employer and a trade union;
  - c. disputes between an employers' organisation and a trade union's organisation;
  - d. disputes between trade unions;
  - e. disputes between employer organisations;
  - f. disputes between an employers' organisation and a trade union;
  - g. disputes between a trade union and a member thereof;



- h. disputes between an employer’s organisation or a federation and a member thereof;
- i. disputes concerning the registration and election of trade union officials; and
- j. disputes relating to the registration and enforcement of collective agreements.”

13. There can be no doubt that the above section clothes the court with exclusive original and appellate jurisdiction to hear and determine labour disputes referred to it in accordance with *the Constitution*, the ELRC Act and any other written law. A simple reading of the section indicates that there is no limitation whatsoever to this jurisdiction. However, it must be appreciated that the right to access court under Article 48 of *the Constitution* is not absolute.

14. In fact, Article 159(2) (c) of *the Constitution* obliges the Court to promote alternative methods of dispute resolution. Further, Section 9(2) of the FAA Act provides that:

“The High Court or a Subordinate Court under sub- section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.”

15. In the instant case, the objection is based on section 86 of the PSC Act and Section 77(1) of the County Government Act, 2012 which provides as follows, respectively:

“86. Any person who is dissatisfied or affected by a decision made by any authority or person in respect of a County Government public service may appeal to the Commission against the decision.”

“77. Appeals to the Public Service Commission

(1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the “Commission”) against the decision.”

16. Although the above provisions use of the word “may” to suggest an option to be exercised by the affected or dissatisfied person section 87(2) of the *Public Service Commission Act* in 2017, uses the word “shall” to mean that the appeal procedure is mandatory. It provides that;

“A person shall not file any legal proceedings in any court of law with respect to matters within the jurisdiction of the commission to hear and determine appeals from the County Public Government Public Service unless the procedure provided for under this part has been exhausted.”



17. The appealable matters are then set out under Regulation 8 of the Public Service Commission (County Government Services Appeals Procedure) Regulations, thus:-

“The Commission may hear and determine an appeal from a public officer in a County Government Public Service regarding any decision relating to the engagement of the person in the County Government, including an appeal in respect of –

- a. Recruitment, selection, appointment, promotion, re-designation, deployment and qualifications attached to any office;
- b. remuneration, and terms and conditions of service;
- c. disciplinary control including imposition of any punishment including dismissal;
- d. ...”

18. The legal principle flowing from the foregoing provisions is that any public officer in a county public service dissatisfied by a decision of the CPSB or any person exercising or purporting to exercise disciplinary control over him or her, must first exhaust the administrative appeal mechanism prescribed by section 77 of the County Government Act.

19. Courts have by passed the administrative appeal procedure on account of exceptional circumstances like where the decision is tainted with illegality, irrationality, and procedural impropriety or where the appeal mechanism cannot grant sufficient remedy. In *Fleur Investments Ltd v Commission of Domestic Taxes & another* [2018] eKLR the Court of Appeal held thus:

“24. Accordingly, the court is perfectly entitled to intervene where it is alleged that the discretion is not being exercised judicially, that is to say, rationally, and fairly and not arbitrary, whimsically, capriciously or in flagrant disregard of the rules of natural justice....

Also in *Municipal Council of Mombasa v Republic & Umoja consultant Ltd* [2002] eKLR, it was stated that although judicial review is concerned with the decision making process, not with the merits of the decision itself, the court would concern itself with issues as to whether the decision makers had jurisdiction; whether persons affected by the decision were heard before it was made, and whether in making the decision the maker took into account relevant matters or did take into account irrelevant matters.’ [Emphasis added].

20. Again, in the case of *Kisumu County Public Service Board & another v Samuel Okuro & 7 others* (2018) eKLR the Court of Appeal addressed itself as follows:-

“(47)...moreover, the court cannot uphold an action of the Governor that is clearly ultra vires his constitutional and statutory mandate.

(48) We have come to the conclusion that the Governor initiated the removal of the respondents without following the appropriate machinery. The respondents being County Public Officers, the Governor could not terminate their services without involving the County Board and the County assembly. In sending the respondents on compulsory leave and terminating the respondents’ contract,



the Governor usurped the role of the County Board. This denied the respondents their rights under section 77 of the County Government Act that allows any County Public officer that is dissatisfied with the decision of the County Board in a disciplinary process to appeal to the public service commission. Further, the respondents' constitutional fundamental rights were violated.

(49) In that regard the learned Judge acted within her constitutional jurisdiction in reviewing the appellants' action and granting the order of certiorari to protect the respondents from violation of their fundamental rights and to prevent the appellants from acting in a manner that contravenes the constitution and the statute."

21. In the instant case, the claimant was accorded a hearing by the CHRAC and thereafter, he was invited to a hearing before the CPSB but failed to attend citing short notice. The CPSB proceeded with the hearing in his absence and a decision to dismiss him was reached. The claimant filed the instant suit instead of appealing to the PSC as required by section 77 of the County Government Act. He has alleged that the PSC has no mandate to award him compensation for unfair termination and damages for defamation and therefore an appeal to the PSC would not remedy his grievance.
22. Having considered the pleadings and the rival submissions, I agree with the respondent that the claimant has not demonstrated any exceptional circumstances that would warrant the court to by pass the administrative appeal mechanism. Section 77 of the County Government Act has prescribed for administrative appeal process and section 85,86 and 87 of the PSC Act and the Regulations thereunder have set out details of the nature of the appealable disputes and the procedure to be followed. Consequently, I find merits in the Preliminary objection, decline jurisdiction over the suit for being premature and accordingly strike out the suit with costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 8TH DAY OF NOVEMBER, 2024.**

**ONESMUS N MAKAU**

**JUDGE**

Order

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N MAKAU**

**JUDGE**

