



REPUBLIC OF KENYA



KENYA LAW
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**Dima v Migori County Secretary & 2 others (Miscellaneous Application
E068 of 2022) [2023] KEELRC 81 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 81 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
MISCELLANEOUS APPLICATION E068 OF 2022**

**S RADIDO, J
JANUARY 25, 2023**

BETWEEN

MARTINE OGOLLA DIMA APPLICANT

AND

MIGORI COUNTY SECRETARY 1ST RESPONDENT

GOVERNOR, MIGORI COUNTY 2ND RESPONDENT

COUNTY PUBLIC SERVICE BOARD, MIGORI 3RD RESPONDENT

RULING

1. On 6 September 2022, the Respondents issued a notice of termination to the applicant who was then serving as a Chief Officer with the County Government of Migori.
2. The applicant challenged the notice in Court through judicial review proceedings.
3. On 16 November 2022, the Court dismissed the judicial review proceedings for lack of jurisdiction.
4. As a consequence of the judgment, the applicant lodged an appeal with the Public Service Commission on or around 24 November 2022.
5. On 6 December 2022, the Respondents instructed the applicant to hand over/clear from office to enable the processing and payment of gratuity.
6. Alarmed with the turn of events, the applicant moved this Court through a Notice of Motion on 13 December 2022 seeking orders:

(1) ...



- (2) Pending the hearing and determination this application, the Respondents be restrained from terminating the services of the applicant and/or removing the applicant from the payroll of the County Government of Migori.
 - (3) Pending the hearing and determination of the applicant's complaint before the Public Service Commission in PSC County Appeal No 101 of 2022, the Respondents be restrained from terminating the services of the applicant and/or removing the applicant from the payroll of the County Government of Migori.
 - (4) The costs of this application be provided for by the Respondents.
7. The grounds in support of the application were that the applicant had instituted an appeal before the Public Service Commission in line with section 77 of the [County Governments Act](#) and the [Public Service Commission \(County Appeals Procedures\) Regulations 2022](#); that despite the pendency of the appeal, the Respondents had on 6 December 2022 instructed the applicant to hand over office; that the Public Service Commission lacked the authority to grant interim injunctive orders; that the appeal had high chances of success and that the applicant stood to suffer losses which damages would not ameliorate if the orders sought were not granted.
 8. The Respondents filed Grounds of Opposition on 15 December 2002. Thereafter, the Governor filed a replying affidavit in opposition to the Motion on 16 December 2022. According to the affidavit, the applicant's employment had already been lawfully terminated upon the determination of Kisumu Judicial Review No 13 of 2022 on 16 November 2022; the applicant had not been at work from the date of the notice of termination; a new Chief Officer had taken over the office held by the applicant; that the applicant was seeking orders restraining the Respondents from terminating the applicant's employment and quashing the notice of termination, and reinstating him as remedies in the appeal before the Public Service Commission; that before the determination of the appeal by the Public Service Commission, the Court was bereft of either original or appellate jurisdiction by dint of section 87(2) of the [Public Service Commission Act](#); that the Public Service Commission had the authority to issue interlocutory orders and that the instant Motion was an abuse of the court process.
 9. The parties did not file submissions as directed by the Court.
 10. The Court has considered the Motion, Grounds of Opposition and affidavits and can make the following determinations.
 11. One, the grant of an injunctive order is an exercise of discretion. The principles which should guide the Court are, the establishment of a prima facie case with a probability of success, demonstration of irreparable harm which cannot be compensated with damages, and if there is doubt, the Court should favour balance of convenience.
 12. The applicant here was in an employment relationship with the Respondent. The contract was for a defined period with known terms and conditions of service including remuneration.
 13. If at all the Respondents were in breach, the damages occasioned can easily be quantified.
 14. Two, the jurisdiction of the Court in termination of employment claims arising from the county public service or breaches of contract is a deferred jurisdiction.
 15. The jurisdiction actualises upon the exhaustion of the appellate procedures contemplated by sections 77 of the [County Governments Act](#) and sections 85,86 and 87(2) of the [Public Service Commission Act](#).



16. In the instant case, the Public Service Commission is still seized of jurisdiction, as it has not made a determination one way or the other.
17. It is instructive that the very order(s) sought by the applicant in the Motion under examination is one of the substantive remedies the applicant has called the Public Service Commission to consider.
18. If this Court were to venture into examining the utility of such an order(s) oblivious to the pending proceedings before the Public Service Commission, there would be a danger or risk of creating parallel forums for adjudicating disputes which belong to domain of the Public Service Commission at the first instance.
19. The Court, therefore, determines that the Motion is an abuse of the court process.
20. Three, one of the remedies the Public Service Commission is mandated to grant setting aside a termination of employment. The consequence of such a setting aside is that the employee would be reinstated into service.
21. It would, therefore, serve no purpose for the Court to preempt the decision that the Public Service Commission may make after hearing the applicant's appeal.
22. For the above reasons, the Court declines the applicant's invitation to issue the orders sought.

Conclusion and Orders

23. In light of the above, the Court finds no merit in the Motion. It is dismissed with costs in the cause.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 25TH DAY OF JANUARY 2023.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For applicant Bruce Odeny & Co. Advocates

For Respondents Okongo Wandago & Co. Advocates

Court Assistant Chrispo Aura

