



Ruto v County Government of Bomet & 2 others; County Assembly of Bomet & another (Interested Parties) (Petition E011 of 2022) [2023] KEELRC 68 (KLR) (24 January 2023) (Ruling)

Neutral citation: [2023] KEELRC 68 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
PETITION E011 OF 2022
HS WASILWA, J
JANUARY 24, 2023**

BETWEEN

SHADRACK KIPTONUI RUTO PETITIONER

AND

COUNTY GOVERNMENT OF BOMET 1ST RESPONDENT

COUNTY GOVERNMENT OF BOMET 2ND RESPONDENT

BOMET COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

AND

COUNTY ASSEMBLY OF BOMET INTERESTED PARTY

KENYA COUNTY GOVERNMENT WORKERS UNION . INTERESTED PARTY

RULING

1. The Application before Court is the Preliminary Objection raised by the 3rd Respondents dated November 24, 2022. The Respondents raised this Preliminary Objection to the effect that:
 - a. That this Honourable Court lacks Jurisdiction to handle the Petition for being barred by *Limitation of Actions Act*.
 - b. That the Petitioner/ Applicant has not exhausted all other existing mechanisms before approaching this Honourable Court.
2. The Parties agreed to dispose of this Preliminary Objection through written submissions.



3rd Respondent's submissions.

3. The Respondent herein submitted with regard to the jurisdiction of this Court that, the issues in dispute in this case arose in the year 2014 and the same are barred by limitations of action as provided for under section 90 of the [Employment Act](#) and Section 4 of the [Limitation of Actions Act](#). It was argued that when a suit is caught up by limitation of action, the same goes to the root of the jurisdiction of the Court. To support this position, they relied on the case of [Justine S Sunyai V Judicial Service Commission and another](#) [2017] eKLR where the Court held that;

“...in the case of Peter Nyamai & & Other v M. J. Clarke Limited that has been relied upon by the 1st Respondent the Court held that this Court has no jurisdiction to extend limitation period. The Court relied on the decision of the Court of Appeal in Divecon v Samani and the High Court decision in Timothy M. Mukalo v Reuben Alubale Shiramba & 3 Others. Again in the case of Charles Musa Kweyu v Wananchi Marine products and in Augustine Odhiambo Abiero v K.K. Security Ltd the Court held that a suit that is time barred is incompetent and bad in law. For the foregoing reasons the preliminary objection is allowed and I consequently strike out this suit for being time barred under section 90 of the [Employment Act](#).”

4. They also cited the case of [Analect Kalia Musau v Attorney General & 2 Others](#) [2020] eKLR, where the Court of Appeal held that;-

“The solitary issue in this appeal is, whether the suit before the High Court was statutorily time barred. To demonstrate that time limitation is a jurisdictional question and that if a matter is statute-barred a Court has no jurisdiction to entertain it, we cite the decision of the Supreme Court in the case of Nasra Ibrahim Ibren v. Independent Electoral and Boundaries Commission & 2 others, Supreme Court Petition No. 19 of 2018,... We fortify that view by quoting yet another passage from the East African Court of Appeal in the matter of Iga V. Makerere University (1972) E.A 62, where it was stated that;“The limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time-barred, the Court cannot grant the remedy or relief.....The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint, and no grounds of exemption are shown in the plaint, the plaint must be rejected.”

5. On the doctrine of exhaustion, it was submitted that the Petitioner has not exhausted all the internal dispute resolution mechanism provided for under the law especially in Section 85 of the [Public Service Commission Act](#) and Section 77(1) & (2) of the [County Government Act](#) and cited the case of [Secretary, County Public Service Board and Another v Hulbbhai Gedi Abdille](#) [2017] eKLR where the Court held that;

“Time and again it has been said 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. Such party ought to seek redress under the other regime. In the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR, this Court emphasized:-....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 c here is no doubt that



the Respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by Section 77 of the Act. The section provides not only a forum through which the Respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one, specifically tailored by the legislators to meet needs such as the Respondent's. In our view, the most suitable and appropriate recourse for the Respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance annot oust clear constitutional and statutory provisions.
..."

6. The Respondent further emphasized on the need to exhaust internal dispute resolution mechanism before approaching the Court by citing several case including the case of *Alfred Sifa Dena v Benjamin Kai Chilumo*[2020] eKLR and the case of *Anthony Miano & Others v Attorney General and Others* [2021] eKLR where the Court relied on a decision by A 5-Judge Bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 (2020) eKLR elaborately dealt with the doctrine of exhaustion. The Court stated as follows: -

“The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR.”

7. On the basis of their argument, the Respondent herein urged this Court to uphold its preliminary objection and strike out the application filed together with the Petition.

1st and 2nd respondents' submissions.

8. The Respondents herein supported the Preliminary objection and submitted on the issue of jurisdiction and on whether the suit offends the provisions of Section 9 (1) -(4) of the *Fair Administrative Actions Act*
9. On the first issue it was submitted that the substance of the petition was on allegation that the Applicant was not issued with appointment letter having successfully passed in the interview but instead that he was given a two-year contract and on expiry he was retained on similar terms without any contract. It was argued that the Petitioner ought to have raise the issue with the 3rd Respondent in accordance with section 75(a)-(c) of the *County Government Act*. It was argued further that the Petitioner did not appeal the decision of the Respondent to the Public Service Commission as directed by Section 77 and Section 87 of the *Public Service Commission Act*. Therefore that the jurisdiction of this Court has been prematurely invoked as was held in *Geofrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others*[2015] eKLR where the Court held that;-

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a



party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of Courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

10. They also relied on the Court of Appeal decision in *Secretary County Public Service Board V Hulbbai Gedi Abdulla* [2017] eklr where the Judges of Appeal held that;

“there is no doubt that the Respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by Section 77 of the Act. The section provides not only a forum through which the Respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one, specifically tailored by the legislators to meet needs such as the Respondent’s. In our view, the most suitable and appropriate recourse for the Respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance.”

11. On the second issue, it was submitted that the failure by the Petitioner to exhaust the internal dispute resolution mechanism violated the provisions of Section 9 (1) - (4) of the *Fair Administrative Act*. It was argued that the cause of action arose in the year 2014 when the Petitioner was issued with a fixed term contract instead of appointment on permanent and pensionable terms as indicated in the interview and therefore he ought to have filed this suit within the 3 years provide for under the Section 90 of the *Employment Act*.
12. In conclusion, the Respondent urged this Court to uphold the preliminary Objection.
13. There were no submissions for the Petitioner at the time of writing this ruling.
14. I have considered the averments and submissions of the parties herein.
15. The main issue raised by the applicant is on jurisdiction, this matter being time barred as per Section 90 of the *Employment Act 2007* which envisages that an employment claim be filed within 3 years.
16. I have looked at the issues raised in the Petition which relate to failure by the Respondents to issue an appointment letter to the Petitioner.
17. The Petitioner also avers that he has worked for Respondent for 9 years. In my view the issue is not a single event but a continuing injury as per Section 90 of the *Employment Act 2007*.
18. The issue of limitation can only then be determined after the full determination of this petition and not as a preliminary objection.
19. As relates to the issue of an Appeal to the PSC Section 77 of the *County Government Act* envisages an Appeal can be filed against a decision of the County Public Service Board to the PSC. In this case however no decision has been made by the County Public Service Board as the board has been accused of inaction. There is therefore nothing appealable to the PSC.
20. In the circumstances, I find the preliminary objection not merited. It is hereby dismissed accordingly and I direct the main petition to proceed.
21. Costs in the petition.

RULING DELIVERED VIRTUALLY THIS 24TH DAY OF JANUARY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE



In the presence of:-

No appearance for parties

Court Assistant - Fred

