



**Republic v Kakamega County Assembly Service Board; Simwa & another (Exparte Applicants); Akosi (Interested Party) (Judicial Review E005 of 2022) [2023] KEELRC 513 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 513 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA**  
**JUDICIAL REVIEW E005 OF 2022**  
**JW KELL, J**  
**FEBRUARY 23, 2023**  
**IN THE MATTER OF THE ALLEGED INVESTIGATION OF THE**  
**ACTING CLERK & PRINCIPAL FINANCE OFFICER OF THE**  
**KAKAMEGA COUNTY ASSEMBLY**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**KAKAMEGA COUNTY ASSEMBLY SERVICE BOARD ..... RESPONDENT**

**AND**

**JOHN SIMWA ..... EXPARTE APPLICANT**

**PASCAL WERE ..... EXPARTE APPLICANT**

**AND**

**BONIFACE SAKWA AKOSI ..... INTERESTED PARTY**

**RULING**

**On Notice of Preliminary Objection dated 9th January, 2023**

1. The *Exparte* Applicant filed the chamber summons dated 13<sup>th</sup> December, 2022 seeking for grant of leave of court to commence Judicial Review Proceedings against the Respondent following the decision to suspend and sent the *Exparte* Applicants on compulsory leave for 45 days. The *Exparte* Applicant further sought for the leave granted to institute Judicial review proceedings to operate as stay of the said decision.



2. The court at first instant sitting in Kisumu the court did not grant the *ex parte* orders and ordered hearing interpartes.
3. The Respondent filed the instant Notice of Preliminary Objection dated 9<sup>th</sup> January 2023 and received in court on the 11<sup>th</sup> January, 2023 challenging the jurisdiction of the court to hear and determine the application dated 13<sup>th</sup> December 2022 at first instance on the following grounds:-
  - a. To the extent that the Application seeks to challenge the decision made by the Respondent as an employer within the County Government Public Service, the Application violates the mandatory requirement under section 87 (2) of the *Public Service Commission Act* No. 10 of 2017 ( the *Public Service Commission Act*) which 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 form County Government Public Service unless the procedure provided for under this part has been exhausted.
  - b. The Public Service Commission has jurisdiction under Articles 234(2) 1 of the *Constitution* as read together with Section 85 &86 of the *Public Service Commission Act* to hear and determine Appeals in respect of any decision relating to engagement of any persons in a county government, including a decision in respect of “ terms of service and any form of disciplinary control”.
  - c. The Application is premature and violates the established principle under the *Constitution*, various statutes and the Human Resource Polices and Procedures Manual for the Public Service applicable to the *Ex-parte* Applicants and which was enunciated by the Court of Appeal in the Case of *Secretary, County Public Service Board & Another -vs Hulbbhai Gedi Abdille* (2017) eKLR which determined 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 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”.
  - d. The Honourable court lacks jurisdiction in the first instance, to do that which is a reserve of the Public Service Commission as the court’s jurisdiction can only be to review the ensuing decision from the Public Service Commission following the determination of an appeal lodged by the *Ex-parte* Applicants to the Public Service Commission.
4. The court directed that the Notice of Preliminary Objection be canvassed first by way of written submissions.
5. Only the Respondent filed submissions on the preliminary objection which are dated 23<sup>rd</sup> January, 2023.

### **Determination**

6. The issue for determination was whether the Notice of Preliminary Objection by the Respondent dated 9<sup>th</sup> January 2023 was merited. The Jurisdiction of the court must be addressed on priority basis



when challenged guided by the decision of the court of Appeal in *Owners of Motor Vessel "Lillian S" vs- Caltex Oil Kenya Limited* (1989)eKLR.

7. The gist of the objection is that the issues raised in the Application are subject of appeal before the Public Service Commission pursuant to the provisions of Sections 87 (2) of the *Public Service Commission Act* No. 10 of 2017.
8. The Respondent submits that the jurisdiction of the court has been invoked prematurely as follows:-
  - a. The issues raised in the application, should be subject of an appeal to the Public Service Commission, the body charged in law to address complaints emanating from decisions of the County Government Public Service.
  - b. To the extent that the Application seeks to challenge the decision made by the Respondent as an employer within the County Government Public Service, the Application violates the mandatory requirement under Section 87 (2) of the *Public Service Commission Act* NO. 10 of 2017 ("the *Public Service Commission Act*") which 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 county government Public Service unless the procedure provided for under this part has been exhausted".
  - (c) The Public Service Commission has jurisdiction under Articles 234(2) 1 of the *Constitution* as read together with Section 85 &86 of the *Public Service commission Act* to hear and determine Appeals in respect of any decision relating to engagement of any persons in a county Government , including a decision in respect of " terms of service and any form of disciplinary control".
9. The Objector submits that the Application is premature and violates the established principle under the Constitution, various statutes and the Human Resource Policies and Procedures Manual for the Public Service applicable to the *Ex-parte* Applicants and which was enunciated by the Court of Appeal in the case of *Secretary, County Public Service Board & Another vis- Hulbbhai Gedi Abdille* (2017) eKLR which determined 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 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".
10. That recently, the Employment and Labour Relations Court ( ELRC ) in *Sammy Kalundu -vs- Ag. Clerk of the Nairobi City County Assembly* ( 2022) eKLR sustained a similar Preliminary Objection with the court holding as follows:-
  - (21) From the foregoing, it is apparent there is an elaborate appeal/review mechanism established by the *County Government Act* and the *Public Service Commission Act*. More significantly , it is worth noting that the appeal structure flows primarily from the Constitution.



- (22) The court further takes note of the provisions of section 87 (2) of the Public Service Commission Act which provides as follows:-
- (87) (2) 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 County Government Public Service unless the procedure provided for under this part has been exhausted)
- (23) in view of the foregoing it is therefore apparent that the Applicant has moved the court prematurely as he is yet to exhaust the dispute resolution mechanisms established under the Constitution, various statutes and the relevant Human Resources Policies and Procedure Manual”.
11. The objector further submits that , in James Akelerio alias Muguu & Another -vs- Moses Kasaine Lenolkilal & 3 Others ( 2014) eKLR the court affirmed jurisdiction of the Public Service Commission and stated as follows:-“ The first port of call before coming to the High Court to seek redress would have been the Public Service Commission. It is apparent that the petitioners did not follow the due process provided by Law”.
12. The Objector submits that this court to find that it lacks jurisdiction the first instance to do that which is a preserve of the Public Service Commission as the court’s jurisdiction can only be to review the ensuring decision from the Public Service commission following the determination of an appeal lodged by the *Ex-parte* Applicants to the Public Service commission.

**Whether the exparte Applicants have met the threshold for grant of leave sought to commence judicial review.**

**Decision**

13. The question of jurisdiction is cardinal in the determination of disputes as was held in the landmark decision of Nyarangi JA (as he then was) in the case of the Owners of Motor vessel ‘Lillian S’ v Caltex Oil Kenya Limited (1989) eKLR to the extent that jurisdiction is everything and without it the court has no power to make one step and must down its tools.
14. The court is guided by the Supreme Court decision in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR where in paragraph 68 it held that jurisdiction flows from either the Constitution or legislation or both. The Court further held that the issue of whether the court had jurisdiction to entertain a matter before it is not a matter of procedural technicality but goes to the very heart of the matter and without jurisdiction the court cannot entertain the proceedings.
15. The court is further guided by the landmark decision of the defunct Court of Appeal for East Africa decision of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 676-701 where it was stated that a Preliminary Objection should be in the nature of what used to be demurrer and should be raising a pure point of law in the open eye of the court that can dispose off the suit in limine. The court finds the instant preliminary objection based on points of law on ground of jurisdiction properly raised.
16. The Respondent relies on the following provisions of the law:-
17. Article 234(2)(i) of the constitution to wit:-“ Functions and powers of the Public Service Commission Article 234(1) the functions and powers of the commission are set out in this article.



- (2) the commission shall-
- a. Subject to this Constitution and legislation-.
  - b. Hear and determine appeals in respect of County Governments Public Service; and
  - c. Perform any other functions and exercise any other powers conferred by national legislation.”
18. Section 85 of the *Public Service Commission Act* of 2017 which reads:-
- “The Commission shall, in order to discharge its mandate under Article 234 (2) (i) of the *Constitution*, 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 qualifications attached to any office;
  - (b) remuneration and terms and conditions of service;
  - (c) disciplinary control;
  - (d) national values and principles of governance, under Article 10 and values and principles of public service under Article 232 of the *Constitution*.”
19. Section 87 (2) of the *Public Service Commission Act* which reads:-
- “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 county government public service unless the procedure provided for under this Part has been exhausted.”
20. The Respondent submits that the instant application is premature and violates the established principle under the Constitution, various statutes and the Human Resources Policies and Procedures Manual for the public service applicable to the *Ex Parte* Applicants as enunciated in the decision of the Court of Appeal in *Secretary County Public Service Board and Another -vs- Hulbbhai Gedi Abdille* (2017) eKLR (Makhandia, Ouko & M’Inoti JJA) where the court held :- ‘...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 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.”
21. The *Ex parte* applicants in application stated that, the Kakamega County Assembly Service Board was their employer.
22. Article 234 (2) of the *constitution* states:- “The commission shall-
- a. Subject to this Constitution and legislation-.
  - b. Hear and determine appeals in respect of County Governments Public Service; and
  - c. Perform any other functions and exercise any other powers conferred by national legislation”. (emphasis given.)



23. Section 77 (1) of the [County Government Act](#) reads:- ‘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”(emphasis given)
24. Section 87(2) of the [Public Service Commission Act](#) ousts the jurisdiction of the court in matter of recruitment of any person to county government by providing as follows: “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 County Government Public Service unless the procedure provided for under this Part has been exhausted.”( Emphasis given)
25. Applying the Supreme Court decision in [Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others](#) [2012] eKLR where at paragraph 68 it held that jurisdiction flows from either the constitution or legislation or both then the court finds and determines that neither the Constitution or the legislation being the [County Governments Act](#) and the [Public Service Commission Act](#) gave the Public Service Commission jurisdiction to handle employment claims emanating from employees of the County Assembly Service Boards.
26. The court finds that the Public Service Commission is limited to executive county government employees and that for the said Commission to deal with employees of the County Assembly Service Boards would be undermining the doctrine of separation of powers. There is need to draw parallel with the national government(executive) and the National Assembly. The Public Service Commission only deals with employees of the national government (the executive) respecting the doctrine of separation of powers. Under Article 6 of the [constitution](#) of Kenya has two levels of government, the national and county. The doctrine of separation of powers applies with equal measure to both levels of government.
27. The court perused the County Government Act and found that unlike the County Public Service Boards, there is no clear redress mechanism provided for appeals from decisions of the County Assembly Service Boards on employees claims as envisaged under the decision of the Court of Appeal in [Speaker of the National Assembly v James Njenga Karume](#) [1992] Eklr where the court held: ‘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 observe without expressing a concluded view that order 53 of the [Civil Procedure Rules](#) cannot oust clear constitutional and statutory provisions.”
28. Further applying the Speaker of National Assembly decision the court finds and determines that any regulations by PSC purporting to give it jurisdiction over the County Assembly Service Boards decisions would be illegal as regulations cannot oust clear constitutional and legislative provisions. Consequently, the court finds that the Court of Appeal decision in [Secretary County Public Service Board and Another v Hulbbhai Gedi Abdille](#) (2017) eKLR dealt with claim by employee of the County Public Service Board and in the opinion of the court the said decision is not relevant to the jurisdiction of the court in the instant suit.
28. The court does not agree with the position taken by court in [Sammy Ndana Kalundu v Ag. Clerk of the Nairobi City County Assembly](#) (2022)e KLR that Section 87(2) of the [Public Service Commission Act](#) applies to employees of the county assemblies as relied on by the respondent in view of the doctrine of separation of powers between arms of government. In this regard the court upholds with approval to apply in the instant objection the decision of Justice Rika in [John Mwivithi Mutie v Speaker Kiambu County Assembly & 2 others; County Secretary Kiambu County Government & another \(Interested Parties\)](#) [2022] eKLR where he held, “The position taken by the Preliminary Objector, requiring the Court to decline jurisdiction, and direct the Petitioner to submit to the Public Service Commission, is



in gross misapprehension of the concept of separation of powers, and distorts the objects and principles of devolution, under Articles 174 and 175 of the Constitution.” The court has in the recent past made a similar finding and holding in Bungoma Elrc Cause No. E003 Of 2021 Martin Adams Wamukota Situma versus The Bungoma County Assembly Of Service Board (CASB) and Others (UR).

29. In the upshot the court finds and determines that it has original jurisdiction to hear and determine claims by employees who allege their services are terminated unfairly or for other grievance by employees against the County Assembly Service Boards as no clear procedure for the redress of such grievance prescribed by the Constitution or an Act of Parliament exists as held in the Speaker of the National Assembly v James Njenga Karume [1992] eKLR.

### **Conclusion and disposition**

30. The court determines that it has original jurisdiction to hear and determine claims by employees who allege their services were terminated unfairly or for violations of their fair labour practices against the County Assembly Service Boards. The notice of preliminary objection dated 9<sup>th</sup> January 2023 is dismissed for lack of merit with costs to the applicants in the cause.

31. It is so ordered.

**RULING DATED, DELIVERED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 23RD DAY OF FEBRUARY 2023.**

**J.W. KELI,**

**JUDGE.**

In the Presence of:-

Court Assistant:- Brenda

Claimant:- Absent

For Respondent:- Kubai

Interested Party: Sore

Court Order:

Mention on 22<sup>nd</sup> March, 2023.

Mr Kubai to serve Exparte Applicant for hearing directions of chamber summons.

**J. W KELI,**

**JUDGE.**

