



**Kapchanga & 4 others v Lusaka & 3 others (Employment and Labour Relations  
Petition E006 of 2023) [2023] KEELRC 782 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 782 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA**

**EMPLOYMENT AND LABOUR RELATIONS PETITION E006 OF 2023**

**JW KELI, J**

**MARCH 23, 2023**

**IN THE MATTER OF: ARTICLES 10(2C), 22(1) & 2(A)(C), 23(1),  
(41)(1)(B),47(1)(2),48,50(1),165,236,179(6),183,236( A)(B) AND  
258(1) AND(2)(C) OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION  
AND VIOLATIONS OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF : THE ENFORCEMENT OF THE BILL OF RIGHTS PARTICULARLY  
ARTICLE 27(1) AND 41(1)(2B) OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF: THE CONSTITUTIONAL VALIDITY OF THE  
DECISION BY THE 1ST RESPONDENT OF THE INTERDICTING THE  
PETITIONER WITHOUT GIVING FAIR HEARING IN TOTAL VIOLATION  
OF ARTICLE 47(1) AND (2) OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF : THE EMPLOYMENT ACT, 2017,LAWS OF KENYA**

**IN THE MATTER OF : THE COUNTY GOVERNMENTSACT NO 17 OF 2012**

**IN THE MATTER OF: FAIR ADMINISTRATIVE ACTIONACT NO 4 OF 2015**

**BETWEEN**

**ABIDAN KIMKERICK KAPCHANGA ..... 1<sup>ST</sup> PETITIONER**

**PATRICK WANDILI WECHULI ..... 2<sup>ND</sup> PETITIONER**

**CHRISTOPHER NYONGESA SIMIYU ..... 3<sup>RD</sup> PETITIONER**

**ARUPUT ISAAC JUMA ..... 4<sup>TH</sup> PETITIONER**

**MAURICE WABWILE MARANGO ..... 5<sup>TH</sup> PETITIONER**

**AND**

**HE KENNETH MAKELO LUSAKA ..... 1<sup>ST</sup> RESPONDENT**



**THE SECRETARY COUNTY PUBLICSERIVE BOARD –  
BUNGOMA ..... 2<sup>ND</sup> RESPONDENT**  
**THE ACTING COUNTY SECRETARY COUNTYGOVERNMENT OF  
BUNGOMA ..... 3<sup>RD</sup> RESPONDENT**  
**THE COUNTY GOVERNMENT OF BUNGOMA ..... 4<sup>TH</sup> RESPONDENT**

## **RULING**

(On Notice of Preliminary Objection dated March 1, 2023)

1. The Petitioners upon interdiction by the Respondents filed in court Petition dated February 17, 2023 through the law firm of Wasilwa Makhakara & Company Advocates seeking the following reliefs:
  - a. A declaration that within the intendment of Articles 1 (3),2(1),2(2),2(4) and 3 (1) of the Constitution, the decision by the Respondent to interdict the tenure of and affect the Petitioner’s continuity of employment, and access to his office to discharge their mandate as respective Chief Officers in the public service of County Government of Bungoma was made outside the scope of the 3<sup>rd</sup> Respondent’s powers and functions and was unconstitutional hence invalid.
  - b. A declaration that within the intendment of Article 73 of the Constitution, the purported interdiction of the Petitioner from his office and functions was influenced by improper motives and not in the Public interest hence invalid.
  - c. A declaration that within the intendment of Article 47 of the Constitution, the purported interdiction of the Petitioner was done without according him a fair administrative process, hence invalid.
  - d. A declaration that the decision to purportedly interdict the Petitioners was *ultra vires* of Section 55 and 59 of the County Government Act.
  - e. As an alternative relief, an order that the purported interdiction of the Petitioner was unlawful, and that the County government of Bungoma, by way of compensation do pay a sum in damages for breach of contract of employment in terms of Clause 31, namely:-
    - i. The monthly salaries for the remainder of the Petitioners’ respective contracts of employment
    - ii. Continuity of the Medical Scheme with benefits as defined by the Medical Scheme Rules for remainder of the Petitioners’ respective contracts of employment
    - iii. Service Gratuity calculated at 31% of each of the Petitioner’s Basic Salary.
    - iv. Punitive Damages for flagrant breach of contract.
    - v. Continuity of Membership to and benefit of Group Life and Group Personal Accident Insurance Scheme of the County Government.
  - f. The County Government of Bungoma do pay to the Petitioners the costs of this petition.
  - g. Any other and further reliefs as this court may be pleased to award the Petitioners.



2. The Petitioner also lodged Notice of motion application on even date seeking conservatory orders.
3. The Petition was supported by the affidavit of the 1<sup>st</sup> Petitioner sworn on February 16, 2023. The other petitioners further filed affidavit in support of conservatory orders.
4. The court granted temporary conservatory orders on February 17, 2023 against the task force.
5. The Respondents entered appearance vide law firm of M/S Wekesa & Simiyu Advocates on March 1, 2023. The Respondents filed response to the Application and the petition vide grounds of opposition dated March 1, 2023. The Respondents in addition filed Notice of Preliminary Objection dated March 1, 2023 and notice of motion of even date.
6. The Notice of Preliminary Objection dated March 1, 2023 was based on the following grounds:-
  - a. That this court has no jurisdiction to hear and determine this application and the Petition pursuant to Section 77 of the County Government Act, 2012 and Sections 85, 86(1) and 87 (2) of the Public Service Act , 2017.
  - b. That the constitutional and statutory imperatives ( Article 235 (1) of the Constitution of Kenya, 2010 and Sections 57 and 59 of the County Government Act, 2012) on the Petitioners' employment cross-cuts the County Government of Bungoma and the County Public Service Board of Bungoma both distinct statutory legal persons and any suit against one of those legal persons to the exclusion of the other is non-starter, incompetent. The County Public Service Board is not a party to this Petition. This Honourable court is thus divested of jurisdiction to entertain an inchoate Petition.
  - c. That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are improperly joined as parties to these proceedings not being the Petitioner' employer and/or constitutional and statutory legal entities that initiated the process the subject of these proceedings and who ought and cannot, by dint of section 1'33 of the County Governments Act, 2012, be sued into their personal capacity in discharge of their Public mandate vested in the County Government of Bungoma and whose offices are not capable of being sued and the Petition ought to be struck off as against them.
  - d. That it is the constitutional, statutory power and prerogative of the County Government/ County Public Service Board to undertake disciplinary action against the Petitioners and this court has no jurisdiction to supervise, control , micro -manage or in any way interfere with the disciplinary process undertaken by the County Government/ County Public Service Board in exercise of their constitutional and statutory powers where the decisions yet to be made signifying the end of the disciplinary process.
  - e. That the Petition herein is premature and speculative as no decision has been made from the disciplinary process capable of invoking the jurisdiction of this court, and
  - f. That it is meet and in furtherance of the overriding objectives of Article 159 (2) of the Constitution and the Rules made thereunder for the timely disposal of proceedings that this court peremptorily strike out the petition and its offshoot Notice of motion as an abuse of the process of the court with costs to the Respondents.
7. The court gave directions that the Notice of Preliminary Objection be heard first and canvassed by way of written submissions. The Objectors/Respondents' written submissions drawn by Wekesa & Simiyu Advocates were dated March 14, 2023 and received in court on even date. The Petitioners' written submissions on the notice of preliminary objection were drawn by Wasilwa Makhakara & Co Advocates and filed in court on March 20, 2023.



## Decision.

8. The Court found that the impugned decision was in letter of interdiction dated February 9, 2023 authored by Monica Salano Fedha the 3<sup>rd</sup> respondent. The court found only the issue of jurisdiction was suitable for determination under the preliminary objection. The Petitioners was interdicted around the same period with other officers under Bungoma ELRC Petitions Nos E003 and E004 and of 2023. The court finds the ruling in the said petitions delivered on March 23, 2023 relevant and is adopted to apply in the instant case.
9. The Objector submits the court has no jurisdiction based on doctrine of exhaustion and section 77 of the County Governments Act vesting jurisdiction of such matters at first instance with the Public Service Commission. To buttress submissions relied on several decisions which the court took note of. The objector relied on decision by Court of Appeal in *Secretary, County Public Service Board & Another versus Hulbbhai Gedi Abdille* (2017) eKLR which they submit is binding on the court and submits that the Court of Appeal in allowing the appeal on the basis that the Respondent had failed to utilize the process under Section 77 of the *County Governments Act* held:- ‘ 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 objector further relies on court of appeal decision in the *Speaker of the National assembly v James Njenga Karume* (1992) eKLR to effect that where there exists clear redress procedures the same must be strictly followed.
10. The Petitioner relied on Several decision on interdiction and Public Service Commission jurisdiction. The court read all the cited decisions. The petitioner relied on decision in *Ouko vs Kisumu County Public Service board* Petition No E007 of 2020 ( 2022 eKLR) where Justice Radido upheld the lack of jurisdiction in first instance on failure to exhaust procedure under No 234(2) (1) of the *Constitution* , Section 77 of the County Governors Act and 85 , 86, 87 (2) of the Public Service Act.
11. The Petitioner stated that the Ouko decision was insignificant to the instant case. The petitioner submits that he relies on the decision of Justice Radido in *John Mwaniki -vs- Governor Irungu & Laikipia County Government* ( 2017 eKLR) Where John Mwaniki was County Secretary for term of 2 years. The Governor authored letter which sent him on compulsory leave. The Judge stated that the County Secretary was under disciplinary control of the Board and there was no connotational basis of sending the Claimant on compulsory leave. Justice Radido declared the Governor had no role and cannot exercise direct disciplinary control over the County Secretary. Secondly, declared that the sending of the Claimant on compulsory leave by the Governor had no legal or contractual basis.
12. The Court agrees it has powers to intervene with internal disciplinary process on basis of illegalities. The Court of Appeal had opportunity to interpret the provision of Section 77 in *Secretary County Public Service Board & Another V Hulbbhai Gedi Abdille* ( 2017) where the court held even on the process the legislation placed nor fetter on jurisdiction of Public Service Commission. The said decision is superior to decision in *John Mwaniki -vs- Governor Irungu & Laikipia County Government* ( 2017 eKLR)
13. It was not in dispute the Petitioner was an employee of the County Public Service Board and was interdicted by an authority within the County Public Service.
14. The Court agrees only the Board can terminate the services of the Petitioner. The court finds that the impugned decision is contemplated under section 77 (1) of the *County Governments Act* which states in part “ Any person dissatisfied or affected by the decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any County Public office may appeal to the Public Service Commission against the decision”.



15. There is a decision by the 3<sup>rd</sup> respondent purporting to exercise disciplinary control over the petitioners, chief officers of the Bungoma County Public Service, being the letters of interdiction dated February 9, 2023. The court holds that the claims fall for resolution in the first instance with the Public Service Commission.
16. The Notice of Preliminary Objection dated March 1, 2023 is allowed.
17. The conservatory orders in place are vacated.
18. The Petition dated February 17, 2023 is struck out for being premature. Each party to bear own costs in the matter.
19. It is so ordered.

**DATED , SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 23<sup>RD</sup> DAY OF MARCH, 2023.**

**JEMIMAH KELI,  
JUDGE.**

**In the Presence of :-**

**Court Assistant : Lucy**

Petitioner: Makhakara Advocate. We seek for leave to appeal and for certified typed ruling and proceedings

Respondent: Masafu Advocate

**COURT ORDER:-**

Right of appeal in 30 days.

Copies of certified typed proceedings and ruling to be availed to the parties on payment of necessary fees.

It is so ordered.

**JEMIMAH KELI,  
JUDGE.**

