



REPUBLIC OF KENYA



**KENYA LAW**  
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**Welikhe v Lusaka & 3 others (Employment and Labour Relations Petition  
E003 of 2023) [2023] KEELRC 780 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 780 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
EMPLOYMENT AND LABOUR RELATIONS PETITION E003 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 GOVERNMENTS ACT NO  
17 OF 2012**

**IN THE MATTER OF: FAIR ADMINISTRATIVE  
ACTION ACT NO 4 OF 2015**



**BETWEEN**

**ISAAC MUKENYA WELIKHE ..... 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**

1. The Petitioner upon interdiction by the Respondents filed in court Petition dated February 14, 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 his mandate as County Secretary of Bungoma was made outside the scope of the 1<sup>st</sup> Respondents 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 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. A monthly salary of shillings 225,000 as increased annually in accordance with the County Public Service Regulations for the remainder of the 9 months residue of the Petitioner’s Contract of Employment;
    - ii. Continuity of the Medical Scheme with benefits as defined by the Medical Scheme Rules for a period of 9 months form the appropriate date.
    - iii. Service Gratuity calculated at 31% 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 Petitioner the costs of this petition.
  - g. Any other and further reliefs as this court may be pleased to award the Petitioner.
2. The Petitioner also lodged Notice of motion application even date seeking conservatory orders.
  3. The Petition was supported by the affidavit of the Petitioner sworn on February 19, 2023.
  4. The court granted temporary conservatory orders on February 17, 2023 against the task force.
  5. The Petitioner was interdicted with other officers under Bungoma ELRC Petition No 4 of 2023. This ruling was ordered to the said petition.
  6. The 2<sup>nd</sup> Respondent entered appearance vide law firm of M/S Amani Wekesa Associates Advocates on March 1, 2023. Further on February 28, 2023 the law firm of Manyonge Wanyama & Associates LLP Advocates filed Notice of appointment to represent all the respondents.
  7. The Respondents filed response to the Application and the petition vide grounds of opposition dated February 27, 2023. The Respondents in addition filed their list of authorities.
  8. The Respondent on March 2, 2023 filed in court Notice of Preliminary Objection dated March 1, 2023 stating the Petition was premature and incompetent on the following grounds:-
    - a. From the pleadings, the Petitioner has a dispute concerning the decision made by the County government of Bungoma on disciplinary issues.
    - b. Under Article 234 (2) (i) of the *Constitution* 2010 as read with Section 77 of the *County Governments Act*, 2012 and Section 85 of the Public Service Commission Act, 2017 , such disputes require to be determined by the Public Service Commission in the first instance.
    - c. The Petitioner has not exhausted the remedies stipulated in the *constitution* and the relevant statutes in paragraph ( 2) herein.
  9. 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 Manyonge Wanyama & Associates LLP Advocates were dated March 7, 2023 and received in court on March 3, 2023 together with authorities. The Petitioners written submissions on the notice of preliminary objection were drawn by Wasilwa Makhakara & Co. Advocates and filed in court on March 5, 2023.

## Decision

10. The Court found that the impugned decision was in letter of interdiction dated February 3, 2023 authored by Governor of the Bungoma County, the 1<sup>st</sup> respondent. The Objector states that this was authority within the County Government Public Service Commission. The Objector submits the court has no jurisdiction based on doctrine of exhaustion and to buttress submissions relied on decision by the Employment and Labour Relations Court in *Fred Marmalei Loronyokwe versus County Government of Samburu* ( 2020) eKLR where the claimant in this suit argued that the Preliminary Objection filed by the Respondents disputing the jurisdiction of the court under Section 77 of the *County Governments Act* should be dismissed for reasons that his employment was terminated over disciplinary issues by an Acting County Secretary instead of the County Public Service Board. The Court disagreed with the Claimant's submissions and held that " pursuant to section 77 of the County



Government Act, the Public Service Commission had jurisdiction in the first instance in matters of disciplinary control”. ( Emphasis given ).

11. The objector further relied on decision by Court of Appeal in Secretary, County Public Service Board & Another versus Hulbhai Gedi Abdille ( 2017) eKLR which they submit has settled the question of interpretation of Section 77 of the County Government Act and stated 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. ( Emphasis ours). In terms of Republic -vs- National Environment Management Authority ( supra) we discern no exceptional circumstance<sup>4</sup> sin this appeal that would have warranted the by passing of the statutory appellate process by the respondent. Her contention that the disregarded the appeal because it could not afford her an opportunity to question the procedure followed by the appellants is in our view, without basis because Section 77 has placed no fetter to the jurisdiction of the Public Service Commission ( Emphasis given). There is no requirement for instance that reasons for the decision be availed to an aggrieved party before he can prosecute an appeal before it.

13. The Petitioner submits there was no decision of the County Public Service Board but by the Governor who assumed the role of the Board. The Petitioner relied on Several decision on compulsory leave 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.
14. 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.
15. 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 Hulbhai 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)
16. 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.



17. 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”.
18. There is a decision by the 1<sup>st</sup> respondent purporting to exercise disciplinary control over the petitioner a County Public Officer being the letter of interdiction dated February 3, 2023. The court holds that the claim falls for resolution in the first instance with the Public Service Commission.
19. The Notice of Preliminary Objection dated March 1, 2023 is allowed.
20. The conservatory orders in place are vacated.
21. The Petition dated February 14, 2023 is struck out for being premature.
22. Each party to bear own costs in the matter.
23. The ruling to apply to Cause Petition No E004 of 2023 which is also struck out for being premature. Each party to bear own costs in the matter.
24. 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: Wanyama 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**

