



**Gesembe v H.E. Amos Kimwomi Nyaribo Governor, Nyamira County & 2 others
(Petition 011 of 2022) [2023] KEELRC 615 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 615 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION 011 OF 2022**

S RADIDO, J

MARCH 15, 2023

(ORIGINALLY KERICHO PETITION NO. E002 OF 2021)

**IN THE MATTER OF ARTICLES 1, 2, 3(1), 10, 19, 21, 22, 27(1),(2) & (3), 28, 41(1),
47(1) & (2), 48, 50(1), 165(3)(B) AND 258(1) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS PURSUANT TO ARTICLES 27(1),(2) &
(3), 28, 41(1), 47(1), AND 50(1) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF RULES 4, 10, 11, 1,3 AND 20 OF THE CONSTITUTION
OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)
HIGH COURT PRACTICE AND PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF SECTION 31 OF THE COUNTY GOVERNMENTS ACT, NO. 17 OF
2012 LAWS OF KENYA IN THE MATTER OF SECTION 45 OF THE EMPLOYMENT ACT**

BETWEEN

JOB ONG'OMBE GESEMBE PETITIONER

AND

**H.E. AMOS KIMWOMI NYARIBO GOVERNOR, NYAMIRA
COUNTY 1ST RESPONDENT**

COUNTY GOVERNMENT OF NYAMIRA 2ND RESPONDENT

NYAMIRA COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT



JUDGMENT

1. Job Ong'ombe Gesembe (the Petitioner) was appointed as a Culture, Heritage & Art Advisor to Hon John Obiero Nyangarama, the then Governor, County of Nyamira on or around 14 May 2020.
2. The contract was to end on 31 August 2022.
3. On or around 18 December 2020, the Governor died while still in office and Hon Amos Nyaribo took over as the Governor.
4. Consequently, the County Public Service Board (the Board) wrote to the Petitioner on 12 January 2021 to notify him that the contract stood terminated with effect from 1 February 2021.
5. The reason given for the decision was that the appointment was tied to the tenure of Hon Nyangarama who had passed away.
6. The decision prompted the Petitioner to move the Court sitting in Kericho on 28 January 2021, alleging that the termination of contract was without lawful justification.
7. The Petition was accompanied with a Motion under a certificate of urgency. The Court sitting in Kericho declined to grant the orders prayed for in the Motion in a Ruling delivered on 21 September 2021.
8. The Court thereafter transferred the Petition to this Court and this Court gave directions on 24 November 2022 and 25 January 2023.
9. In the directions, the Court directed the Petitioner to file and serve an Amended Petition together with submissions on or before 1 February 2023, and the Respondents to file responses and submissions before 8 February 2023.
10. The Petitioner filed the Amended Petition on 1 February 2023, and he sought the following orders:
 - a1. A declaration that by dint of the letter of appointment dated May 14, 2020, the Petitioner was entitled to a right to fair labour practices provided under Articles under Article 41(1) of *the Constitution* of Kenya and/or protected under Article 236(b) of *the Constitution* from being removed from office without due process of law.
 - a2. A declaration that the actions of the Respondents of terminating the employment of the Petitioner and relieving the Petitioner of his duties is a breach of the Petitioner's rights under Articles 27(1),(2) & (3), 28, 41, 47 and 236 of *the Constitution* of Kenya, 2010 and the same is null and void for all intents and purposes.
 - a3. A declaration that the termination of the Petitioner's employment was unlawful and/or unfair. As such, he is entitled to compensation for unlawful and/or unfair termination of employment.
 - a4. An order compelling the Respondents jointly and or severally to pay the Petitioner damages amounting to 18 months' salary being the remainder of the contract which was to run till 31st August 2022.
 - a5. In the alternative without prejudice to prayer a4 above, an order of mandamus to be and is hereby issued to the Respondents to jointly and or severally pay the Petitioner 12 months' salary for wrongful dismissal and/or unfair termination.



- a6. An order compelling the Respondents jointly and/or severally to pay the Petitioner Kshs 155,000/- being a one (1) month's salary in lieu of notice.
 - e). Costs of the Petition and interest thereon.
 - f) Any other relief or order that this Honourable Court may deem fit to grant.
- 11. The Petitioner filed his submissions on 2 February 2023.
 - 12. The Respondents filed a Reply to the Petition on 14 February 2023 and submissions on 27 February 2023.
 - 13. Pursuant to further directions given on 1 March 2023, the Petitioner filed supplementary submissions on the question of jurisdiction on 10 March 2023 and the Respondents on 13 March 2023.
 - 14. The Court has considered the Amended Petition, affidavits and submissions.

Jurisdiction

- 15. The Petitioner moved the Court to challenge his removal from the county public service by the Board through the letter dated 12 January 2021.
- 16. Article 234(2)(i) of *the Constitution* bestows upon the Public Service Commission the function of hearing and determining appeals from the decisions of county public service boards.
- 17. The Article provides:
234.
(2) The Commission shall –
(i) hear and determine appeals in respect of county governments' public service; and ...
- 18. The provision has been given statutory context in the *County Governments Act* and the *Public Service Commission Act*.
- 19. Section 77 of the *County Governments Act* states:
77. Appeals to the Public Service Commission
(1) 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 (in this Part referred to as the "Commission") against the decision.
(2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of—
(a) recruitment, selection, appointment and qualifications attached to any office
(e) retirement and other removal from service;
- 20. In a near similar language, the *Public Service Commission Act* provides:
85. 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) ...
- (b) remuneration and terms and conditions of service
- (c) ...
- (d) ...
- (e) retirement and other forms of removal from the public service;
- (f) ...
- (g) ...

86.

- (1) Any person who is dissatisfied or affected by a decision made by any authority or person in respect of a County Government public service may appeal to the Commission against the decision.
- (2) ...
- (3) ...
- (4) ...

87.

- (1)
- (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.

21. The Court of Appeal had occasion to consider the implication of section 77 of the [County Governments Act](#) in Secretary, County Public Service Board and Ar vs Hulbhan Gedi Abdille (2017) eKLR where it stated as follows:

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 the only 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.

- 22. The Petitioner herein did not exhaust the appellate procedures set out in law.
- 23. Under the said legal framework, the jurisdiction of this Court is deferred and the mere fact that the Public Service Commission could not grant the remedies sought is not here or there as the Commission had the legal authority to reverse the decision of the Respondents.
- 24. The Court, in the circumstances, declines jurisdiction.
- 25. If the Court were wrong on that conclusion, it would still have dismissed the Petition on the ground that the Petitioner improperly invoked its constitutional jurisdiction whereas the dispute raised



questions of contractual breaches which could have been determined under the procedures envisaged by Rule 7(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016.

Conclusion and Orders

26. From the foregoing, the Court declines jurisdiction and strikes out the Petition with costs to the Respondents.

DELIVERED VIRTUALLY, DATED, AND SIGNED IN KISUMU ON THIS 15TH DAY OF MARCH 2023.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Petitioner Mwae & Associates Advocates

For 1st Respondent Ligunya Sande & Associates

For 3rd Respondent Abincha Mogambi, Advocate, County Public Service Board

