



**Kenya County Government Workers Union v County Public
Service Board of Nyeri (Employment and Labour Relations Petition
E007 of 2021) [2023] KEELRC 539 (KLR) (6 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 539 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS PETITION E007 OF 2021
ON MAKAU, J
MARCH 6, 2023**

BETWEEN
KENYA COUNTY GOVERNMENT WORKERS UNION CLAIMANT
AND
COUNTY PUBLIC SERVICE BOARD OF NYERI RESPONDENT

RULING

1. This ruling relates to the respondent's preliminary objection contained in the Notice dated June 18, 2021, which seeks to have the suit struck out with costs on grounds that:
 - a. The court has no jurisdiction hear the suit pursuant article 234 of the *Constitution* of Kenya and section 88 of the *Public Service Commission Act*.
 - b. The court lacks jurisdiction as applicants are required to first apply for review to the Public Service Commission under section 77 of the County Government Act.
 - c. The filing of the Petition offends the mandatory provisions of section 77 (2) of the Public Service Act.
 - d. The petition does not disclose constitutional issues that cannot be remedied through statutory procedure under section 88 of the County Government Act.
2. The preliminary objection was disposed of by written submissions. The respondent filed on October 19, 2022 and the claimant filed on March 4, 2022.
3. It was submitted on behalf of the respondent that this court lacks jurisdiction to hear the petition because the Public Service Commission has clear constitutional and statutory jurisdiction under article 234 (2) of the *Constitution* and section 88(5) of the *Public Service Commission Act* 2017 to hear the matter and give the remedies sought because they related to retirement from employment. For



emphasis, reliance was placed on the case of *Secretary County Public Service Board & another v Hulbbai Gedi Abdile* [2016] eKLR where the Court of Appeal in a similar matter held that it is the Public Service Commission which is clothed with the primary jurisdiction.

4. It was further submitted that the petitioner ought to have first sought redress from the Public Service Commission vide the procedure set out under section 86(1) of the *Public Service Commission Act* of 2017. Consequently, it was submitted that in the absence of an appeal to the Public Service Commission under section 77 of the County Government Act read with section 85, 86 and 87(2) of the *Public Service Commission Act*, the petition is abuse of the process of the court and the petitioner is not entitled to the reliefs sought for breach of the exhaustion doctrine under section 9(2) of the Fair Administrative Actions Act. Besides, the petition does not raise any constitution dispute to warrant by-passing of the said statutory procedure.
5. For emphasis, reliance was further placed on the case of *Nakuru County Human Rights Network (NAHURINET) v Nakuru County Government & another* [2014] eKLR, *James Tinai Murete & others v County Government of Kajiado & 22 others* [2015] eKLR and *Wilson Mutegi Nyaga & others v The County Public Service Board, Kitui County & 2 others* [2016] eKLR where the High Court declined jurisdiction on ground that the mechanism provided under section 77 of the *County Governments Act*, for an appeal to the Public Service Commission, had not been exhausted.
6. Further reliance was placed on the case of *Ismael Noo Onyango & another v Siaya county Public Service Board & another* [2018] eKLR where Ndums J observed that this court has unlimited jurisdiction over matters employment and labour but declined jurisdiction on ground that where there is a clear alternative procedure for redress prescribed by the *the constitution* or statute, it should be strictly followed.
7. The petitioner submitted that the respondent's preliminary objection lacks merits and prayed for the same to be dismissed with costs. It further submitted that the constitutional rights and fundamental freedoms of its members were violated by the respondent's failure to sensitize them on the voluntary early retirement, and as such they are entitled to access the court for redress.
8. For emphasis, the petitioner relied on the case of *Monica Munira Kibuchi & 6 others v Mount Kenya University & another* [2021] eKLR where the court held that it is well settled that the this court has jurisdiction to determine constitutional questions within the context of employment and labour relations.

Determination

9. The issues for determination in the preliminary objection are threefold:
 - a. Whether the preliminary objection raises a pure point of law.
 - b. Whether the court has no jurisdiction to hear and determine the suit.

Pure point of law

10. In the case of *Mukisa Biscuits manufacturing co Ltd v West End Distributories Ltd* [1969] EA 699 the court held that:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implications out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the



dispute to arbitration... a preliminary objection is in the nature of demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertain or if what is sought is the exercise of judicial discretion.”

11. I have carefully considered the grounds for the objection raised herein and I am satisfied that pure points of law have been raised. The respondent is contending that the court also lacks jurisdiction pursuant to the exhaustion doctrine. Such issues do not require evidence to establish nor is judicial discretion necessary to determine the same. Besides if the same succeeds the suit will be disposed of and save judicial time.

Jurisdiction vis- a-vis exhaustion doctrine

12. The respondent contends that this court lacks jurisdiction to entertain the suit because the internal appeal mechanism has not been exhausted. Article 234 of the Constitution, section 87 (2) and 88 of the Public Service Commission Act and section 9(2) of the Fair Administrative Actions Act were cited as the basis for the objection. The petitioner did not make any submissions on the provisions cited by the respondent.
13. It is obvious that article 234 of the Constitution of Kenya provides that the Public Service Commission shall have jurisdiction to hear appeals from decisions made by a County Public Service Board. In order to give effect to the foregoing provision, the Parliament enacted section 77(1) of the County Government Act, 2012 as follows;

“Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of the disciplinary control against any public officer may appeal to the Public Service Commission against the decision.”

14. The use of the word “may”, in my view suggests an option to be exercised by the affected or dissatisfied person. However, the enactment of the Public Service Commission Act in 2017, the position seems to have taken a drastic change. Section 85 of the Act provides that;

“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...”

15. The appealable matters are then set out under Regulation 8 of the Public Service Commission (County Government Services Appeals Procedure) Regulations, thus:-

“The commission may hear and determine an appeal from a public officer in a County Government Public Service regarding any decision relating to the engagement of the person in the County Government, including an appeal in respect of –

- a. Recruitment, selection, appointment, promotion, re-designation, deployment and qualifications attached to any office;
- b. remuneration, and terms and conditions of service;
- c. disciplinary control including imposition of any punishment including dismissal;
- d. ...



e. ”

16. Section 87(2) of the *Public Service Commission Act* then 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 the County Public Government Public Service unless the procedure provided for under this part has been exhausted.”

17. The dispute herein springs from the claimants’ engagement in the respondent’ County Public Service and more specifically retirement from service. The petitioner is contending that the respondent has violated constitutional rights and freedoms of its members by failing to sensitize the employees about the intended voluntary early retirement. The respondent is not in denial of the fact that the employees were not sensitized on the said retirement but contends that such dispute can be remedied by an appeal to the Public Service Commission as prescribed under section 77 of the County Government Act read with section 85, 86 and 87 of the *Public Service Commission Act*.

18. I have carefully considered the petition and the submissions. It is clear that the dispute revolves around termination of employment through retirement. There is a clear procedure for settling any dispute regarding retirement of the respondent’s employees set out under section 77 of the County Government Act read with section 85, 86 and 87 of the *Public Service Commission Act*.

19. The precedents cited by the respondents and foregoing provisions of the law fortify the objection by the respondent that the petition is premature as the petitioner has not exhausted the appeal process prescribed by section 77 of the County Government Act read with section 85, 86 and 87 of the *Public Service Commission Act*. Consequently, I allow the preliminary objection by the respondent and strike out the Petition and the accompanying Notice Motion. The respondent is awarded costs of the suit.

DATED, SIGNED AND DELIVERED AT NYERI THIS 6TH DAY OF MARCH, 2023.

ONESMUS N MAKAU

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

