



Otieno & another v County Government of Homabay & 3 others (Petition E053 of 2022) [2023] KEELRC 519 (KLR) (2 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 519 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E053 OF 2022
CN BAARI, J
MARCH 2, 2023**

BETWEEN

MICHAEL KOJO OTIENO 1ST PETITIONER

EVANCE OTIENO OLOO GOR 2ND PETITIONER

AND

COUNTY GOVERNMENT OF HOMABAY 1ST RESPONDENT

COUNTY SECRETARY OF HOMABAY 2ND RESPONDENT

GOVERNOR HOMABAY COUNTY 3RD RESPONDENT

COUNTY PUBLIC SERVICE BOARD OF HOMABAY 4TH RESPONDENT

RULING

1. Before court is the petitioners motion dated December 28, 2022, brought pursuant to articles 3(1), 10, 27, 47, 56,73, 81, 162, 165, 232, 259 and 159(2)(d) of the Constitution, sections 34, 51(2), 59, 60, 61, 62, 63 & 64 of the County Government Act, section 12 of the Employment and Labour Relations Court Act and order 51 of the Civil Procedure Rules. The petitioners/applicants seek the following orders:
 - i. Spent.
 - ii. Spent.
 - iii. That pending hearing and determination of this petition, this honourable court be pleased to issue a conservatory order staying, setting aside or vacating the circular issued by the 2nd respondent on December 23, 2022.
 - iv. That the honourable court be pleased to issue any other order it may deem just and fit in the interest of justice.



- v. That the costs of this application be provided for.
2. The motion is supported by grounds on the face and the affidavit of Michael Kojo Otieno, the 1st petitioner. The petitioners aver that the 2nd respondent through a circular reference No HB/CTY/TR/VOL II (334), announced changes in the public service by transferring various ward administrators and appointing others who are not within the establishment of the County Government.
 3. The petitioners further aver that the appointments and transfers are irregular for reason that they offend section 91 of the County Government Act, section 59 of the County Government Amendment Act and articles 10 and 232 of the Constitution.
 4. The petitioners further aver that at the time of the appointments and transfers, the County Public Service Board was not fully constituted, hence the appointments were not legal.
 5. It is the petitioners assertion that such level of appointment ought to have been made competitively and that the 2nd respondent did not have power to appoint.
 6. The petitioners aver that appointments and transfers by the 2nd respondent offend the doctrine of separation of power.
 7. The respondents opposed the motion through an affidavit sworn by Prof Benard Muok, the 2nd respondent herein, together with grounds of opposition filed by the respondents on similar date.
 8. The respondents aver that this court lack jurisdiction to entertain this suit on the basis that it offends the provisions of article 234(2)(i) of the Constitution as read with section 77(1) & 2 of the County Government Act and section 87(2) of the Public Service Commission Act, 2017.
 9. It is the respondents' position that the suit offends the doctrine of exhaustion contemplated under article 159(2)(c) of the Constitution, for reason that there exists alternative dispute resolution forum, and alternative remedies which the petitioners ought to have exhausted before seeking redress in this court.
 10. The respondents state that nothing has been produced to show that the 2nd respondent has appointed any person or purported to exercise any function, duties or powers that are not within his mandate.
 11. It is the respondents position that the power to transfer officers from one department to another, is power conferred on the 2nd Respondent as the head of the County Public Service by section 72(2) of the County Government Act, and has thus lawfully exercised his mandate.
 12. The respondents aver that the orders sought if granted, will deny the County Government of Homabay and its entities, the opportunity to have in place a depository of qualified and competent persons and which in turn will hamper service delivery.
 13. Parties urged the application orally on January 25, 2023, when each party reiterated their pleadings.

Determination

14. I have considered the motion, the grounds and affidavit in support and the parties' oral submissions. To start with, this court's jurisdiction on the matter has been challenged on the basis that the petitioners have not exhausted the available dispute resolution mechanisms available to them, making their presence before this court premature.
15. Jurisdiction as they say, is everything and nothing else matters when the court is devoid of jurisdiction in a suit before it. The court succinctly described the centrality of jurisdiction in any matter before it



in the celebrated case of Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited [1989] eKLR, thus: -

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

16. The first issue for determination is whether article 234(2)(i) as read with section 77 of the County Government Act and section 87(2) of the Public Service Commission Act, 2017, oust this court's jurisdiction to entertain this suit.

17. Section 77 of the County Government Act provides as follows: -

- "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;
 - (b)
 - (c)
 - (d) national values and principles of governance, under article 10, and values and principles of public service under article 232 of the Constitution;
 - (e)"

18. Further, section 87(2) of the Public Service Commission Act states: -

"(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 service unless the procedure provided under this part has been exhausted."

19. The foregoing provisions are unequivocal on the mechanisms available to the petitioners on issues concerning appointments in the County Public Service. In Lukale Moses Sande v the County Government of Kakamega & 3 others Cause No 23 of 2020, the court had this to say on exhaustion of internal mechanisms: -

"The claimant did not exhaust the appeal procedures in respect to his removal, purported removal and or terms and conditions of service as contemplated by the Constitution, the



County Government Act and the Public Service Commission Act, before moving this court, and the court therefore declines jurisdiction.”

20. The petitioners have not in their oral submissions led any evidence to show that they attempted the dispute mechanisms provided under the Constitution, the County Government Act and the Public Service Commission Act, before approaching this court. Instead, their singular response in this regard, is that the provisions are not mandatory.
21. Contrary to the petitioners’ assertion, disputes emanating from the County Government Public Service should, in the first instance, be referred to the Public Service Commission by way of appeal, and this requirement is couched in mandatory terms.
22. In Geoffrey Muthinji & another v Samuel Henry & 7 others (2015) eKLR, the court held that it is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the court is invoked, and that, courts ought to be a fora of last resort.
23. The Court of Appeal further delved on this issue in Republic v National Environment Management Authority Ex parte Sound Equipment Ltd [2011] eKLR, where it held that a party should not be allowed to bypass the statutory appellate process provided under the County Governments Act, and the Public Service Commission Act, save in exceptional circumstances.
24. In the case of Susan Wanjiru Mwai & 65 others v County Government of Kirinyaga & 2 others, the court declined jurisdiction premised on the failure of the applicants to exhaust internal mechanisms on disputed resolution.
25. In the circumstances, the court is inclined to agree with the submissions by the respondents on the question of jurisdiction. Consequently, I hold that this suit offends the doctrine of exhaustion, and this court lacks jurisdiction to entertain both the application and the petition. For reason that jurisdiction goes to the root of the case, the application herein together with the petition are dismissed.
26. I make no orders on costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 2ND DAY OF MARCH, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Michael Otieno 1st Petitioner present in person

Mr. Otieno Oloo 2nd Petitioner Present in person

Ms. Kwena Present for the Respondents

Ms. Christine Omolo-C/A

