



**Kioko v Independent Electoral & Boundaries Commission (Petition
E014 of 2023) [2023] KEELRC 1044 (KLR) (26 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1044 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E014 OF 2023**

**JK GAKERI, J
APRIL 26, 2023**

BETWEEN

COSMUS KIOKO PETITIONER

AND

**INDEPENDENT ELECTORAL & BOUNDARIES
COMMISSION RESPONDENT**

RULING

1. Before the court for determination is a Preliminary Objection by the Respondent dated January 30, 2023 urging that;
 1. The court lacks jurisdiction to hear and determine the matter in light of the doctrine of exhaustion of internal dispute resolution mechanisms.
 2. The Petitioner has not exhausted the internal dispute resolution mechanisms, Human Resources, Administration, Policies and procedures Manual (herein HR Manual).
 3. The Petition offends the requirements of Section 9(2) of the *Fair Administrative Action Act*.
 4. The Petition is incurable, defective, incompetent, abuse of the court process and wastage of precious judicial time and ought to be dismissed with costs.
2. It is not in dispute that the Petitioner/Respondent was an employee of the Respondent from October 2012, initially as the Regional Information Communication Technology Officer and rose to the rank of Systems Administrator effective August 1, 2016.



3. Equally, it is not in contest that the Respondent suspended the Petitioner from employment via letter dated May 11, 2017 and was required to hand over Commission property in his position to the Director Information Communication Technology.
4. The suspension letter required the Petitioner to show cause, within 7 days why he should not be summarily dismissed pursuant to Section 8.15 of the Respondent's Human Resources, Administration Policies and Procedures Manual.
5. The Claimant responded via letter dated May 17, 2017 and the suspension was lifted by letter dated August 28, 2017. However, the Petitioner received a subsequent notice to show cause dated April 11, 2022 and was interdicted on April 13, 2022 and responded to both letters.
6. That he was invited for a disciplinary hearing through a telephone call and appeared on January 3, 2023 and was dismissed via letter dated January 20, 2023 and appealed on the same day and the appeal is awaiting determination by the Respondent's Commissioners.
7. Noteworthy, the Respondent has no policy making organ or body as it has no Commissioners and the process of identifying the appointment of potential members is pending.

Respondent's submissions

8. Counsel for the Respondent identified one issue for determination, namely; whether the Petition violated the Doctrine of Exhaustion.
9. Counsel explained the essence of the doctrine of exhaustion and cited Section 9(2) of the *Fair Administrative Action Act* to buttress the submission and additionally cited sections 12.14 and 12.15 of the Respondent's Human Resource Manual on appeal to the relevant Committee of the Commission.
10. Counsel urged that since the Petitioner's appeal was filed on January 23, 2023 and had not been heard, the Petitioner had not exhausted the internal dispute resolution mechanisms prescribed by the Human Resource Manual and the Petition violated the doctrine of exhaustion.
11. Reliance was made on the decisions in *Geoffrey Muthinja & another V Samuel Muguna Henry & 1756 others* (2015) eKLR to underscore the centrality of the doctrine of exhaustion in dispute resolution and the place of courts in the dispute resolution ecosystem.
12. The decision in *William Odhiambo Ramogi & 3 others V Attorney General & 4 others; Muslims for Human Rights and 2 others (Interested Parties)* (2020) eKLR was also cited to buttress the submission as well as the exceptions to the doctrine of exhaustion.
13. Counsel submitted that the Petitioner had not submitted and proved any special/exceptional circumstances to warrant the instant petition pending the hearing and determination of the appeal before the Commission.
14. That the Petitioner's complaint related to the composition of the Disciplinary Committee which according to counsel was legally constituted in accordance with the Human Resource Manual.
15. That the Appeals Committee of the Respondent is bound by law and may uphold or vary the decision of the Committee including the orders sought by the Petitioner.
16. Finally, counsel submitted that the Petitioner had not demonstrated how his rights to appeal had been infringed.



Petitioner's submissions

17. Counsel for the Petitioner identified two issues for determination namely;
 - i. Whether the Preliminary Objection meets the threshold set for raising a Preliminary Objection.
 - ii. Whether the court has jurisdiction to hear and determine the petition in light of the principle of exhaustion under Section 9(2) of the [Fair Administrative Action Act](#).
18. As regards threshold, counsel relied on the decision in *Mukisa Biscuit Manufacturing Co Ltd V West End Distributors Ltd* (1969) EA 696 to urge that a Preliminary Objection must consist of a pure point of law as rehashed in [Boniface Akusala & another V Law Society of Kenya & 12 others](#).
19. It was urged that the Respondent's Preliminary Objection did not meet the threshold formulated in the Mukisa Biscuit case as it had not been pleaded and had not raised a pure point of law.
20. On jurisdiction of the court to hear and determine the petition as against the principle of exhaustion, counsel relied on Article 162(2)(a) of the [Constitution](#) of Kenya, 2010 to urge that the court had jurisdiction to hear and determine the petition as Section 9(2) of the [Fair Administrative Actions Act](#) had exceptions including exceptional circumstances.
21. The court was invited to take judicial notice of the non-existence of the appellate authority at the Respondent's place of work as the terms of the Commissioners ended on January 17, 2023 which constituted an exceptional circumstances to oust the doctrine of exhaustion.
22. Reliance was made on the decision in [Republic V Independent Electoral and Boundaries Commission \(IEBC\) Ex parte National Super Alliance \(NASA\) Kenya & 6 others](#) (2017) eKLR to urge that the High Court could in exceptional circumstances make a finding that the requirement of exhaustion "would not serve the values enshrined in the [Constitution](#) or law and permit the suit to proceed before it."
23. That the timing of the Petitioner's dismissal at the tail end of the term of the Commissioners was intended to maliciously lock the Petitioner from appealing.
24. Counsel led no evidence to substantiate the submission.
25. Further, reliance was made on the decision in [Robert Khamala Situma & 8 others V The Acting Clerk of the Nairobi City County Assembly](#) (2022) eKLR to urge that the court may intervene.
26. Counsel submitted that the Respondent's Human Resource Manual was vague and ambiguous on timelines for determination of appeals and composition of the Appellate Committee was not defined.

Determination

27. The issues for determination are;
 - i. Whether there is a competent Preliminary Objection before the court.
 - ii. Whether the petition violates the principle of exhaustion under Section 9(2) of the [Fair Administrative Action Act](#), 2015.
28. As to the competence of the Preliminary Objection on record, the starting point is a delineation of the constituents of a Preliminary Objection as elucidated by the Court of Appeal for Eastern Africa



in *Mukisa Biscuit Manufacturing Co Ltd V West End Distributors Ltd (Supra)* where Law JA stated as follows;

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

29. In other words of Sir Charles Newbold P.,

“A Preliminary Objection is in the nature of what used to be a 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 has to be ascertained, or if what is sought is the exercise of judicial discretion . . .”

30. As aptly captured by Law JA above, an objection to the jurisdiction of the court qualifies as a Preliminary Objection as it consists of a pure point of law. The question whether a court has jurisdiction or not is one of the law.

31. Significantly, in the celebrated sentiments of Nyarangi JA (as he then was) in *Owners of the Motor Vessel “Lillian S” V Caltex Oil (K) Ltd*,

“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.”

32. The Respondent urges that the court has no jurisdiction on account of the principle of exhaustion of internal dispute resolution mechanisms in that the Petitioner’s appeal has not been heard and determined.

33. Needless to emphasize, Section 9 of the *Fair Administrative Action Act* does not oust the jurisdiction of the court in totality.

34. From the foregoing, the court is satisfied and finds that the Respondent’s Preliminary Objection is competent.

35. As to whether the petition violates the doctrine of exhaustion, counsel for the parties adopted opposing positions. While the Respondent urges that the Petitioner had not exhausted internal dispute resolution mechanisms, in that his appeal filed on January 23, 2023 was pending determination and the Appellate body of the Respondent had power to order reinstatement and payment of salaries in arrears, the Petitioner urges that the court had jurisdiction to proceed under the exceptions prescribed by Section 9(4) of the *Fair Administrative Action Act*, 2015 as the circumstances in this case were exceptional.

36. Section 9(4) of the *Fair Administrative Action Act*, 2015 provides that;

Notwithstanding subsection (3), the High Court or a Subordinate Court may, in exceptional circumstances and on application by the applicant exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.



37. Whereas the court is in agreement with the sentiments of the court in *Geoffrey Muthinja & another V Samuel Muguna Henry & 1756 others* (*Supra*), cited by the Respondent, that internal dispute resolution mechanisms should be exhausted before the court's jurisdiction is invoked and courts should be the fora of last resort and accords with the promotion of alternative dispute resolution mechanisms, it is also alive to the centrality of Section 9(4) cited herein above on exceptional circumstances and as expounded in *William Odhiambo Ramogi & 3 others V Attorney General & 4 others* (*supra*) as follows;
- “ . . . the first principle is that the High Court may in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the *Constitution* or law and allow the suit to proceed before it. It is also essential for the court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised. The second principle is that the jurisdiction of the courts to consider valid grievances from parties who lack adequate audience before the forum created by a statute or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted.”
38. The court is in agreement with these sentiments.
39. Although the Respondent insists on compliance with Section 12.14 of the Human Resource Manual on appeal, it is reticent on why the Petitioner's appeal filed on January 23, 2023 had not been heard and determined more than 3 months later and has not provided any timelines.
40. In sum, the Respondent insists on upholding the doctrine of exhaustion in circumstances in which there is no guarantee as to when the Petitioner's appeal will be heard and determined and thus to the detriment of the Petitioner.
41. Relatedly and correctly submitted by the Petitioner's counsel, Section 12.14 of the Human Resource Manual has no timelines as to when an appeal ought to be heard and determined.
42. The Petitioner's counsel invited the court to take judicial notice of the fact that the Respondent had no appellate authority to hear and determine the Petitioner's appeal since the term of the Commissioners lapsed on January 17, 2023 and the Petitioner's appeal was useless.
43. Counsel urged that the absence of Commissioners to hear the appeal amounted to exceptional circumstance to exempt the Petitioner from exhaustion requirements.
44. The court takes judicial notice of the fact that the Respondent has had no Commissioners since January 28, 2023 and since the Respondent tendered no evidence to show when the new Commissioners are likely to be appointed and when the Petitioner's appeal was likely to be heard and determined, the court is satisfied that the Petitioner has fulfilled the requirements of Section 9(4) of the *Fair Administrative Action Act*, 2015 as construed by courts and the Petitioner is exempted from the obligation to exhaust the appellate process of the Respondent.
45. In the court's view, holding otherwise would deny the Petitioner audience before the court yet he has no other audience owing to the absence of Commissioners.
46. More significantly, such a holding would be in violation of the provisions of Article 47(1) of the *Constitution* of Kenya, 2010 which guarantee the “right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair” which is also captured in Section 4(1) of the *Fair*



Administrative Action Act, 2015 and Section 3(1) of the Employment and Labour Relations Court Act, 2011.

47. The court is persuaded that it is judicious to intervene to prevent the Respondent from keeping the Petitioner on tenterhooks indefinitely in addition to subjecting him to the perplexing vagaries of politics.
48. From the foregoing, it is decipherable that the Respondent's Preliminary Objection dated January 31, 2023 is for dismissal and it is accordingly dismissed.
49. Costs shall be in the cause.
50. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 26TH DAY OF APRIL 2023

DR. JACOB GAKERI

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

