



Lomari & 4 others v County Government of Turkana & 5 others; Attorney General (Interested Party) (Petition E025 of 2022) [2023] KEELRC 856 (KLR) (13 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 856 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

PETITION E025 OF 2022

MA ONYANGO, J

APRIL 13, 2023

IN THE MATTER OF ARTICLES 3, 10, 22, 23, 27, 28, 41, 47, 50, 176, 179, 232, 235, 236 AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27,28,41,47 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED ILLEGAL, IRREGULAR AND UNCONSTITUTIONAL REMOVAL FROM OFFICE OF THE COUNTY CHIEF OFFICERS, TURKANA COUNTY GOVERNMENT

BETWEEN

JEREMIAH APALIA LOMARI 1ST PETITIONER
JACOB LOLELEA NATADE 2ND PETITIONER
AUGUSTINE LOKWANG EKITELA 3RD PETITIONER
STELLA E LOCHODO 4TH PETITIONER
ESTHER IKARU 5TH PETITIONER

AND

COUNTY GOVERNMENT OF TURKANA 1ST RESPONDENT
JEREMIAH EKAMAIS LOMORUKAI NAPOTIKAN 2ND RESPONDENT
THE COUNTY SECRETARY 3RD RESPONDENT
COUNTY PUBLIC SERVICE BOARD 4TH RESPONDENT
COUNTY ATTORNEY 5TH RESPONDENT



COUNTY ASSEMBLY OF TURKANA 6TH RESPONDENT

AND

THE HONOURABLE ATTORNEY GENERAL INTERESTED PARTY

JUDGMENT

1. The petitioners herein were, at the time of filing of this petition, the duly appointed and/or sitting County Chief Officers of the County Government of Turkana in charge of Tourism, Culture, Environment and Natural Resources; Lands, Housing and Urban Areas Management; Office of the County Governor; Economic planning; Public Service, Administration and Disaster management, respectively.
2. The 1st Petitioner was appointed on February 22, 2016 as the County Chief Officer in charge of the Department of Finance and subsequently his contract was extended for periods 2020,2021,2022 for two years ending on February 25, 2024.
3. The 2nd Petitioner was appointed to be the County Chief Officer in charge of Department of Water Services, Environment and Mineral Resources which contract was subsequently extended for a further period of two years ending February 25, 2024.
4. The 3rd Petitioner was appointed on December 3, 2020 to serve as County Chief Officer in charge of office of Governor for two years with a renewable contract which contract was extended on July 26, 2022 for a period of three years.
5. The 4th Petitioner was appointed to serve as the County Chief Officer in charge of Department of Tourism, Culture, Environment, Energy and Natural Resources on January 6, 2022 and was to serve for two years ending on January 5, 2024.
6. The 5th Petitioner was appointed on November 24, 2020 as the County Chief Officer to serve in the 1st Respondent's office and her contract was subsequently extended by a letter dated July 26, 2022 for a period of three years ending on August 10, 2025.
7. According to the Petitioners, the said contracts are deemed as valid by operation of law and legal advisory of the Council of Governors.
8. The Petitioners aver that after the August 8, 2022 general elections, the 2nd Respondent was duly elected as the Governor, County Government of Turkana and that on August 30, 2022, issued a press statement reorganizing the County Government and re-deploying the County Chief Officers to various departments. That the Petitioners were affected by the said changes.
9. The Petitioners state that they assumed their new roles and have been exercising delegated power as authorised.
10. It is the Petitioners case that on October 18, 2022, the 2nd Respondent wrote to the Petitioners a letter under the Ref No P/No 20150018563/30 notifying them that the Turkana Public Service Board had commenced review and investigation of the County Chief officers' contracts and that a Pending Bill Committee(PBC) had been established to verify, scrutinize and analyse all the existing stock of Turkana County Pending Bills with a view to identify cases where there had been corrupt, fraudulent and false claims against the County Government of Turkana and that the TCPSB was to make recommendations to the 2nd Respondent.



11. That the said letter dated October 18, 2022 signed by Mr Peter Eripete, the County Secretary, the 3rd Respondent, sent the Petitioners on compulsory leave for one month, an action which the petitioners allege was tantamount to technically removing them from office.
12. It is the Petitioners' case that the said action is unconstitutional as it violated the Petitioners' fundamental rights and freedoms as enshrined under Article 2(1), 2(4), Article 10, Article 47, Article 50, Article 232 and Article 236 of the Constitution.
13. It is also averred that the 2nd, 3rd, 4th, 5th and 6th Respondents' action of sending the Petitioners home on compulsory leave is inconsistent with the grounds set forth under section 45 of the County Governments Act.
14. The Petitioners state that the purported decision to send them away on compulsory leave for one month from the office they legally held was actuated by apparent malice and ill-will against them by the 2nd Respondent.
15. The Petitioners therefore seek the following orders in their Petition dated October 21, 2022;
 - i. A declaration to issue to declare that the decision to send the Petitioners on compulsory leave vide the 2nd Respondent's letter dated October 18, 2022 is unconstitutional and therefore unlawful on account of violation of Section 31 and 45 of the County Government Act, 2012 as read with Articles 47 and 236 of the Constitution of Kenya and section 41 of the Employment Act.
 - ii. An order of certiorari to issue to bring into the honourable court for purposes of being quashed the decision of the 2nd respondent forcefully removing and sending the petitioners on compulsory leave with a view to dismissing them and hounding them out of office is inconsistent with sections 31 and 45 of the County Government Act as read together with Articles 47 and 236 of the Constitution as well as section 41 of the Employment Act.
 - iii. A declaration to issue to declare that under sections 31 and 45 of the county Governments Act as read with Articles 236 of the Constitution of Kenya, the petitioners do remain as the lawful holders of the position of the Chief County offices in their respective departments of the County Government of Turkana.
 - iv. This Honourable court do find and uphold that the decisions, actions and omissions of the 2nd Respondent and his assigns and agents in respect of the removal and dismissal of petitioners from their positions constitute conduct that violates Articles, 10, 47 and 236 of the Constitution.
 - v. This Honourable court to be pleased to order for compensation to issue for violation of the petitioners' rights and an inquiry into quantum to be gone into(sic), negotiated, agreed and in default to be taxed by this court and an award of gross earnings as at October 2022 and the remainder of the contract be paid in full to the petitioners.
 - vi. Costs of this petition
 - vii. Or such other orders as this Honourable Court shall deem just.



Response To Petition

16. The Petition was opposed by the Respondents through a replying affidavit sworn on December 23, 2022 by David Esuron who describes himself as the Principal Legal Counsel at the office of the 5th Respondent.
17. In that affidavit, the deponent averred that after the new Governor was elected on August 8, 2022, the Governor in line with his manifesto issued an executive order restructuring both the County Executive Officers and County Chief Officers thereby merging some of the ministries and separating others.
18. That the said executive order which merged the executive and accounting offices and abolished some offices effectively extinguished the positions that were previously held by the Petitioners herein which renders the instant petition an abuse of court process given that the subject matter is non-existent as the positions that have been pleaded herein no longer exist.
19. It was stated that the consequence of the above executive order issued by the Governor was that every Chief Officer was to take leave and reapply for the positions that they felt their education and professional achievements would fit.
20. It is averred that the creation of new roles and new ministries and the abolition of others meant that all the positions had to be advertised afresh for purposes of consideration of the candidates who met the qualifications and that in this case, the petitioners are not exempted from reapplication for consideration because their positions as the chief officers had in effect been abolished by the restructuring of the executive ministries.
21. It was further averred that when the governor was appointed he took notice of how the previous government issued renewals of contracts to the Chief Officers without consultations with the Turkana County Public Service Board as provided for in Sections 56, 59, 74 and 75 of the [County Governments Act](#).
22. That the issue was raised with the County Secretary who then wrote a letter to the Turkana County Public Service Board to look into the renewals of the contract and whether there were irregularities that accompanied such actions.
23. According to the deponent, the first glaring irregularity was that all the contract renewals for the County Chief Officers were done without consultation of the County Public Service Board as provided in the [County Governments Act](#).
24. That the Turkana County Service Public Board conducted a thorough review on the renewal of contracts, wrote a letter dated November 4, 2022 to the County Secretary who is ipso facto the Human Resource Manager of the Respondent and would take charge of any irregularity.
25. It was further contended that based on recommendations of the Turkana County Public Service Board, the County Secretary, sent a notice of compulsory leave to the Petitioners.
26. It was contended that any action or decision undertaken by the Turkana County Public Service Board is appealed to the Public Service Commission by any individual who is aggrieved by such a decision as envisaged by Section 77 of the [County Governments Act](#) and that as such, the Petitioners violated the provisions of the said statute by coming to court which position according to the Respondents has been upheld by various courts.
27. It was the deponent's contention that failure to adhere to the strict provisions and regulations set out in the aforementioned provisions of the law robs the court the jurisdiction to deal with such a petition



and that further, the Petitioners have failed to demonstrate in their petition how the Respondents violated their rights or failed to adhere to the statutory provisions governing their employment in both the letter of compulsory leave or the termination notice.

28. It was further averred that the Respondents have at all times adhered to the laws and regulations governing the hiring of employees and as such, an olive branch was extended to the Petitioners herein to reapply for the advertised positions if they met the mandatory professional and academic qualifications for the new positions created by the executive order.
29. In the end, the court was thus urged to dismiss the petition dated October 21, 2022 with costs
30. The Petitioners filed a further affidavit on January 23, 2023 sworn by the 1st Petitioner on January 12, 2023 where they reiterated the contents in the petition and further averred that under Section 45 of the [County Governments Act](#), the County Governors have no power to remove County Chief Officers from office but rather to re-assign a Chief Officer by transferring him/ her from one department to another.

Written Submissions

31. On January 16, 2023 parties agreed to dispose the petition through written submissions. The Petitioners filed their submissions on January 23, 2023 whereas the respondents filed their submissions on March 20, 2023.
32. The Petitioners submitted that they were unfairly terminated as the termination letter dated November 17, 2022 did not state the reason for the dismissal. They averred that in the letter dated November 4, 2022 produced by the Respondents in their response to the petition, which was addressed to the County Secretary and the Head of Public Service board cited the reasons for the Petitioners dismissal as being;
 - a. Instances of illegalities and irregular renewals
 - b. Mistakes and inconsistencies in the renewed contracts
 - c. Mistakes by the former governor in renewing the contracts
 - d. Illegal timings of renewals by the former Governor.
33. According to the Petitioners, the aforesaid reasons points to mistakes by the governor and that there is nothing that impugns their conduct to warrant the dismissal.
34. The Petitioners submitted the contracts of employment or renewals herein were drawn by the Respondents and that any mistakes therein cannot be interpreted against the Petitioners. It was thus stated that it is trite law that where a party alleges mistake in a contract or where there is a mistake in a contract, then the same ought to be interpreted against the maker as stipulated by the contra proferentem rule. The case of [Mwangi Ngumo vs Kenya Institute of Management](#) (2012) eKLR was cited to buttress this position.
35. The court was urged to apply the contra proferentem rule and construe the interpretation of the contract or renewals against the Respondents.
36. Further, the Petitioners submitted that they were not afforded a right to be heard and as such, the Respondents did not follow a fair process in terminating them from employment.
37. The Petitioners also raised the issue of violation of their right to Fair Administration Action under Article 47(1) and (2) of the [Constitution](#), and Section 3(1) of the [Fair Administrative Action Act](#) and submitted that the procedure followed before the termination of the Petitioners' employment



- were unprofessional, unfair, wrongful and in contravention of Articles 27,28,41,47 and 50 of the Constitution and section 31 and 45 of the County Government Act.
38. The Petitioners also raised the issue of legitimate expectation in their submissions and contended that the conduct of the Respondents created a legitimate expectation on the part of the petitioners that they would work and earn a salary upto a certain agreed period and that based on that promise, they took up their roles and focused on delivering for the Respondents.
 39. Lastly, the Petitioners submitted that the Respondents in terminating their contracts of employment violated the principles of good governance, integrity and transparency under Article 10 of the Constitution. It was submitted that the conduct of the Respondents violated the national values and principles of good governance under Article 10(2) of the Constitution, as well as Article 232(1)(e) and (f) of the Constitution which provides for the principles of accountability in administrative acts as well as transparency and provision to the public of timely and accurate information.
 40. The court was then urged to allow the appeal with costs.
 41. The Respondents in their submissions identified the issues for determination to be whether the decision to send the petitioners on compulsory leave was made by the County Public Service Board and assigned to the County Secretary to execute; whether there are set out provisions on the process of challenging an adverse decision by the County Public service Board; whether the petition before this honourable court was filed prematurely and therefore limits the court in its jurisdiction to substantively and effectively determine this suit.
 42. It was submitted that the decision to send the Petitioners on compulsory leave was solely undertaken by the County Public Service Board after it conducted a thorough review on the renewal of contracts of Petitioners which the office of the Governor felt had been secured fraudulently without following the laid down guidelines in the County Governments Act. That based on the recommendations of the Turkana County Public Service Board, the County Secretary Turkana County sent a notice of compulsory leave.
 43. It was the Respondents contention that the said actions originated from Turkana County Public Service Board who is by law mandated to do the same and that any action or decision undertaken by the Turkana County Public Service Board is subject to appeal to the Public Service Commission by an individual dissatisfied by such a decision as envisaged by Section 77 of the County Governments Act
 44. To buttress this position, the Respondents cited the cases of David Baariu Mwirabua & 2 others v Governor, Meru County & another (2019) eKLR Shem Okora Onywera v Kisii County Government & another (2018) eKLR and the case in Eldoret ELRC Pet/E027/2022; Rosemary Chinyei Parangiro vs Turkana County Government Service Board and others.
 45. With regard to the issue whether the petition herein was filed prematurely, the Respondent submitted that the petition was filed 48 hours after the notice of compulsory leave was served upon the Petitioners and that by the time the petition was filed, there was no notice of termination that would warrant the conservatory orders that the Petitioners seek. That as such, the court is not presented with a substantive picture of issues in dispute to enable it pronounce itself.
 46. The court was urged to pronounce itself that it does not have jurisdiction to entertain this petition at this stage as the Petitioners have not exhausted all the available avenues for championing their grievances.



Determination

47. I have analysed the Petition, the response thereto, the rival affidavits and submissions as well as the cited authorities at length. In my view, the issues for determination are whether the Petitioners failed to exhaust the statutory dispute resolution machinery before coming to this court, whether the petitioners' constitutional rights were infringed by the Respondents and whether they are entitled to the reliefs sought in the petition.
48. At the time this petition was filed, the petitioners' employment contracts had not been terminated. They had been issued with notices of compulsory leave.
49. The court has been invited to find that the Petitioners did not exhaust the available remedies before coming to this court as envisaged by Section 77 of the *County Governments Act*. Although the Respondents raised the issue of non-exhaustion of available remedies the petitioner did not address the same in its submissions. This court must however make a determination on the issue as a preliminary point as it would impact on the jurisdiction of this court to hear and determine this matter.
50. Section 77 of the *County Governments Act* provides as follows;

77.

- (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) remuneration and terms and conditions of service;
 - (c) disciplinary control;
 - (d) national values and principles of governance, under Article 10, and values and principles of public service under Article 232 of the *Constitution*;
 - (e) retirement and other removal from service;
 - (f) pension benefits, gratuity and any other terminal benefits; or
 - (g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.
- (3) An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of the Commission, the circumstances warrant it.



- (4) The Commission shall not entertain an appeal more than once in respect to the same decision.

51. The *Black's Law Dictionary* 11th Edition defines the doctrine of exhaustion as

“The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The purpose of the doctrine is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases which judicial relief is unnecessary.”

52. The *Fair Administrative Action Act* under Section 90 also makes provision for the doctrine of exhaustion and stipulates as follows;

- (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the *Constitution*.
- (2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
- (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
- (4) 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.
- (5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

53. In the case of *Secretary, County Public Service Board & another v Hulbhai Gedi Abdille* [2017] eKLR, the court of appeal observed that;

“Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime”.

54. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition No 159 of 2018 consolidated with Constitutional Petition No 201 of 2019 *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR. The Court stated as follows:

“The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency’s action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms



in line with Article 159 of the Constitution and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:

This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.

This is Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR, where the Court of Appeal stated that:

It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.

55. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R. Vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (*supra*), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (*supra*), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.)



As observed above, 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 a 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. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR where he observed:

In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.

56. The Court of Appeal while dismissing an appeal in Mombasa Civil Appeal No 166 of 2018 Kenya Ports Authority v William Odhiambo Ramogi & 8 others [2019] eKLR held as follows: -

The jurisdiction of the High Court is derived from Article 165 (3) and (6) of the Constitution. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of the Constitution encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.

At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of Article 189 of the Constitution and Sections 33 and 34 of Inter-Governmental Relations Act of 2012 (IGRA)" The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in *Republic vs. Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR. They applied a dual pronged approach before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed Constitutional violations seeking to be enforced are not mere "bootstraps." We have keenly addressed our minds to the learned Judges' decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court



under Article 165 (5) of the Constitution became automatic. And in our view, it could not be ousted or substituted.

57. Further, in Civil Appeal 158 of 2017, Fleur Investments Limited -vs- Commissioner of Domestic Taxes & another [2018] eKLR, the Learned Judges of the Court of Appeal relied on an earlier decision in Speaker of National Assembly vs Njenga Karume (1990-1994) EA 546 to assume jurisdiction by bypassing the mechanism under Income Tax Tribunal. They observed as follows: -

For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.

[Emphasis added]

58. Turning back to the case at hand, it is apparent that there is a disconnect between the pleadings in the Petition and the submissions of the Petitioners. In the petition the prayers are against their being sent on compulsory leave by letters dated October 18, 2022. However, the submissions address the subsequent termination of their employment by letters of termination dated November 17, 2022 which was the subject of their notice of motion dated November 21, 2022. The petitioners did not amend the petition to address the issue of the subsequent termination of their contracts and to seek appropriate remedies in respect thereof.
59. Parties are bound by their pleadings and this court can only determine the prayers before it as set out in the petition as set out herein above.
60. When the petitioners first approached the court through their notice of motion dated October 21, 2022 they were granted the following orders:
- a. In view of the fact that counsel of the Respondent has confirmed that Petitioners are only on compulsory leave and are on salary, the Court directs that the Respondent continues paying salary pending inter parties hearing of the application.
 - b. That the file be transferred to Eldoret for hearing and determination.
 - c. That mention in ELRC Court on November 30, 2022, in the meantime Respondents to file response to the application and petition.
61. The orders were on November 23, 2022 erroneously summarily vacated by my brother Abuodha J on the mistaken belief that there were two separate suits filed by the Petitioners, one being Eldoret Petition No E025 of 2022 and the other Nairobi ELRC Petition No E0179 of 2022. The Judge made the following orders:
- a. The Petition and application involve the same parties and same issues as Petition Number E0179 of 2022 filed in Nairobi which has since been transferred to Eldoret and put together with the present petition. The Court takes great exception that Counsel could simultaneously



file two Petitions in two different locations involving same parties and same issue. This is not only an abuse of Court process but tantamount to forum shopping. Whereas the Nairobi petition is scheduled for mention in Eldoret on November 30, 2022, the Eldoret Court had already given directions in the matter and the same is scheduled for mention on December 19, 2022. In order to avoid conflicting the Judges, this Court will take the unprecedented decision and summarily discharge the order issued in petition E0179 OF 2022 and direct the parties to abide by the directions given in the Petition and the application dated November 21, 2022.

62. The correct position was that the Nairobi petition having been transferred to Eldoret was given the new number in Eldoret.
63. Having come to court to contest their compulsory leave, were the petitioners required to appeal against the same to the PSC as provided in section 77 of the *County Governments Act*?
64. In *Republic v National Environment Management Authority Ex parte Sound Equipment Ltd*, (*supra*), the Court of Appeal observed as follows: -

“... Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it”

[Emphasis added]

65. As observed by the Court in the case of *Republic v National Environment Management Authority Ex parte Sound Equipment Ltd*, (*supra*), and as provided in Section 9(4) of the *Fair Administrative Action Act*, there are exceptions to the exhaustion rule.
66. The compulsory leave of the petitioners was for one month. Was it practical for them to appeal against the decision to the PSC as provided in the County Government Act or was this a matter that fell within the exceptions to the exhaustion doctrine? In my view, No
67. When the Petitioners came to court they were seeking temporary orders set out in their application dated 21st October 2022 to wit: orders restraining the Respondents from undertaking recruitments to fill the positions they held as County Chief Officers, and from effecting the decisions to send them on compulsory leave by letters dated 18th October 2022.
68. It is my view that these were orders which the PSC could not grant. I do not think section 77 of the County Government Act was intended for urgent interlocutory reliefs but rather, for determination of final orders by the County Public Service Board. The wording of the section which refers to filing appeals within 90 days clearly means that the PSC cannot effectively handle matters that require urgent relief as in the instant case.
69. Further, the appointment of county chief officers is provided for under section 45 of the *County Governments Act* as follows:
 1. The governor shall—
 - a. nominate qualified and experienced county chief officers from among persons competitively sourced and recommended by the County Public Service Board; and



- b. with the approval of the county assembly, appoint county chief officers.
 2. The office of a county chief officer shall be an office in the county public service.
 3. A county chief officer shall be responsible to the respective county executive committee member for the administration of a county department as provided under section 46.
 4. The county chief officer shall be the authorized officer in respect of exercise of delegated power.
 5. The governor may re-assign a county chief officer.
 6. A county chief officer may resign from office by giving notice, in writing, to the governor.
70. From the above provision it is clear that the County Public Service Board does not employ county chief officers and therefore does not exercise disciplinary control over them. The county public service board only identifies candidates and presents the names to the governor for appointment. Even the Governor does not have power to remove them from office. It is expressly provided that for them to leave office due process must be complied with as expressly set out in section 46 of the Act.
71. This further means that section 77 does not apply to the petitioners as the County Public Service Board does not employ or exercise control over them.
72. On the substantive prayers in the petition, it is clear that apart from acting without authority in sending the Petitioners on compulsory leave the Respondents punished the petitioners for wrongs that are alleged to have been committed by the previous administration without observing due process. It was not demonstrated that the petitioners were involved in any alleged misconduct to warrant being punished for wrongs attributed to other persons and without as much as being asked to show cause why they should not be held accountable for the alleged wrongs.
73. The Respondents therefore violated the right of the petitioners to a fair hearing under Article 47 of the Constitution, their rights to due process of the law under Article 236 and their right to fair labour practice under Article 41 of the Constitution.
74. It has further not been demonstrated by the Respondent that there was provision either in law or in the regulations and or policies of the County Government or the Public Service Commission that permitted the sending of the petitioners on compulsory leave under the circumstances of the instant case.
75. The foregoing notwithstanding and as has been pointed out above, the Petitioners were issued with letters of termination of their contracts, during the pendency of this suit but did not amend the petition to reflect the changed circumstances or to seek orders relevant to their changed circumstances.
76. It is trite law that courts do not make orders in vain. It is obvious that the course of action in the petition has been overtaken by events by the termination of the contracts of the petitioners which they sought to preserve in the instant petition. This court would therefore be engaging in an academic exercise in granting the reliefs sought by the Petitioners in the instant petition.
77. It is for these reasons that I find no merit in the petition as currently framed and accordingly dismiss the same with no orders as to costs. This shall however not be a bar to the petitioners, should they be inclined to do so, to file a claim in respect of the termination of their contracts.
78. Orders accordingly.

DATED AND DELIVERED VIRTUALLY IN ELDORET THIS 13TH DAY OF APRIL, 2023.



MAUREEN ONYANGO
JUDGE

