



REPUBLIC OF KENYA



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**Oloo v Governor Homabay County & 3 others (Petition E044 of 2022)
[2023] KEELRC 1561 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1561 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E044 OF 2022
CN BAARI, J
JUNE 29, 2023**

BETWEEN

EVANS OTIENO OLOO PETITIONER

AND

THE GOVERNOR HOMABAY COUNTY 1ST RESPONDENT

THE COUNTY GOVERNMENT OF HOMABAY 2ND RESPONDENT

THE HOMABAY COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

THE COUNTY ASSEMBLY OF HOMABAY 4TH RESPONDENT

JUDGMENT

1. The petition herein, is dated 8th November, 2022, and was filed on 9th November, 2022. The Petitioner seeks the following reliefs:
 - a. A declaration that the appointment of advisors, Liaison Officers and Governor's delivery unit to wit; Charles Odhiambo, Erastus Randusi, Sylas Jakakimba, Nicholas Ayieta Odawo, Paul Onditi, Patrick Were, Silas Nyacharoh Rabah, Rachel Adhiambo Ogutu, Benard Omuga, Gerge Okoth Mboya and Gordon Okech Kendo, Erick Jakim, William Abonyo Onditi (Farao), Collins Kalee, Kennedy Dede, Magdalene Owino, Lucy Odwar, Eng. Daniel Onyango Ogenga, Thomas Nyonje, Omondi Ayieko and Jared Omondi Omolo as contained in the Governor Homabay County Press Release dated 11/10/2022 or other partisan staff known by other styles to any offices within the County Government of Homabay Public Service that lacks legal authority for its establishment is invalid, illegal, null and void.
 - b. A declaration that the advisories by the Interested Party (SRC) Capping the number of staff to be appointed as advisors and any other officers is binding upon all state organs including the Respondents.



- c. A declaration that the Respondents by unlawfully and irregularly appointing persons to positions of advisors, liaison Officers and Governor's delivery Unit Offices which have not been authorized in the County Staff establishment have improperly exercised their public power conferred on them thereby abusing their officers.
 - d. A declaration that the Respondents, more specifically the 1st Respondent creation and appointment of one Dr. Sylas Jakakimba advisor, Legal Affairs is in blatant disregard and/or in contravention of the provisions of Sections 5, 7 and 16 of the [Office of the County Attorney Act](#), no 14 of 2020, and therefore illegal, null and void.
 - e. An order of Judicial Review in the nature of prohibition prohibiting the Respondents from appointment of persons to serve namely; Charles Odhiambo, Erastus Randusi, Sylas Jakakimba, Nicholas Ayieta Odawo, Paul Onditi, Patrick Were, Silas Nyacharoh Rabah, Rachel Adhiambo Ogutu, Benard Omuga, Gerge Okoth Mboya and Gordon Okech Kendo, Erick Jakim, William Abonyo Onditi (Farao), Collins Kalee, Kennedy Dede, Magdalene Owino, Lucy Odwar, Eng. Daniel Onyango Ogenga, Thomas Nyonje, Omondi Ayieko and Jared Omondi Omolo as contained in the Governor Homabay County Press Release dated 11/10/2022, or other partisan staff known by other styles to any offices within the County Government of Homabay if any approval and or appointment has been done at the point of determination of this petition, the same be squashed.
 - f. An order of Judicial Review in the nature of Certiorari bringing before this court for purposes of quashing the decision of the County governor of Homabay of *vide* Press Release dated 11/10/2022 purporting to appoint Advisors, Liaison Officers and Governor's Delivery Unit to wit; Charles Odhiambo, Erastus Randusi, Sylas Jakakimba, Nicholas Ayieta Odawo, Paul Onditi, Patrick Were, Silas Nyacharoh Rabah, Rachel Adhiambo Ogutu, Benard Omuga, Gerge Okoth Mboya and Gordon Okech Kendo, Erick Jakim, William Abonyo Onditi (Farao), Collins Kalee, Kennedy Dede, Magdalene Owino, Lucy Odwar, Eng. Daniel Onyango Ogenga, Thomas Nyonje, Omondi Ayieko and Jared Omondi Omolo as contained in the Governor Homabay County Press Release dated 11/10/2022 or other partisan staff known by other styles to any offices within the County Government of Homabay the same be quashed and subsequent actions/execution arising from the same proceeding be quashed as well.
 - g. An order of *Mandamus* be directed to the Governor of Homabay Count, compelling her in person, her office/her employees or such persons purporting to act on her behalf to perform the appointments in due compliance with Articles 10, 27(3)(4), 56 and 232 of [the Constitution](#) of Kenya 2010 and Sections 65 and 66 of the [County Government Act](#) 2012(2020).
 - h. An order awarding costs of the Petition to the Petitioner.
 - i. Any other or further orders, writs and direction this Honourable Court considers appropriate and just to grant for the purpose of enforcement of the Petitioner's fundamental rights and freedoms.
2. The petition is premised on the grounds That:
- i. The 1st Respondent who is the duly elected governor of Homabay County on 11th October, 2022, notified the public of the appointment of various officers to wit advisors, liaison officers and officers in the governor's delivery unit. The Petitioner states that the positions are outside the approved establishment under [the Constitution](#) and the [County Government Act](#).



- ii. The Petitioner states that out of the twenty-one (21) positions filled, only three have been given to women thus breaching the requirements of the Constitution and the County Government Act, 2012.
 - iii. That out of the appointments, it is apparent that special groups and persons with disability have not been considered under the affirmative action in regards to the County Government Act and the relevant provisions of the Constitution.
 - iv. The Respondents have unlawfully appointed the Deputy Governor Homabay County, as the County Executive Committee Member for Agriculture and Livestock, a portfolio number (0) exceeding the number envisaged under Article 179 (3)(b) of the Constitution, and which appointment was never gazetted nor taken before the County Assembly for vetting.
 - v. The Petitioner states that the Respondents have created offices in the County Public Service and proceeded to appoint persons to hold various offices without reference to an advisory by the Salaries and Remuneration Commission and in breach of the 4th Respondent's function under Section 59 and 62 of the County Government Act.
 - vi. The 1st Respondents has appointed one Dr. Sylas Jakakimba advisor legal affairs in blatant disregard and in contravention of the provisions of Sections 5, 7 and 16 of the Office of the County Attorney Act, 2020.
 - vii. That persons have been appointed to jobs with unknown job description in the name of advisors, liaison officers and governor's delivery unit, which positions are vague and do not exist under the law.
 - viii. That the appointments will continue to cause unnecessary wasteful use of public resources which undermines accountability, good governance, the rule of law and Constitutionalism.
3. The Respondents opposed the petition *vide* a replying affidavit, sworn on 20th November, 2022, by George Ila and grounds of opposition filed on 8th March, 2023. The Respondents' case is:
- i. That the suit herein being a Constitutional petition, it was incumbent upon the Petitioner to have articulated the Articles of the Bill of Rights allegedly infringed, and the particulars of the breaches. It is the Respondents' case that a look at the petition shows that the gravamen of the petition is anchored on alleged breaches of Articles 179(3)(b) and the two thirds gender rule under Article 27 (8) of the Constitution.
 - ii. That the petition herein is fatally flawed for reason that the Petitioner seem confused on the contents of the County Executive Committee appointed by the 1st Respondent, since the notice dated 11th October, 2022, indicates only ten (10) appointments, three of whom, are female appointees, constituting the required 30% threshold.
 - iii. That the Petitioner has lumped advisors and other officers appointed in the Executive Office of the Governor, as constituting the core of the County Executive Committee outlined under Article 179 of the Constitution in a bid to convolute issues.
 - iv. That the 1st Respondent was clear in her appointment memo that the advisors and other officers in the Executive Office of the Governor, were for purposes of enhancing the effective functioning of the Executive Office of the Governor.
 - v. That by Article 234(2)(i) of the Constitution and Section 77 (1) & (2)(c) of the County Government Act and Section 87(2) of the Public Service Commission Act, this Court does not



have jurisdiction to hear and determine this petition in the first instance for reason that it concerns appointment and inter departmental transfers.

- vi. That the proceedings herein, offend the doctrine of exhaustion contemplated under Article 159(2)(c) of *the Constitution* since there are in place alternative dispute resolution mechanisms and alternative remedies which have not been invoked.
- vii. That the Petitioner has not show that the county government entities enjoined in this suit have appointed any person and/or purported to exercise powers, duties and functions they did not have.
- viii. That the power to nominate for employment private staff and county public officers in the office of the governor, is conferred on the County Public Service Board, the 3rd Respondent herein, and that in effecting the same in the manner it did, the Respondents lawfully exercised a power and function conferred on them
- ix. That the orders sought if granted will deny the county government and its entities the opportunity to have in place a depository of qualified staff and which will hamper service delivery.
- x. That the County Public Service Board is a body corporate with perpetual succession and is properly constituted, and hence the allegations of there having been a vacuum is not true.
- xi. That no reasons have been advanced that warrants the issuing of the orders sought as there is no inherent interest to individuals that would occasion irreparable harm to either the Petitioner or the public.

The Petitioner's Submissions

4. It is submitted for the Petitioner that the 1st Respondent had no power to create and appoint to the positions herein. It is his further submission that the creation and abolition of offices in the County Government is only preserved for the County Public Service Board under Section 59(A), 62 and 63 of the *County Government Act*.
5. The Petitioner further submits that the entire appointment process was biased towards men as the principle of 1/3 rule was not met, contrary to provisions of Article 27(8) of *the Constitution* of Kenya 2010 as read together with Section 65(a) of the *County Government Act*.
6. The Petitioner submits that Section 59(a) and 62 of the *County Government Act*, gives the County Public Service Board exclusive powers to create and abolish offices within the County Government. The Petitioner had reliance in *Duncan Kariuki Gitau & 2 Others v Lamu County Public Service Board & another* [2021] eKLR to support this assertion.
7. The Petitioner submits that the appointments in dispute herein, were both substantially and procedurally flawed.

The Respondents' Submissions

8. The Respondents submit that this Court lacks the requisite jurisdiction to entertain this Petition in the first instance, for reasons that the Petitioner has failed to exhaust all the necessary administrative dispute resolution mechanisms and other legal avenues expressly provided for under the law, by way of preferring an appeal to the Public Service Commission contrary to Section 77 of the *County Governments Act*.



9. It is submitted for the Respondents that the proceedings herein offend the Doctrine of Exhaustion contemplated under Article 159(2)(c) of *the Constitution*, since there exists alternative dispute resolution forums, and alternative remedies, including investigative process by the County Public Service board under Section 59(4) and 75 of the *County Government Act*, Petition and challenge under Section 88 *County Governments Act* to the County Government itself, and an appeal process to the Public Service Commission under Section 77 of the *County Governments Act* respectively.
10. The Respondents further submit that the Doctrine of Exhaustion has been restated with notoriety in our Courts and this Honourable Court should uphold it. The Respondents sought to rely in the decision of the Court of Appeal in *Secretary County Public Service Board and another v Hulbbhai Gedi Abdille* [2017] eKLR to support this position.
11. The Respondents submit that the Petitioner has failed to prove his case on a balance of probability. It is their further submission that Article 235(1) of *the Constitution* allows County Governments to establish offices in their County Public Service, to appoint persons to act and/or serve in such offices and to confirm such appointments.
12. The Respondents submit that the burden of proof always lies with he who alleges, and therefore in this case, the burden of proof lay with the Petitioner to prove that the Respondents did not follow the due process in the nomination and appointment of advisors, liaison officers and officers in the Governor's delivery unit.
13. It is their further submission that, the County Governor being the Chief Executive Officer at the County, is entitled to personal staff including advisors; and the Governor, Homabay County was only working within her statutory powers and performing her duties when she nominated for appointment Charles Odhiambo, Erastus Randusi, Sylas Jakakimba, Nicholas Ayieta Odawo, Paul Onditi, Patrick Were, Silas Nyacharoh Rabah, Rachel Adhiambo Ogutu, Benard Omuga, Gerge Okoth Mboya and Gordon Okech Kendo, Erick Jakim, William Abonyo Onditi (Farao), Collins Kalee, Kennedy Dede, Magdalene Owino, Lucy Odwar, Eng. Daniel Onyango Ogenga, Thomas Nyoje, Omondi Ayieko and Jared Omondi Omolo to various roles.
14. The Respondents pray that this Court finds that the Petitioner has failed to substantiate his claims and therefore dismiss the Petition for lack of proof.

Analysis and Determination

15. I have considered the petition, the reply by the Respondents and the submissions by both parties. The issues that fall for determination are:
 - i. Whether the Court has jurisdiction to hear and determine the petition, and if yes;
 - ii. Whether the appointment of Advisors, Liaison Officers and officers in the Governor's delivery unit violated the law.

Whether the Court has jurisdiction to hear and determine the petition

16. The Respondents opposed the petition herein, on the premise that a decision regarding the engagement of any person in a County Government including; the recruitment, selection, appointment and qualifications attached to that office, are issues that lie on appeal to the Public Service Commission in the first instance.
17. It is their assertion that for having failed to first prefer the matter to the Public Service Commission in form of an appeal in accordance with Article 234(2)(i) of *the Constitution* and Sections 77 of the



County Government Act, read with Section 87(2) of the Public Service Commission Act, 2017, this Court lacks jurisdiction to entertain this petition on account of the doctrine of exhaustion.

18. The Court succinctly described the centrality of jurisdiction in any matter before it in the case of Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited [1989] eKLR, in the following words: -

“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.”

19. Article 234(2)(i) of the Constitution states thus on appeals emanating from the County Government public Service: -

“The Commission shall: -

- i. Hear and determine appeals in respect of county governments’ public service....”

20. Section 77 of the County Government Act states: -

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)“ (emphasis mine)

21. Further, Section 87(2) of the Public Service Commission Act provides thus: -

22.

“(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.”

23. Courts have in a plethora of decisions upheld the proposition that where there is a clear procedure for redress of any grievance prescribed by the Constitution and Acts of Parliament, that procedure should be strictly followed. This is the position adopted in the cases of Tom Kusienya & 11 Others v Kenya Railways Corporation & 2 Others, Constitutional Petition no 353 of 2012 [2013]eKLR, the Court of Appeal cases of Narok County Council v Transmara County Council & another, Civil Appeal no 25 of 2000 [2000]eKLR, Speaker of National Assembly v James Njenga Karume, Civil Application no 92 of 1992 [1992]eKLR and the English case of Wilkinson v Barking Cooperation [1948]1 KB 721

24. It has specifically been held that the requirement to appeal to the Public Service Commission on matters arising from the county government public service, is couched in mandatory terms. 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.”

25. Again, in the case of Secretary County Public Service Board and Another v Hulbbhai Gedi Abdille [2017] eKLR, cited by the Respondents, the Court of Appeal (Makhandia, Ouko & M’Inoti, JJA) allowed the appeal on the basis that the Respondent had failed to utilize the process provided by Section 77 of the County Governments Act 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 only the forum through which the Respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one specifically tailored by 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.”

26. The issues subject of the Petitioner’s petition are in respect of appointment to the positions of Advisors, Liaison Officers and Officers in the Governor’s delivery unit. It thus follows, that they are matters that fall within the appellate jurisdiction of the Public Service Commission in the first instance and not this Court.

27. There is no doubt that the foregoing provisions of the law and judicial precedent, ousts this Court’s jurisdiction on matters arising from the county government public service, where parties by pass the appellate procedure.

28. In the circumstances, I return that this Court lacks jurisdiction to hear and determine this petition on account of the doctrine of exhaustion.

29. The petition is dismissed in its entirety.

30. The petition having been brought in the public interest, I make no orders on costs.

31. Judgment of the Court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 29TH DAY OF JUNE, 2023.

C. N. BAARI

JUDGE

Appearance:

Mr. Obiero h/b for Ms. Otunga for the Petitioner

Ms. Odhiambo h/b for Mr. Okongo for the Respondents

Christine Omolo- C/A

