



**Oyieyo & 5 others v County Government of Homabay & 3 others (Petition
E006 of 2023) [2023] KEELRC 1832 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1832 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E006 OF 2023
CN BAARI, J
JULY 31, 2023**

BETWEEN

**ESTHER AKINYI OYIEYO 1ST PETITIONER
LIDIA AKOTH JUMA 2ND PETITIONER
QUINTER ATIENO OKATCH 3RD PETITIONER
HELLEN AMONDI OMORO 4TH PETITIONER
JANICE AKINYI ONYANGO 5TH PETITIONER
JASPER OKENGO RAONGO 6TH PETITIONER**

AND

**COUNTY GOVERNMENT OF HOMABAY 1ST RESPONDENT
THE HOMABAY COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT
THE GOVERNOR, HOMABAY COUNTY 3RD RESPONDENT
THE COUNTY SECRETARY HOMABAY COUNTY 4TH RESPONDENT**

RULING

1. Before Court is a Notice of Preliminary Objection filed by the Respondents seeking the striking out of the Petitioners' petition on the premise that it is incompetent on account of jurisdiction.
2. It is the Respondents' assertion that Article 234(2)(i), read with Section 77 of the *County Government Act*, grants jurisdiction to the Public Service Commission to determine disputes arising from the County Government Public Service.
3. The Respondents further avers that the Public Service Commission (PSC) has power under the foregone laws, to adjudicate disputes concerning remuneration and terms and conditions of service. It



is their assertion that the provisions of Articles 234(2)(i), Section 77 of the County Government Act and Section 86 of the *Public Service Commission Act*, have not been exhausted prior to filing of the instant petition. The Respondents had reliance in the case of *Sofia Mbone Amadi & 42 others v County Government of Vihiga* [2021] eKLR for the holding that the Claimants did not exhaust the appellate process as envisaged under both the *Constitution* and applicable statutes in place, and that the Court’s jurisdiction was invoked prematurely.

4. The Petitioners opposed the objection on the basis that under Article 234(3)(c) of the *Constitution*, the provisions of Article 234(2)(i) do not apply to persons under the service of the Teachers Service Commission.
5. Counsel for the Petitioners further argued that the Petitioners herein, are teachers registered under Article 237 of the *Constitution* by the Teachers Service Commission.
6. It is Mr Obiero’s submission that jurisdiction is granted by law and not craftmanship. He sought to rely in the decision of the Supreme Court in *Samuel Macharia Kamau v. KCB* to buttress this position.
7. The Petitioners submit that the Court has jurisdiction to hear and determine the petition herein, and pray that the objection be dismissed with costs.

Determination

8. I have considered the objection together with the oral submissions by both parties. The issue for determination is whether this Court has the jurisdiction to hear and determine the petition herein.
9. 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, 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.”

10. 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.
11. 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)
 - (b) remuneration and terms and conditions of service;
 - (c)



- (d)
- (e)

12. 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.”

13. The foregoing provisions are couched in mandatory terms on the mechanisms available to the Petitioners on issues concerning remuneration and terms and conditions of service in the County Public Service.

14. 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.”

15. The Petitioners’ only defence in regard to the objection is that the provisions of Article 234(2)(i) do not apply to persons registered as teachers by the Teachers Service Commission.

16. Part II of the Fourth Schedule to the Constitution on duties of both National and County Governments, places pre-primary education under the County governments. Further, the Petitioners herein sued the Respondent on the premise that they are their employer, and not the Teachers Service Commission.

17. There is no doubt on my mind that the Petitioners are employed in the service of the County Government of Homabay, and the assertions by Counsel on their exemption under Article 234(3)(c) does not hold.

18. Without a doubt, the dispute between the parties herein, is one that lies in the fast instance to the Public Service Commission. The Petitioners have not 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 invoking the jurisdiction of this Court.

19. In Geoffrey Mutbinji & 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.

20. Further, the Court of Appeal in Republic v National Environment Management Authority Ex Parte Sound Equipment Ltd [2011] eKLR, 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.

21. 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.



22. In light of the foregoing, I find and hold that this suit offends the doctrine of exhaustion, and this Court lacks jurisdiction to hear and determine the same.
23. I proceed to strike out the petition and down my tools.
24. Having struck out the petition herein, to delve in the merits or lack thereof of the contempt motion dated May 8, 202, is tantamount to flogging a dead horse. It falls by the wayside and is hereby dismissed.
25. I make no orders on costs.
26. Orders of the Court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 31ST DAY OF JULY, 2023.

C. N. BAARI

JUDGE

Appearance:

Mr. Otieno Obiero Present for the Petitioners

Mr. Ogembo Present for the Respondents

Ms. Christine Omolo-C/A

