



Loyatum & 5 others v West Pokot County Government & 2 others (Cause E007 of 2022) [2023] KEELRC 1831 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1831 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE
CAUSE E007 OF 2022
MA ONYANGO, J
JULY 27, 2023**

BETWEEN

**JULIA CHEPKORIR LOYATUM 1ST CLAIMANT
NELSON LOTULIANGIRO LOSIKE 2ND CLAIMANT
MUSA PTIKE LORISO 3RD CLAIMANT
TIMOTHY PTIYOS NGIMOR 4TH CLAIMANT
ROTINO PKOPUS CYRIL 5TH CLAIMANT
JACOB AMEME CHEMKENDO 6TH CLAIMANT**

AND

**WEST POKOT COUNTY GOVERNMENT 1ST RESPONDENT
COUNTY SECRETARY, WEST POKOT COUNTY GOVERNMENT 2ND
RESPONDENT
COUNTY PUBLIC SERVICE BOARD, WEST POKOT COUNTY 3RD
RESPONDENT**

RULING

1. The suit herein was filed by the Claimants by Statement of Claim dated 16th December 2022 in which they allege that the Respondents have without valid reason failed to pay their salaries from 1st May 2022 when they were appointed in various capacities. As at the time of filing suit they allege to have been owed cumulative arrears in the sum of Kshs. 4,579,390/=.
2. By a notice of preliminary objection dated 18th March 2023 the Respondents seek the dismissal of the suit on the following grounds:



- a. The suit is fatally and incurably defective as it offends the doctrine of exhaustion of available statutory remedies;
 - b. The suit is fatally and incurably defective as it offends the provisions of Section 77 of the County Government's Act and as such cannot stand or be ventilated before this Court;
 - c. The Court's jurisdiction has been prematurely invoked as the Claimants have not exhausted the dispute resolution mechanisms established under Section 77 of the County Governments Act and that the issues raised ought to be resolved by the Public Service Commission; and
 - d. The entire suit is defective to the extent that there is a complete misjoinder of causes of action and misjoinder of parties in breach of Rule 9 of the Employment and Labour
3. The preliminary objection was disposed of by way of written submissions. Both parties filed submissions which they highlighted in court.
 4. Mr. Kipkogei for the Respondents submitted that the claim was lodged in defiance of the existing statutory requirements for resolution of such claims. He submitted that the claimants ought to have first lodged the claim with Public Service Commission (PSC) by dint of Article 234(2)(i) of the Constitution 2010 as read with section 77 of the County Government Act and section 85 and 87 of the Public Service Commission Act which require the Claimants to first approach the PSC to seek redress.
 5. He submitted that the Claimants having not done so, their claim should be struck out so that they can exhaust the constitutional and statutory provisions.
 6. In support of their preliminary objection the Respondents relied on the following authorities:
 1. The Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017] eKLR
 2. Nakuru Civil Appeal no E136 of 2022 as consolidated with Nakuru Civil Appeal no 137 of 2022 The Clerk, Nakuru County Assembly & 4 Others vs Kenneth Odongo & 7 Others eKLR,
 3. William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR
 4. Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry 1756 Others [2015] eKLR
 5. Hezron Mwambia Karong'a v Tharaka Nithi County Government & another [2019] eKLR
 7. For the Claimants Ms. Rutto submitted that this court has jurisdiction to hear the claim herein as the claim relates to a threat to terminate the employment of the Claimants for inquiring about their salary arrears, surcharge on their pay and reverting of their positions of employment. Counsel relied on the decision in the case of Zena Achieng' Mohamed v County Public Service Board of Kilifi & 6 Others [2021] eKLR wherein the Justice Ongaya stated:

“I do not think the Court can lock out a party seeking interim relief, on the basis of the exhaustion principle provided under the County Governments Act and the Public Service Commission Act. I say so because, if the subject of appeal before the Public Service Commission dissipates, then the ultimate decision by the Commission could well be an exercise in futility,.....The Petitioner submits that the appeal process before the Public Service Commission is long and tedious. I have looked at the Public Service Commission (County Government Public Services Appeals Procedures) Regulations, 2016 and did not



find any timelines given to the Public Service Commission within which to conclude appeals emanating from the County Governments. I also did not see any provision for interim relief pending determination of appeals lodged with the Commission. The effect of this is that actions forming the subject matter of appeals before the Commission could become entrenched and irreversible. In such an event, the resultant injustice to appellants would be great and the Court cannot ignore this exposure.”

8. It is submitted that there are exceptions to the doctrine of exhaustion as was held in the cases of *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others* 120171 eKLR where the Court while asserting that exceptions to the doctrine of exhaustion requirement will be decided on a case-by-case basis, held that;

“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.”

9. It was further submitted that in the case of *Fleur Investments Limited v Commissioner of Domestic Taxes & another* [20181 eKLR, the Court of Appeal while determining whether a litigant can be exempt from the doctrine of exhaustion held thus:-

“Whereas courts of Law are enjoined to defer to specialized 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. Accordingly, the court is perfectly entitled to intervene where it is alleged that the discretion is not being exercised judicially, that is to say, rationally and fairly and not arbitrarily, whimsically, capriciously or in flagrant disregard of the rules of natural justice.”

10. It is further submitted that the efforts of the Claimants to access fair labour practices as outlined in Article 41(1) and (2) of *the Constitution* and section 46(h) of the *Employment Act* were frustrated by the 3rd Respondent who threatened them with termination of their employment when they made inquiry about their salary arrears, surcharge and reversion of their employment. That they can therefore not be faulted for approaching this court for redress.

11. The Claimants submit that their case falls within the exceptions to the doctrine of exhaustion as was held in the case of *Krystalline Salt Limited v Kenya Revenue Authority* [2019] eKLR where the court held that:

“What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile. ...This court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal



remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal.”

12. The claimant submitted that in the case of *Night Rose Cosmetics [1972] Ltd v Nairobi County Government & 2 others* [2018] eKLR, the court held that:-

“An internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in *the Constitution* and our law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct. An internal remedy is adequate if it is capable of redressing the complaint”

13. The Claimants submit that they wrote a letter to the 3rd Respondent, as the Alternative Dispute Resolution Mechanism on 13th October 2022. That 16th December 2022, the 3rd Respondent failed to set up a dispute resolution mechanism to hear and determine the Claimants' claim. They instead threatened the Claimants with termination of employment.
14. They submit that the threats by the Respondents rendered it futile for the Claimants to exhaust the internal remedies provided under Section 77 of the County Government Act. That as a result of the 3rd Respondent's inadequacy and inefficiency to resolve the dispute, the Claimants' brought their claim before this Honourable Court.
15. It was the submission of the Claimants that they cannot be faulted for approaching this court to resolve the dispute as the 3rd Respondent, being the Alternative Dispute Resolution Mechanism, failed to set up an internal dispute resolution mechanism to resolve the dispute between the Claimants and the 1st and 2nd Respondent.
16. I have considered the grounds of objection in the notice of preliminary objection together with the submissions filed in support of and against the same.
17. The twin issues for determination are whether the whether the claim herein was filed prematurely and whether this court has jurisdiction to hear the same.
18. Article 234(2)(i) of *the Constitution* provides for powers and functions of the PSC which include to hear and determine appeals in respect of county governments' public service, among other functions and duties.
19. Section 77 of the *County Governments Act* provides that:
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; No. 17 of 2012 [Rev. 2012] County Governments [Issue 1] 44
 - 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.
 5. Any person dissatisfied or affected by a decision made by the Commission on appeal in a decision made in a disciplinary case may apply for review and the Commission may admit the application if—
 - a. the Commission is satisfied that there appear in the application new and material facts which might have affected its earlier decision, and if adequate reasons for the non-disclosure of such facts at an earlier date are given; or
 - b. there is an error apparent on record of either decision.
 6. An application for review under subsection (5) shall be in writing and made within the time prescribed by the Commission in regulations governing disciplinary proceedings, but the commission may entertain an application for review later if, in the opinion of the Commission, the circumstances warrant it.
20. Section 85 of the *Public Service Commission Act* provides that;
- “The Commission shall, in order to discharge its mandate under Article 234(2)(i) of *the Constitution*, hear and determine appeals in respect of any decision relating to engagement of any 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 forms of removal from the public 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 an appeal in that regard.
21. Further, Section 87(2) of the same Act provides that;
- “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 public service unless the procedure provided for under this Part has been exhausted. (Emphasis Ours)

22. These provisions have been subjected to various interpretation by this Court and by the Court of Appeal. In *Secretary, County Public Service Board & another v Hulbhai Gedi Abdille* [20171 eKLR the Court of Appeal stated that;{

“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 a forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one, specifically tailored by the 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. In terms of *Republic v National Environment Management Authority* (supra), we discern no exceptional circumstances in this appeal that would have warranted the bypassing of the statutory appellate process by the respondent. Her contention that she disregarded the appeal because it could not afford her an opportunity to question the procedure followed by the appellant is in our view, without basis because Section 77 has placed no fetter to the jurisdiction of the Public Service Commission. There is no requirement for instance that reasons for the decision be availed to an aggrieved party before he can prosecute an appeal before it.

It does not also matter that an applicant in judicial review proceedings need not exhaust all other available remedies. The invocation of judicial review jurisdiction Of the court was in the circumstances premature and uncalled for. The first ground of appeal therefore succeeds, "(emphasis added)

23. Further, the Court of Appeal in *Nakuru Civil Appeal no E136 of 2022 as consolidated with Nakuru Civil Appeal no 137 of 2022 The Clerk, Nakuru County Assembly &4 Others v Kenneth Odongo & 7 Others* eKLR, the Court held that;

"Section 87(2) of the *Public Service Commission Act* provides that 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 public service unless the procedure provided for under this Part has been exhausted.

It is imperative to note that the provisions of Section 87(2) Of the Act are couched in mandatory terms and the said section expressly ousts the jurisdiction of the courts in the first instance and a party must first exhaust the provisions of Part XV of the *Public Service Commission Act* before approaching this Court. In the instant case, it is evident that the 1st Respondent did not exhaust the procedure for appeal provided under Part XV of the Act and instead opted to rush to Court contrary to the express provisions of the Act and the petition as filed was a non-starter and premature since no decision had even been made by the Appellants. The matter was therefore not ripe for hearing.

24. The issues raised in the claim herein are salary arrears, surcharge and reversion of their employment. These are issues that would ordinarily fall under section 77 of the *County Governments Act* and which would therefore ordinarily be subject of appeal to the PSC as provided in the said section and in sections 85 and 87(2) of the *Public Service Commission Act*.
25. The Claimants have submitted that their claim falls under exceptions to the doctrine of exhaustion.



26. The Court of Appeal in *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756* held that ;

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

27. The court in *Hezron Mwambia Karong'a v Tharaka Nithi County Government & another* [2019] eKLR in dismissing an employment cause for having been prematurely instituted held that;

“The Claimant it would seem was obliged to approach the Public Service Commission if dissatisfied with the decision of the Respondents. The Claimant cannot argue, in the face of the clear provisions of section 77 of the County Government Act, that he could bypass the legislative provision above and come to this Court directly seeking reprieve for matters that were for the Public Service Commission to handle. As held in the case of *Republic v Secretary County Public Service Board ex parte Hulbai Gedi Abdille* (supra) the law does not envision a situation where the litigants chose what part of a statute to follow. The foregoing is proof the suit is unmerited. Suit is dismissed but each party to bear their own costs.”

28. As was held in the case of *Krystalline Salt Limited v Kenya Revenue Authority* [2019] eKLR the exceptions to the exhaustion doctrine would be resorted to where the immediate intervention of the court is necessary such as where the internal dispute resolution machinery would be inappropriate. In other words, the exceptions are applicable only in exceptional circumstances.

29. In the instant case the Claimants have submitted that the 3rd Respondent failed to set up a dispute resolution mechanism to hear and determine the Claimants' claim. The 3rd Respondent whom they accuse of failing to set up a mechanism to resolve their dispute is not the final authority in the determination of the dispute at that level. The pleadings filed by the Claimants herein do not demonstrate that they approached the PSC which failed to resolve the issues that have been brought before this court.

30. The Claimants have further not demonstrated that there were exceptional circumstances warranting the immediate intervention of this court to justify the bypassing of the appeal process to the PSC and escalation of the dispute to this court.

31. For the foregoing reasons I am in agreement with the Respondent that this suit was filed in this court prematurely as the Claimants did not exhaust the internal dispute resolution machinery as provided by *the Constitution*, the County Government Act and the *Public Service Commission Act*. The first port of call for the Claimants should have been an appeal to the PSC.

32. The preliminary objection herein therefore succeeds and I accordingly strike out the suit herein for failure to exhaust the constitutional and statutory dispute resolution machinery before approaching this court.



33. This decision shall not be a bar to the Claimants filing a fresh suit should they wish to approach this court after exhausting the statutory machinery, provided that they come within the statutory limitation period.

34. There shall be no orders for costs.

DATED, DELIVERED AND SIGNED AT KITALE THIS 27TH DAY OF JULY 2023.

M. ONYANGO

JUDGE

