



Akubu v County Secretary, County Government of Meru & 4 others (Employment and Labour Relations Petition E008 of 2023) [2023] KEELRC 1591 (KLR) (4 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1591 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
EMPLOYMENT AND LABOUR RELATIONS PETITION E008 OF 2023**

ON MAKAU, J

JULY 4, 2023

BETWEEN

SILAS GITONGA AKUBU APPLICANT

AND

**COUNTY SECRETARY, COUNTY GOVERNMENT OF MERU ... 1ST
RESPONDENT**

GOVERNOR, COUNTY GOVERNMENT OF MERU 2ND RESPONDENT

MERU COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

**MERU COUNTY ALCOHOLIC DRINKS CONTROL BOARD ... 4TH
RESPONDENT**

COUNTY GOVERNMENT OF MERU 5TH RESPONDENT

RULING

1. This ruling relates to the Notice of Preliminary Objection dated 14th June, 2023 and 15th June 2023. The former is by the 1st and 2nd respondent while the latter is by the 4th and 5th respondent. They all seek for striking out of the petition with costs for the following grounds:-
 - a. The court lacks jurisdiction to hear the suit by dint of Section 85 and 87 of the [Public Service Commission \(PSC\) Act](#) and section 77 of the [County Government Act](#).
 - b. The suit offends the doctrine of exhaustion of remedies vis a vis section 77 of the [County Government Act](#) (CGA) and section 87(2) of the [PSC Act](#).
 - c. The petition does not meet the competence threshold for a constitutional petition set out in *Anarita Karimi Njeru v Republic* [1979] 1 KLR 154



Factual background

2. The petitioner was employed by the 4th respondent as Senior Licensing and Compliance Officer Job Group N on contract basis, but by a letter dated 3rd January 2022, his terms were converted to permanent and pensionable. However, by another letter dated 10th may 2023, the acting Secretary/ Chief Executive Officer of the 3rd respondent informed the petitioner that the 3rd respondent had revoked his appointment for the reason that, after carrying out a verification process, his Diploma Certificate from the Kenya Institute of Professional Studies was found to be fraudulent.
3. The petitioner was aggrieved and brought this suit seeking, among others, for an order to quash the said decision because it violated his rights to be treated with dignity, right to fair administrative action, and right to fair hearing under Article 28, 47 and 50 of *the Constitution* among others. He also filed an interlocutory application seeking reinstatement to his employment as the Senior Licensing and Compliance Officer, and an injunction to restrain the respondents from terminating his employment. He further prayed for any other relief that the court deems just and fit to grant.

Submissions on the objection

4. Mr. Mwirigi urged the objection on behalf of the 1st and 2nd respondents. He submitted that objection is based on section 77 of the *CGA* and section 85 and 87(2) of the *PSC Act* which are grounded on Article 234 of *the Constitution* which provides alternative forum for remedy through appeal from the decisions of a County PSB. He argued that the dispute herein concerns termination of employment contract which falls within the jurisdiction of the PSC; that the said provisions of the law do not restrict the powers of the PSC while exercising the said mandate and it can even inquire into any issue of legitimacy of the decision; that the case herein does not fall within the exemption to the exhaustion doctrine
5. Reliance was placed on the case of *The Clerk, Nakuru County Assembly & 2 others v Kenneth Odongo & 3 others* [2023] eKLR and *Alfred Sifa Dena v Benjamin Kai Chilumo* [2020] eKLR where the Court of Appeal and this Court upheld similar preliminary objections observing that section 77 of the *CGA* and section 85 of the *PSC Act* does not restrict the jurisdiction of the PSC inquire into the legitimacy of the process adopted in effecting the decision.
6. Mr. Ashaba Advocate argued the objection by the 4th and 5th respondent. He basically mimicked the submissions by Mr. Mwirigi that the suit is premature and the court lacks jurisdiction over the petition herein by dint of section 77 of the *CGA* and section 87(2) of the *PSC Act* which provides that the PSC shall hear and determine appeals from a County PSB.
7. He further contended that section 87(2) of the *PSC Act* ousts this court's jurisdiction by barring anyone from filing suit based on any disputes falling within the jurisdiction of the PSC. Consequently, he submitted that the first port of call for the petition should have been the PSC and not this court. For emphasis, he cited *James Tanai Murete v County Government of Kajiado & others* [2015] eKLR, and *John Kakindu Makau v County Government of Makeni & 6 others* where the court held that the petitioners ought to have first invoked the alternative mechanism before invoking the jurisdiction of the Court.
8. In view of the foregoing reasons, the court was urged to find that the petition was dead on arrival and proceed to strike it out with costs because the question of jurisdiction is not a mere procedural technicality but a substantive issue of law.
9. Mr. Kaumbi for the 3rd respondent supported the objection by the co-respondents that the suit is premature and the court lacks jurisdiction over the petition by dint of section 87(2) of the *PSC Act*.



He therefore associated himself with and adopted the submissions by his colleagues Mr. Mwirigi and Ashaba advocates.

10. Mr. Maranya advocate for the petitioner opposed the objections by the respondents and urged the court to dismiss the same with costs. He submitted that the petition is brought under Article 22 and 165 of *the Constitution* claiming protection of his fundamental rights under Article 10, 23, 28, 41, 47, 48, 50,73,75,159 and 232 of *the Constitution*. He submitted that the PSC only hears appeal from decision of an employer and not one man pronouncement as in this case. Further the PSC has no jurisdiction to determine matters of procedural irregularities and breaches of *the constitution*; that only this court has that jurisdiction under Article 165 of *the Constitution*.
11. He relied on *James Orre v Office of the Governor, County Government of Marsabit & another* [2022] eKLR and *Thuranira Salesio Mutua v County Public Service Board & 2 others* [219] eKLR where the court held that a suit seeking to test the constitutionality and legality of termination of employment is outside the limits of section 77 of the *CGA*. Further reliance was placed on the case of the *Secretary County Public Service Board & another v Hulbbhai Gedi Abdile* [2016] eKLR that appeals to the PSB deals only with the merits or the substance of the case and the procedural or legal propriety of the case. He contended that the petition herein deals with the issue of procedure and not merits of the case. That the impugned decision was made without any resolution of the County PSB and without giving him a hearing.
12. He further submitted that section 77 of the *CGA* and section 87 of the *PSC Act* do not extinguish the jurisdiction of the court and that section 9 of the *Fair Administrative Action (FAA) Act* allows the court to by pass statutory mechanism. He cited the case of *Republic v Independent Electoral and Boundaries Commission Exparte NASA* [2017] eKLR, *Republic v National Environment Management Authority Exparte Sound Equipment Ltd* and *Fleur Investments Ltd v Commission of Domestic Taxes & another* [2018] eKLR where it held that the court disregard the exhaustion doctrine and intervene where there is arbitrariness, malice, caprice and the rules of natural justice have been disregarded.
13. He submitted that in this case the petition was removed from public service without being heard or being taken through due process. In the circumstances, the court was reminded that it cannot just sit and watch the rights of citizens being violated. He submitted that had the petitioner been given a hearing before the termination, he would have demonstrated that the respondent went to the wrong institution to verify his academic certificate, that is, KIPS instead of KIBS.
14. The court was urged to uphold its decision in the case of *Joseph Kathure Mberia & another v County Government of Meru* where a similar objection was dismissed since it has powers to ensure that the government adheres to the law.
15. In his rejoinder, Mr. Mwirigi submitted that the case of James Orre was different from the instant one because it involved a decision by the Governor while in the instant suit the decision to terminate employment was by the county PSB. Further in the case of *Alfred v Kai Chilubo* the court held that the court has jurisdiction to determine legitimacy but the PSC has no restriction of the matters to deal with.
16. Mr. Kaumbi submitted that section 77 of the *CGA* covers decision made by the county PSB and any person purporting to exercise disciplinary control over a county public service officer.
17. Mr. Ashaba submitted that there was indeed a decision contained in the letter revoking the appointment and therefore the petitioner ought to have appealed against it under section 77 of the *CGA* because it relates to engagement and qualification for employment. Further the petitioner has not shown how the provisions of *the constitution* cited were violated.



Determination

18. The dispute in the petition herein is straight forward. The petitioner alleges that he holds an academic certificate from KIBS but the employer went to verify the same at KIPS. Wrong information was obtained from KIPS which was used to revoke the petitioner’s appointment. No show cause letter was served on him and no opportunity was given to him to defend himself. The issues for determination from preliminary objections are therefore:
- a. Whether the preliminary objections raises a pure point of law.
 - b. Whether the court lacks jurisdiction to hear and determine the suit.
 - c. Whether the petition meets the competence threshold enunciated by *Anarita Karimi Njeru v Republic*.

Pure point of law

19. In the case of *Mukisa Biscuits manufacturing co. Ltd v West End Distributors Ltd* [1969] EA 699 the court held that:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implications out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of 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 had to be ascertain or if what is sought is the exercise of judicial discretion.”

20. I have carefully considered the grounds upon which the objections stand and I am satisfied that pure points of law have been raised. First, the respondents are objecting that the court also lacks jurisdiction over the petition herein pursuant to section 77 of the *CGA* and section 87(2) of the *PSC Act*. Second, the respondents are contending that the suit is premature and it offends the exhaustion doctrine as established by the said provisions. Finally the petition is challenged on ground that it does not meet the threshold for a constitutional pleading. Such issues do not require evidence to establish nor is judicial discretion necessary to determine the same. Besides if the same succeeds the suit will be disposed of and save judicial time.

Jurisdiction

21. The Respondent contends that this court lacks jurisdiction to entertain the suit because the internal appeal mechanism provided under section 77 of *CGA* has not been exhausted. Article 234 of *the Constitution*, section 85 and 87 (2) of the *Public Service Commission Act* were cited as the basis for the preliminary objection. The petitioner opposed the preliminary objections and maintained that the court has the necessary jurisdiction over the suit because the suit challenges procedural impropriety of the termination of the petitioner’s employment without being accorded a hearing in breach of the law and the rules of natural justice.
22. It is obvious that Article 234 of *the Constitution* of Kenya provides that the Public Service Commission shall have jurisdiction to hear appeals from decisions made by a County Public Service Board. In



order to give effect to the foregoing provision, the Parliament enacted section 77(1) of the County Government Act, 2012 as follows;

“Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of the disciplinary control against any public officer may appeal to the Public Service Commission against the decision.”

23. The use of the word “May”, in my view suggests an option to be exercised by the affected or dissatisfied person. However, with the enactment of the Public Service Commission Act in 2017, the position morphed drastically. Section 85 of the 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...”

24. Section 87(2) of the Public Service Commission Act then 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 the County Government Public Service unless the procedure provided for under this part has been exhausted.”

25. The appealable matters are then set out under Regulation 8 of the Public Service Commission (County Government Services Appeals Procedure) Regulations, thus:-

“The Commission may hear and determine an appeal from a public officer in a County Government Public Service regarding any decision relating to the engagement of the person in the County Government, including an appeal in respect of –

- a. Recruitment, selection, appointment, promotion, re-designation, deployment and qualifications attached to any office;
- b. remuneration, and terms and conditions of service;
- c. disciplinary control including imposition of any punishment including dismissal;
- d. ...”

26. The dispute herein concerns the termination of the petitioner’s employment through “revocation of his appointment as the Senior Licensing and Compliance Officer”. The reason cited was fraud with respect to an academic certificate. However the petitioner contends that the verification of the said certificate was erroneously done in KIPS instead of KIBS where he did his studies. That, had he been accorded a hearing before the revocation, he would have clarified the matter.

27. As already demonstrated by the cited decisions, this is not the first time the question of jurisdiction of this court in respect of suits filed by county public service officers is being raised. As the name suggests, this court’s core mandate is to hear and determine disputes involving employment and labour relations. The court derives its existence and jurisdiction from Article 162 (2) (a) and 165 (5) of the constitution while its establishment and jurisdiction is prescribed by the Employment and Labour Relations Court (ELRC) Act. Section 12 of the ELRC Act donates to the court exclusive original and appellate jurisdiction in employment and labour relations disputes between employers



and employees among others. There are however exceptions where there is an alternative dispute resolution mechanisms.

28. In the case of the *Secretary County Public Service Board & another v Hulbbhai Gedi Abdile* [2016] eKLR, cited by the respondents, the Court of Appeal observed that:

“There is no doubt that the respondent initiated the judicial review proceedings in utter disregard to the dispute 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 specialized one, specially 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 the reasons for the decision be availed to an aggrieved party before he can prosecute an appeal before it.”

29. Recently the Court of Appeal cited with approval the above decision in the case of *The Clerk, Nakuru County Assembly & 2 others v Kenneth Odongo & 3 others* [2023] eKLR and held that:

“It is Imperative to note that the provisions of Section 87(2) of the Act are couched in mandatory terms and expressly oust the jurisdiction of the courts in the first instance and a party must first exhaust the provisions of part XV of the Public Service Act before approaching the courts.

In the instant case, it is evident that the 1st respondent did not exhaust the procedure for appeal provided for under part XV of the Act and instead opted to rush to court contrary to the express provisions of the said 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.”

30. The above decisions underscore that the jurisdiction of the courts has been postponed by Section 77 of *CGA* and Section 87(2) of the *PSC Act* until the appeal mechanism is exhausted. However, that does not mean that the court cannot intervene at all until the appeal mechanism is exhausted. My understanding of the administrative law is that the court can intervene to review the legitimacy and not merits of the decision. I gather support from *Fleur Investments Ltd v Commission of Domestic Taxes & another* [2018] eKLR where the Court of Appeal held thus:

“24. 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 arbitrary, whimsically, capriciously or in flagrant disregard of the rules of natural justice....

Also in *Municipal Council of Mombasa v Republic & Umoja consultant Ltd* [2002] eKLR, it was stated that although judicial review is concerned with the decision making process, not with the merits of the decision itself, the court would concern itself with issues as to whether the decision makers had



jurisdiction; whether persons affected by the decision were heard before it was made, and whether in making the decision the maker took into account relevant matters or did take into account irrelevant matters.’ [Emphasis added].

31. Again in the case of *Kisumu County Public Service Board & another v Samuel Okuro & 7 others* (2018) eKLR the Court of Appeal addressed itself as follows:-

“(47) ...moreover, the court cannot uphold an action of the Governor that is clearly ultra vires his constitutional and statutory mandate.

(48) We have come to the conclusion that the Governor initiated the removal of the respondents without following the appropriate machinery. The respondents being County Public Officers, the Governor could not terminate their services without involving the County Board and the County assembly. In sending the respondents on compulsory leave and terminating the respondents’ contract, the Governor usurped the role of the County Board. This denied the respondents their rights under section 77 of the County Government Act that allows any County Public officer that is dissatisfied with the decision of the County Board in a disciplinary process to appeal to the public service commission.

Further, the respondents’ constitutional fundamental rights were violated.

(49) In that regard the learned Judge acted within her constitutional jurisdiction in reviewing the appellants’ action and granting the order of certiorari to protect the respondents from violation of their fundamental rights and to prevent the appellants from acting in a manner that contravenes the constitution and the statute.”

32. In my view the law as pronounced by the Court of Appeal in *Fleur Investments Ltd v Commission of Domestic Taxes & another* [2018] eKLR and *Kisumu County Public Service Board & another v Samuel Okuro & 7 others* (2018) eKLR is the correct position although it was not dealing with section 77 of the *CGA* and section 87(2) of the *PSC Act* per se in both cases. The purposive interpretation of said sections, in my opinion, and guided by the cited authorities, is that this court can intervene where a person aggrieved by a decision of a County PSB or any person exercising its functions challenges the legitimacy of the said decision by way of a review suit on ground of illegality, irrationality, and procedural impropriety.

33. Although the decision of the Appellate Court in the case of *The Clerk, Nakuru County Assembly & 2 others v Kenneth Odongo & 3 others* [2023] eKLR states that the section 87(2) of the *PSC Act* has ousted the jurisdiction of courts in all disputes contemplated by section 77 of the *CGA*, the said ouster is only with respect to merits and not the legitimacy of the concerned decision. Holding otherwise would be contradictory to earlier decisions of the same court. Further, it would be taking away the inherent jurisdiction of the superior courts of the first instance to review decisions of administrative bodies and subordinate courts.

34. The respondents cited *Alfred Sifa Dena v Benjamin Kai Chilumo* [2020] eKLR, where Ndolo J held that: -

“22. This court did not find any legal backing for the position taken by the petitioner in this regard. My reading of section 77 of the County Government



Act and section 85 of the *Public Service Commission Act* does not reveal any restriction on the appellate powers of the Public Service Commission.

23. It seems to me that in exercising these powers, the commission is free to inquire into any aspect of the decision and action complained of, including the legitimacy of the process adopted in effecting the decision.”

35. I agree with foregoing holding but hasten to observe that, the said provision also does not oust the inherent jurisdiction of the Superior courts to review administrative decisions where, like in this case, a serious decision has been made allegedly in disregard to the rules of natural justice and constitutional rights guaranteed under Article 41, 47 and 236 of *the Constitution*.

Competence Threshold

36. In the Anarita Karimi Njeru case the court held that “Constitutional violations must be pleaded with a reasonable degree of precision.”

37. In this case the petitioner has pleaded with a degree of precision the provisions of *the Constitution* that was allegedly violated and the manner of the violation. Consequently I am satisfied that the petition meets the competence threshold as a Constitutional pleading.

38. In view of the foregoing matters, I find no merits in the two notices of objection since the court has jurisdiction to review the alleged procedural impropriety. I accordingly dismiss them with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 4TH DAY OF JULY, 2023.

ONESMUS N MAKAU

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

