



**Republic v Odege (Secretary General, Union of Kenya Civil Servants) & 3 others; Odhiambo (Exparte) (Judicial Review E013 of 2023) [2023] KEELRC 2066 (KLR) (18 August 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2066 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
JUDICIAL REVIEW E013 OF 2023**

**AN MWAURE, J  
AUGUST 18, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**TOM MBOYA ODEGE (SECRETARY GENERAL, UNION OF KENYA CIVIL SERVANTS) ..... 1<sup>ST</sup> RESPONDENT**

**THE NATIONAL ADMINISTRATIVE COUNCIL, UNION OF KENYA CIVIL SERVANTS ..... 2<sup>ND</sup> RESPONDENT**

**THE NATIONAL EXECUTIVE BOARD, UNION OF KENYA CIVIL SERVANTS ..... 3<sup>RD</sup> RESPONDENT**

**UNION OF KENYA CIVIL SERVANTS ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**LAMECK ABRAHAMS ODHIAMBO ..... EXPARTE**

**RULING**

1. The applicant *vide* chamber summons dated March 27, 2023 sought the court’s leave to apply for judicial review orders of:-
  - a. Certiorari to remove into this court and for this court to quash the decision of the 2<sup>nd</sup> respondent through its Secretary General, the 1<sup>st</sup> respondent, to suspend the *ex parte* applicant from the position of 1<sup>st</sup> Deputy Secretary General of the 4<sup>th</sup> respondent *vide* their letter dated March 14, 2023.
  - b. Certiorari to remove into this court and for this court to quash the deliberations, resolutions and decisions made in the purported disciplinary



hearing of the *ex parte* applicant of March 8, 2023 before the 2<sup>nd</sup> respondent as well as to quash the decision and import of the follow-up internal memorandum dated March 9, 2023 addressed to the staff of the 4<sup>th</sup> respondent by the 1<sup>st</sup> respondent.

- c. Certiorari to remove into this court and for this court to quash the 1<sup>st</sup> respondent's notice to show cause letter of March 1, 2023 addressed to the *ex parte* applicant.
  - d. Prohibition restraining the 3<sup>rd</sup> respondent from deliberating, issuing edicts and/or making resolutions and decisions and/or acting in any manner that may limit, curtail or compromise the role, duties, responsibilities, mandate and privileges of the *ex parte* applicant as the 1<sup>st</sup> Deputy Secretary General of the 4<sup>th</sup> respondent pursuant to the 1<sup>st</sup> and 2<sup>nd</sup> respondent's letter of suspension of March 14, 2023 and the resolutions and proceedings of the purported disciplinary hearing of the *ex parte* applicant of March 8, 2023.
  - e. *Mandamus* directed at the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein to reinstate fully the *ex parte* applicant to his position as the 1<sup>st</sup> Deputy Secretary General of the 4<sup>th</sup> respondent with the full duties, responsibilities, mandate and privileges of the position.
  - f. Prohibition prohibiting and/or restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents from purporting to deliberate, issue edicts and/or make resolutions and decisions, and/or act in any manner that may limit, curtail or compromise the role, duties, responsibilities, mandate and privileges of the *ex parte* applicant as the 1<sup>st</sup> Deputy Secretary General of the 4<sup>th</sup> respondent except by strict adherence to the statutory and regulatory provisions of the laws of Kenya and the [Constitution](#) of the Republic of Kenya and the 4<sup>th</sup> respondent.
2. The 1<sup>st</sup> and 4<sup>th</sup> respondents entered appearance then raised a preliminary objection on the April 3, 2023, which comes out as follows;
- “The Employment and Labour Relations Court lacks jurisdiction to deal with this matter for the 4<sup>th</sup> respondent's constitution has an elaborate internal dispute resolution mechanisms to deal with matters of such nature as ones raised in the *ex parte* applicant's application.”
3. The preliminary objection was canvassed by way of written submissions with the respondents filing on the April 24, 2023 while the *ex parte* applicant filed his on April 18, 2023.

### **Respondent's Submissions**

4. The respondents submitted in support of their preliminary objection on grounds that the applicant's application was prematurely instituted as he had not exhausted the 4<sup>th</sup> respondent's internal disciplinary mechanism as set out in its constitution.
5. The respondents submitted on March 1, 2023 that the 1<sup>st</sup> respondent issued a notice to show cause letter to the applicant to attend a disciplinary hearing of the National Administrative Council (NAC) of the 4<sup>th</sup> respondent on March 8, 2023 which the applicant attended and defended his case. Subsequently, NAC reached a decision to suspend the applicant and issued him suspension letter dated



March 14, 2023 and forwarded its decision to the National Executive Board for further deliberations and ratification of its decision and this is when the applicant instituted this case.

6. The respondents submitted in contrast of the applicant's argument that the 4<sup>th</sup> respondent lacks a viable internal disciplinary mechanisms; article 154(4) (d) (i) the 4<sup>th</sup> respondent's constitution provides a member or union official on whom a disciplinary action has been taken shall have recourse for appeal at the National Executive Board; Art 12(2) further states that if aggrieved by the decision of NEB one should appeal the decision to the Advisory Council within 30 days and if dissatisfied with the decision of the Advisory Council article 12(4) the party has right to restate his case at the delegates conference where the matter shall be deliberated on.
7. The respondents submitted that the applicant refused to exhaust the aforementioned internal mechanisms and prematurely instituted this suit and sites the case of *Cleophas Malala & another v Speaker of the Senate & 2 others; Stewart Madzayo & another (Interested Parties)* [2021] eKLR where the court in allowing a preliminary objection on grounds of exhaustion doctrine held:-

“In the instant petition and application, the petitioners overlooked a clearly spelled out procedure, without having the dispute first heard and determined through Internal Political Party Dispute Resolution Mechanisms, as well as through Political Parties Tribunal, and if need be through Appeal Mechanisms, as provided in law. I find as the petitioners / applicants failed to exhaust the mechanisms for dispute resolution as set for in law, this court has no jurisdiction until that is complied with first to review the decision complained of. I find this court lacks jurisdiction to hear the application and the petition for reasons set out in this ruling.

In view of my findings, on the key issue on jurisdiction, in which I have found that this court lacks jurisdiction to entertain the application and the petition, for failure on part of the petitioners to comply with exhaustion doctrine, I shall not proceed to determine the application and petition for want of jurisdiction.”

8. In view of the foregoing, it was submitted that this court does not have jurisdiction as the applicant prematurely instituted his application dated March 27, 2023 before exhausting the 4<sup>th</sup> respondent's internal disciplinary mechanisms and prayed that the preliminary objection be upheld.

### **Applicant's Submissions**

9. The *ex parte* applicant submitted that the doctrine of exhaustion cannot be subject to a preliminary objection as it is subject to the court's discretion and further it calls upon the court to invite relevant facts and relied on the landmark case *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 69 which stated a preliminary objection should raise a pure point of law; it argued on the assumption that all the facts pleaded by the other side are correct; and that it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
10. The *ex parte* applicant submitted bias permeates all the administrative and disciplinary bodies of the 4<sup>th</sup> respondent and therefore the internal mechanism is not viable to buttress this, he relied on Hon Lady Justice Maureen Anyango's decision in *Robert Khamala Situma & 8 others v Acting Clerk of the Nairobi City County Assembly* [2022] eKLR:-

“I find that there are indeed special circumstances to warrant the claimants approaching this court instead of appealing to the County Assembly Service Board where the respondent sits as secretary..... the board would thus according to the claimants, not be in a position to



be objective in the handling of their disciplinary case. They are claiming that they cannot get a fair hearing from the board.”

### **Analysis and Determination**

11. It is the position of the respondents that the applicant has not exhausted the internal disciplinary mechanism provided under the 4<sup>th</sup> respondent’s constitution and therefore the suit offends the doctrine of exhaustion.

12. The doctrine of exhaustion is defined in *Blacks Law Dictionary* 10th Edition as follows –

“exhaustion of remedies. 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 doctrine’s purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary.”

13. Section 90 of the *Fair Administrative Action Act* provides for the doctrine of exhaustion 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.”

14. In *Okiya Omtatah Okoiti v Parliamentary Service Commission & another* [2021] eKLR the court states:-

“It is trite that 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*, 2010 as held in section 90 (4) of the *Fair Administrative Action Act*, provides that there are exceptions to the exhaustion rule in exceptional circumstances.”



15. In the case of *Anthony Miano & others v Attorney General & others* [2021] eKLR the court held that;

“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 ...

There are exceptions to the rule, outlined as follows;

“... 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. ..., in exceptional circumstances you 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 and.

“... 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.”

16. The applicant’s argument that the 4<sup>th</sup> respondent’s internal mechanisms as laid down by the respondents is biased has not been challenged by the respondents and respondents have not proved to the court that the applicant will be granted an impartial and fair hearing to issues set out in his application dated March 27, 2023.

17. Secondly the preliminary objection does not raise a pure point of law as the court may still be expected to adjudicate on whether the internal mechanisms provided in the *constitution* of the 1<sup>st</sup> respondent is sufficient to handle this matter. Going by the submissions of the respective parties and the authorities the provision for ADR mechanism does not take away the court’s jurisdiction in special circumstances. The said Alternative Dispute mechanism must be encouraged as much as possible in order to unclog backlog of cases in court but must not oust the court’s jurisdiction completely. In this case the court finds the submissions raised by the respondent/applicant persuades the court to proceed with the hearing of this application.



18. The preliminary objection which is not purely on a matter of law is found not to be merited and so is dismissed. The application is therefore to proceed.

19. Each party will meet its costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18<sup>TH</sup> DAY OF AUGUST 2023.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

