



Fondo v County Government of Kilifi H.E. the Governor, Kilifi County (Petition E002 of 2022) [2023] KEELRC 2364 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEELRC 2364 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
PETITION E002 OF 2022
AK NZEI, J
SEPTEMBER 28, 2023

BETWEEN

MICHELE BIBI FONDO PETITIONER

AND

**COUNTY GOVERNMENT OF KILIFI H.E. THE GOVERNOR, KILIFI
COUNTY RESPONDENT**

RULING

1. On September 9, 2022, the Petitioner filed a Constitutional Petition dated September 8, 2022 and pleaded inter-alia:-
 - a. that the Petitioner is the Current County Attorney of Kilifi, having transitioned into office by virtue of her appointment by the then Governor of the County Government of Kilifi upon the enactment of the [Office of the County Attorney Act](#) No 14 of 2020. That the Petitioner's term was to run for a term of six(6) years as provided for by Section 6(1) of the said Act, with effect from July 27, 2020.
 - b. that prior to her appointment under the aforesaid Act, the Petitioner was duly discharging her role as County Attorney of the County Government of Kilifi, having been so appointed on April 1, 2018 by the Kilifi County Public Service Board following a competitive recruitment process in which she emerged the most suitable candidate.
 - c. that previously, the Petitioner was performing her duties as the Head of Legal Services with the County Government of Kilifi, having been equally appointed on permanent and pensionable basis in July 2014 through to the year 2018 when she was appointed as the County Attorney by the Governor.



- d. that the Petitioner had held and diligently performed her duties as the Head of County Legal Services with the County Government of Kilifi since July 2014, which duties/functions are similar to those of the County Attorney.
- e. that in the year 2018, the 1st Respondent herein (the County Government of Kilifi), through the County Public Service Board, advertised for the position of County Attorney of the County Government of Kilifi. That the Petitioner applied, was interviewed by the County Public Service Board on February 8, 2018 and was appointed as the County Attorney.
- f. that upon recommendation by Kilifi County Public Service Board, the Petitioner was appointed effective April 2, 2018, vide a letter of appointment dated April 1, 2018, as the County Attorney of the County Government of Kilifi. That the letter of Appointment was duly executed by the rightful appointing authority, the then Governor of Kilifi County.
- g. that the Petitioner's initial assumption of office was procedural and regular, was done following declaration of a vacancy and public advertisement thereof, interviews conducted by the County Public Service Board, and subsequent competitive filling of the position.
- h. that the Petitioner was still in office as at July 27, 2020 when the office of County Attorney Act No 14 of 2020 was enacted, and that upon the enactment of the said Act, the Petitioner formally transitioned to the Office of County Attorney in line with the transitional provisions of the Act, Section 31 which applied where there already existed a department within the County Government carrying out the functions envisaged to be performed under the Office of the County Attorney Act. That the section is to the effect that upon the Act coming to effect, the person already performing the function of the County Attorney shall, by operations of the Act, be deemed to be the holder of the office of the County Attorney where the person is qualified under the Act.
- i. that on the basis of the transition, the Petitioner was issued with a Corrigendum Letter of Appointment dated October 14, 2020 as the County Attorney with effect from July 27, 2020, being the date of enactment of the Office of County Attorney Act. That upon the transition, the Petitioner was supposed to serve for a term of six (6) years with effect from July 27, 2020 as provided under Section 6(1) of the Act.
- j. that the Honourable Court did grant a stay in Malindi ELRC Petition No E001 of 2020 (Commission for Human Rights and Justice v County Government of Kilifi & 2 others), in effect suspending the decision of the Court restricting the Petitioner's term to that of the Governor, pending determination of an appeal.
- k. that on 30/8/2022, the 2nd Respondent, being the newly elected Governor of Kilifi County, violated the said stay order by releasing a statement titled "reorganization of the County Government of Kilifi" in which he effectively declared that the Petitioner's term as the County Attorney had expired, and effectively appointed the County Solicitor of the County Government of Kilifi the Acting County Attorney until the position is substantively filled.
- l. that at the time of issuing the said statement, the Petitioner was away from office on statutory maternity leave and was not consulted by the 2nd Respondent before issuing the statement. That the Petitioner was not given an opportunity to explain the legal position regarding her contract of employment.
- m. that the effect of the 2nd Respondent's statement was to pre-maturely, unprocedurally, unlawfully and unconstitutionally terminate the Petitioner's term as the County Attorney of



the County Government of Kilifi in contravention of Section 45 of the [Employment Act](#) as read with Section 6(1) of the [Office of the County Attorney Act](#).

- n. that the Petitioner is aggrieved by, and prejudiced by the 2nd Respondent's decision to remove her from office and to declare her term as having expired.
2. The Petitioner further pleaded violation of Articles 19.,20, 21, 22, 23, 27(1), 28, 41, 165(3)(b), 259 and 162(2) (a) of the [Constitution of Kenya](#).
 3. The Petitioner sought the following reliefs:-
 - a. a declaration that the statement released on 30/8/2022 by the 2nd Respondent touching on the Office of the County Attorney infringes upon, and violates the Petitioner's right to fair labour practices as guaranteed under Article 41 of the [Constitution of Kenya 2010](#) as read together with Section 45 of the [Employment Act](#).
 - b. a declaration that the statement released by the 2nd Respondent on 30/8/2022 infringes on the Petitioner's right to Fair Administrative Action as guaranteed under Article 47 of the Constitution of Kenya 2010 as read together with Section 45 of the [Employment Act](#) and Sections 6(1) and 31 of the [Office of County Attorney Act](#) No 14 of 2020.
 - c. an order of certiorari to remove into this Court for purposes of being quashed part of the statement dated 30/8/2022 by H.E. Gideon Mung'aro in so far as it relates to the office of the County Attorney of Kilifi.
 - d. an order of prohibition restricting the Respondent from advertising, shortlisting, interviewing, recruiting, vetting, appointing and/or filling the position of County Attorney of the County Government of Kilifi.
 - e. an order of injunction restraining the Respondents from advertising, shortlisting, interviewing, recruiting, vetting, appointing and/or filling the position of County Attorney of County Government of Kilifi.
 - f. an order of injunction restraining the Respondents from removing the Petitioner from office and/or barring the Petitioner from accessing her office and discharging her role as County Attorney of County Government of Kilifi before the end of her statutory term.
 - g. an order of mandamus compelling the Respondents to ensure that the Petitioner is allowed to be on maternity and annual leave as guaranteed by law.
 - h. compensation in damages to be assessed by the Court for violation of the Petitioner's rights to fair labour practices, fair hearing, freedom from discrimination and fair administrative action as guaranteed under Articles 41,47 and 27 of the [Constitution of Kenya 2010](#).
 - i. that the 1st Respondent compensates the Petitioner in damaged for breach of contract, to be assessed by the Court in line with the circular dated 31/8/2022 by the Salaries and Remuneration Commission and Benefits for the Office of County Attorney as follows:-
 - i. salary for remainder of the term.....ksh. 19,808,250
 - ii. gratuity payksh. 17,463,600
 - iii. medical cover for the remainder of the term as per the prevailing terms of the salaries and Remuneration Commission to cover spouse and child.
 - iv. leave allowance of ksh.40,000



- v. Airtime Benefits for the remainder of the contract term being ksh.490,000
 - vi. outstanding unpaid allowanceksh. 242,700
 - vii. salary in lieu of notice.....404,205
 - j. general damages for emotional distress and discrimination on account of pregnancy.
4. The Petition was filed contemporaneously with an urgent Notice of Motion dated September 8, 2022 whereby the Petitioner sought both conservatory and injunctive orders against the Respondents pending hearing and determination of the Petition. The Court's record shows that the application was placed before the Court at Malindi (Manani, J) under a certificate of urgency on September 9, 2022, and that conservatory and injunctive orders were granted pending hearing and determination of the Petition.
 5. On 16/9/2022, the Respondents filed an evenly dated Notice of Preliminary Objection to the Petition and grounds of opposition to the said Notice of Motion application, and on 15/2/2023 filed affidavits in response to both the Petition and the application.
 6. It is to be noted that after I gave directions on 2September 8, 2022 that the preliminary objection be heard first and directed parties to file written submissions thereon, Counsel for parties herein informed the Court (on 7/11/2022) that parties had opened negotiations on the issues involved herein, and sought time for the negotiations. The Court was eventually informed that nothing had come out of the negotiations; and submissions on the preliminary objection were filed. The Respondents filed their written submissions on 21/2/2023, while the Petitioner's submissions were filed on 25/5/2023.
 7. In their Notice of Preliminary Objection dated 16/1/2022, the Respondents called for the Petitioner's Petition to be struck off on grounds:-
 - a. that the Petitioner is seeking reliefs related to alleged breach and enforcement of a contract of employment, and resultant compensation; and that the Respondents lack legal capacity to enforce contracts of employment entered into between the County Government and the employees.
 - b. that Section 57 of the County Government Act 2012 establishes the County Public Service Board as a body corporate with legal capacity to sue and to be sued in its own corporate name.
 - c. that the legal capacity and mandate to oversee contracts of employment and handling of employment related issues is vested in the County Public Service Board in accordance with Part VII of the County Government Act, 2012.
 - d. that the Petitioner has wrongly sued the Respondents in the Petition herein, and the remedies sought by the Petitioner do not lie as against the Respondents.
 - e. that Article 234(2) (1) of the Constitution of Kenya 2010 mandates the Public Service Commission to hear and to determine appeals in respect of County Government's Public Service.
 - f. that the Petitioner's grievance regarding enforcement of her contract of employment ought to be directed to the Public Service Commission.



- g. that pursuant to Article 234(2)(1) of the *Constitution of Kenya* as read together with Section 77 of the *County Government Act 2012*, this Court is not the first port of call, and lacks jurisdiction to hear and to determine the matter herein.
8. Before determining the issues raised in the Respondent’s preliminary objection, I must state that although the Petitioner’s Petition is titled “Constitutional Petition” and was filed in this Court as such Petition, it ought to be noted that the pleadings contained in the Petition and documents annexed to the affidavit sworn in support of the Petition reveal, and indeed show that the Petition is an ordinary employment suit that has been styled, packaged and presented as a constitutional Petition.
9. The issues as to whether rights in employment and labour relations matters addressed within a contract of employment should be addressed through a constitutional Petition was addressed by the Court of Appeal in *Sumayya Athmani Hassan v Paul Masinde Simidi & Another* [2019] eKLR as follows:-
- “It is evident that the Petition was hybrid combining violations of various rights, employment rights under the *employment Act* and breach of Public Officers Ethics Act. However, the underlying complaint was the alleged unlawful interdiction and subsequent dismissal of the 1st Respondent by the Corporation Appellant. The specific remedies sought were general damages, terminal benefits and issuance of certificate of service. In determining the Petition, the ELRC relied wholly on the provisions of the *Employment Act*.
- The Article 41 rights are enacted in the *employment Act* and *Labour Relations Act*. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1st Respondent filed a Petition directly relying on the provisions of the constitution for enforcement of contractual rights governed by the *Employment Act* without seeking a declaration of invalidity of the provisions of the *Employment Act* or alleging that the remedies provided therein are inadequate. The Petition did not raise any question of the interpretation or application of the Constitution. We adopt and uphold the general principle in the persuasive authority in *Barbara De Klerk* (supra) that where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in the *Communication’s Commission Case* (supra).”
10. In the present case, the Petition seeks declaratory orders based on alleged breach of an employment contract, injunctive orders based on alleged breach of an employment contract, payment of damages arising from alleged breach of a contract of employment and violation of employment rights; and payment of terminal dues.
11. In view of the foregoing, I will treat the Petition herein as an ordinary employment suit, and will proceed to determine the Respondent’s preliminary objection, which challenges this Court’s jurisdiction to hear and to determine the suit herein; based on Sections 57 and 77 of the *County Government Act*, Article 234(2) (i) of the *Constitution of Kenya 2010* and any other relevant provisions of the law.
12. Parties will forever be bound by their pleadings. The Petitioner’s Petition is premised on the Petitioner’s supporting affidavit sworn on September 8, 2022, which basically replicates the averments made in the Petition, and which I have reproduced in paragraph 1 of this Ruling. Documents annexed to the said affidavit include copies of:-



- a. the Petitioner’s letter of appointment dated 19/5/2014, issued by Kilifi County Public Service Board.
 - b. an advertisement (dated September 8, 2017) of vacancies in the 1st Respondent’s County Government Executive Committee, including a vacancy in the office of the County Attorney.
 - c. a Petitioner’s letter of appointment dated April 1, 2018, appointing her to the position of the 1st Respondent’s County Attorney; for a contractual term commensurate to the term of the Governor, commencing April 2, 2018.
 - d. the Petitioner’s corrigendum letter of appointment to the Office of the 1st Respondent’s County Attorney for a contractual term of six (6) years.
 - e. the 2nd Respondent’s statement titled “Reorganization of the County Government of Kilifi”; vide which the 2nd Respondent announced the appointment of one Henry Faraji Chipade Advocate, the County Solicitor, to serve as the Acting County Attorney following the expiry of the contract of the previous office holder.”
13. The Petitioner has pleaded that by appointing another person to act as the 1st Respondent’s County Attorney, the 2nd Respondent, being the 1st Respondent’s newly elected Governor, effectively removed the Petitioner from office, hence breaching her contract of employment. The Petitioner has contested that apparent removal in the Petition herein.
14. The Petitioner has pleaded herein that the issue of the extend of her contractual term of office with the 1st Respondent was the subject in Malindi ELRC Petition No, E001 of 2020 ([*Commission for Human Rights and Justice v County Government of Kilifi & 2 Others*](#)) and a pending appeal in the Court of Appeal stemming from that Petition.
15. Section 57 of the [*County Governments Act*](#) establishes a County Public Service Board (Board) in each County, which shall be a body corporate with perpetual succession and a seal, and capable of suing and being sued in its corporate name. Section 59(1) of the said [*Act*](#) mandates the Board to perform the following functions, among others, on behalf of the County Government: -
- a. to establish and abolish offices in the County Public Service.
 - b. to appoint persons to hold or act in office of the County Public Service, including in the Boards of cities and urban areas within the County and to confirm appointments.
 - c. exercise disciplinary control over, and remove persons holding or acting in those offices as proved for under this part.
 - d. prepare regular reports for submission to the County Assembly on the execution of the functions of the Board.
 - e.
 - f.
 - g.
 - h.
 - i.”



16. Section 77(1) & (2) 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. 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 and governance under Article 10 and values and principles of public service under Article 222 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.”

17. Although the Petitioner is not shown to have been removed from office pursuant to a decision of the 1st Respondent’s County Public Service Board as contemplated in Section 77(1) of the [County Government Act](#), Section 77(2) mandates the Public Service Commission to entertain appeals from any decision relating to retirement and other removal from service, and relating to employment of a person in a County Government. Section 77(2) (g) widens the Public Service Commission’s appellate jurisdiction and mandates the commission to entertain appeals against any decision it considers to fall within its constitutional competence to hear and determine.”

18. I recently stated as follows in [Major \[RTD\] Abdirahman Idris v County Government of Mombasa & 2 Others](#) [2023] eKLR regarding the provisions of Section 77(2) of the [County Governments Act](#):-

“This, in my view, means that a County Government employee aggrieved by a decision to terminate his or her employment, regardless of whether or not the termination is effected by the County Public Service Board must, as a matter of law, appeal to the Public Service Commission. It is for the commission to determine whether the appeal falls within its constitutional competence to determine.”

19. Section 87(2) of the [Public Service Commission Act](#) provides as follows:-

- “(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 Public Service unless the procedure provided for under this part has been exhausted.”



20. The Petitioner herein is/was a person in the 1st Respondent’s County Government Public Service. She contests herein her removal from office by the 1st Respondent (the 1st Respondent’s Governor) in exercise or purported exercise of control over the Petitioner. The Petitioner ought to have appealed the Governor’s decision to the Public Service Commission as by the aforestated law provided.

21. In Secretary, *Public Service Board & Another v Hulbbhai Gedi Abdille* [2017] eKLR, the Court of Appeal stated as follows:-

“Time and again it has been stated that where there exists other sufficient and adequate avenue or form to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the Court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under that other regime. In the case of Speaker of the National Assembly v James Njenga Karume [2992] eKLR, this Court emphasized:-

“...in our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by an Act of Parliament, that procedure must be strictly followed.

..... There is no doubt that the Respondent initiated the Judicial Review proceedings in utter disregard to the dispute resolution mechanisms 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 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 jurisdiction under the Act rather than resort to judicial process in the first instance.

Section 77 has placed no fetter to the jurisdiction of the Public Service Commission.”

22. I agree with the Respondent’s contention that this Court ought not to have been the Petitioner’s first port of call, and, yes, this Court lacks jurisdiction to hear and to determine the suit herein. The Respondent’s preliminary objection is upheld to the extent that it challenges this Court’s jurisdiction over the Petition herein. Consequently, the Petition is hereby struck off in its entirety, and any interim and/or conservatory orders issued herein are hereby vacated.

23. Each party will bear its own costs of the Petition and the proceedings herein.

24. It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH SEPTEMBER 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgement has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....for Petitioner



.....Respondent

