



**Kamba & 8 others v County Public Service Board, Machakos County
Government & 2 others (Employment and Labour Relations Cause
E099 of 2023) [2023] KEELRC 2227 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2227 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E099 OF 2023
BOM MANANI, J
SEPTEMBER 28, 2023**

BETWEEN

**NORAH NDINDA KAMBA 1ST CLAIMANT
PATRICIA KIOKO SYOMBUA 2ND CLAIMANT
ERIC MUTUA KIMUYU 3RD CLAIMANT
LUCY KASWII MBUVI 4TH CLAIMANT
MICHAEL MULI MUSYOKI 5TH CLAIMANT
CYNTHIA MUTHEU NGUI 6TH CLAIMANT
GRACE MWIKALI MUSYOKI 7TH CLAIMANT
MIKA KITUKU KIMEU 8TH CLAIMANT
STEPHEN KYALO MUEMA 9TH CLAIMANT**

AND

**COUNTY PUBLIC SERVICE BOARD, MACHAKOS COUNTY
GOVERNMENT 1ST RESPONDENT
COUNTY SECRETARY, MACHAKOS COUNTY GOVERNMENT 2ND
RESPONDENT
GOVERNOR, MACHAKOS COUNTY GOVERNMENT 3RD RESPONDENT**



RULING

Background

1. The Claimants are all employees of the County Government of Machakos holding various positions. The pleadings show that sometime in March 2022, the 1st Respondent advertised various positions within the County which the Claimants applied for. The pleadings also show that the Claimants were interviewed for the various positions where-after they were issued with letters of appointment to the positions.
2. It would appear that after this process, the regularity of the Claimants' appointments aforesaid was questioned. As a result, it does appear that the impugned appointments were revoked and the Claimants asked to revert to their earlier positions at the County.
3. It is this decision to revoke the Claimants' new positions that triggered the current suit. Together with the main claim, the Claimants filed the application dated 10th February 2023 seeking various interim reliefs to wit the following:-
 - a. An order to compel the Respondents to reinstate the Claimants to the impugned positions and pay their salaries and benefits enjoyed by the Claimants as at December 2022.
 - b. An order of interim injunction to restrain the Respondents from advertising and or filling the positions that the Claimants held as at December 2022.
 - c. An order of interim injunction to restrain the Respondents from victimizing the Claimants on account of their decision to institute these proceedings.

The Preliminary Objections

4. After they were served with the pleadings and application for interim reliefs, the Respondents filed preliminary objections to the competence of the action. Overall, it is the Respondents' position that the action by the Claimants is premature. The Respondents contend that the Claimants have not exhausted the dispute resolution procedures under sections 77 of the *County Governments Act* and 87(2) of the *Public Service Commission Act* both of which require an employee that is aggrieved by a decision of a County Government to appeal against such decision to the Public Service Commission (PSC). In addition, the 1st Respondent asserts that the Claimants did not issue the Respondents with a notice of intention to sue under section 13A of the *Government Proceedings Act* before presenting their case to court. As such, the suit is bad in law.
5. The court gave directions that the points of law aforesaid be argued through written submissions. The parties have since filed their respective submissions.

Analysis

6. Article 234 (2) (i) of the *Constitution* stipulates as follows:-

The Commission shall hear and determine appeals in respect of county governments' public service.

7. Section 77 of the *County Government Act* provides, in part, as follows:-



- a. 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.
 - b. The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of:-
 - i. recruitment, selection, appointment and qualifications attached to any office;
 - ii. remuneration and terms and conditions of service;
 - iii. disciplinary control;
 - iv. national values and principles of governance, under Article 10, and, values and principles of public service under Article 232 of the [Constitution](#) ;
 - v. retirement and other removal from service;
 - vi. pension benefits, gratuity and any other terminal benefits; or
 - vii. any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.
8. Section 87(2) of the [Public Service Commission Act](#) provides as follows:-
- 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.
9. Section 13A of the [Government Proceedings Act](#) provides, in part, as follows:-
- No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing in the prescribed form have been served on the Government in relation to those proceedings.
10. The Respondents contend that the Claimants filed these proceedings without first exhausting the dispute resolution procedures set out above. As such, the proceedings offend the doctrine of exhaustion of alternative remedies.
11. Proceeding on this premise, the Respondents argue that the suit is not ripe for litigation before the court. Consequently, the court lacks the requisite jurisdiction to entertain the action.
12. On the other hand, the Claimants have challenged the validity of the preliminary objection on a number of fronts. First, they argue that there was no decision rendered by the Respondents that would have triggered the appeal process under section 77 of the [County Governments Act](#).
13. Second, the Claimants contend that neither party has demonstrated that the subject matter of the dispute has not been the subject of the appeal process provided for under section 77 of the [County Governments Act](#). As such, this matter can only be appropriately addressed through evidence to be tendered at the trial.



14. Third, the Claimants contend that section 77 of the [County Government Act](#) only applies where a grievant is able to get a suitable remedy before the PSC. Where the remedy sought is incapable of being granted by the PSC, the grievant may approach the court directly.
15. I think that the record demonstrates that there was indeed a decision by the 1st Respondent against the Claimants that affected the Claimants' contracts of employment and which ought to have been the subject of appeal to the PSC. In their affidavit in support of the application for interim relief, the Claimants have annexed a letter by the 1st Respondent to the Chief Officer of the County in which the 1st Respondent states that the appointment of the Claimants to their new positions was irregular. As such, the 1st Respondent had revoked the impugned positions and asked the Claimants to revert to their earlier positions in the County.
16. In the face of this evidence, it is incorrect for the Claimants to suggest that there was no decision by the Respondents that could have triggered the appeal process under section 77 of the [County Governments Act](#). In any event, the Claimants contend that the effect of the 1st Respondent's directive in the aforesaid letter was to reduce their emoluments as they later realized upon receiving their December 2022 pay slips. How then can they argue that there was no decision against which they could have filed an appeal to the PSC? And if indeed there was no appealable decision as asserted by the Claimants, why did they file the various appeals evidenced in their supplementary affidavit filed in court on 4th May 2023?
17. The Claimants also contend that the Respondents have not filed pleadings that raise the issue of the Claimants' failure to submit to the appeal process under section 77 of the [County Governments Act](#). They contend that because of this, the objection by the Respondents based on section 77 of the [County Governments Act](#) is founded on quicksand. In the Claimants' view, the Respondents cannot sustain this objection without furnishing the court with evidence that the Claimants have indeed failed to invoke the procedure under section 77 of the [County Governments Act](#).
18. This argument by the Claimants is self-defeating. The fact that the Claimants had not submitted to the appeal process under section 77 of the [County Governments Act](#) at the time of filing this action is self-evident from their further affidavit filed in court on 4th May 2023. By this affidavit, the Claimants have tabled evidence showing that they filed their appeals to the PSC in March 2023 after filing this suit.
19. The Claimants also contend that some of the reliefs that they seek cannot be issued by the PSC. As such, their suit falls outside the purview of section 77 of the [County Governments Act](#). Of significance are the reliefs relating to interim injunction orders.
20. I agree with the position expressed by the Respondents that where the law provides for an alternative mechanism for resolving a dispute, parties should pursue that mechanism before invoking the court's jurisdiction. That said, it is generally acknowledged that the court will not insist on this approach if the alternative dispute resolution mechanism is incapable of providing the parties with a suitable remedy.
21. Indeed, the foregoing is what I understand most of the decisions on this issue to be saying. For instance, in the Court of Appeal case of [Secretary, County Public Service Board & another v Hulbbhai Gedi Abdille \[2017\] eKLR](#), the court expressed itself on the subject as follows:-

“Time and again it has been said that where there exists other sufficient and adequate avenue or forum 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 the other regime.” Emphasis added by underlining.



22. In *Republic v National Environmental Management Authority* [2011] eKLR, the Court of Appeal, whilst commenting on a series of decisions relied on by one of the parties in the action, observed as follows on the use of alternative avenues for dispute resolution: -

“The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.” Emphasis added by underlining.

23. In, *Republic v Migori County Secretary & another; Migori County Public Service Board (Interested Party); Ngwala & 8 others* (Exparte Applicants) (Judicial Review Application E013 of 2022) [2022] KEELRC 13209 (KLR), the court observed as follows on the same matter:-

“ Section 77(2)(e) of the *County Governments Act* unreservedly gives the Public Service Commission of Kenya the mandate to entertain an appeal, including on a decision on retirement or other removal from the county public service. The provision does not restrict the appellate function to decisions made by a county public service board.

This contrasts with the provision in section 77(1) of the Act, which restricts the appellate power to decisions made by the Board or on its behalf in purported exercise of disciplinary control.

In terms of Article 234(2)(i) of the *Constitution* as read with section 77(2) of the *County Governments Act* and section 87(2) of the *Public Service Commission Act*, the ex-parte applicants' first port of call should have been through an appeal to the Public Service Commission.

The jurisdiction of this Court is therefore deferred until the Public Service Commission considers and determines such an appeal.

Decisions from the Court of Appeal and the Supreme Court are clear that in these types of cases, the alternative jurisdiction should be invoked before a party approaches the Court unless there are exceptional circumstances.” Emphasis added by underlining.

24. What is apparent from the foregoing decisions is that courts lean towards a policy of requiring disputants to exhaust the available dispute resolution mechanisms before they approach the court with their grievances. Nevertheless, it is recognized that there are instances when this approach may not serve the ends of justice if the remedies available to a party through the alternative dispute resolution mechanism are not appropriate.

25. In the case before me, the Claimants have, in addition to the reliefs for reinstatement to their positions, prayed for interim injunctive orders. There is nothing in the law that expressly confers upon the PSC the power to grant interim injunctive reliefs in the appeals that go before it. As is apparent from sections 74 (5), 75 (4), 86 (4) and 88 (5) of the *Public Service Commission Act*, PSC appears to only have power to grant reliefs after hearing the appeals before it. As a matter of fact, sections 74 (4) and 88 (4) of the *Act* appear to bar PSC from stopping implementation of a decision that is the subject of an appeal that is pending before it.



26. Conversely, section 12 (3) of the *Employment and Labour Relations Court Act* grants the court power to grant interim conservatory and injunctive orders when appropriate. This is in addition to a plethora of other remedies that are at the court's disposal.
27. In my estimation, a grievant that is in urgent need of interim relief of injunction in the first instance will be deprived of a suitable remedy if his options for dispute resolution are restricted to the PSC. This, in my view, provides sufficient justification for such grievant to bypass the grievance resolution procedure that is prescribed under section 77 of the *County Government Act* but only for purposes of pursuing the interim relief that is sought. Having regard to the foresaid, I am satisfied that the Claimants' circumstances presented an exceptional reason for them to approach the court.
28. As regards the requirements of notice under section 13 A of the *Government Proceedings Act*, this has been satisfactorily addressed in the decision of *Kenya Bus Service Ltd & another v Minister for Transport & 2 others* [2012] eKLR. Apart from impeding access to justice, this provision adds little value to our statute books.

Determination

29. Having found as above, I reach the conclusion that the Claimants' action, in so far as it sought interim injunctive reliefs falls within the accepted exceptions to the exhaustion principle founded on sections 77 of the *County Governments Act* and 87(2) of the *Public Service Commission Act*.
30. As such, the suit will not be struck out for want of jurisdiction.
31. Instead, I order a stay of further proceedings in the cause and refer the dispute to the PSC for resolution of the appeals that are pending before it and arising from the same cause of action as this cause.
32. Meanwhile, the interim orders of injunction that were granted on 10th February 2023 shall remain in force pending the hearing and determination of the appeals before the PSC.
33. The decision of the PSC on the various appeals aforesaid shall be filed before this court for adoption as the court's order.
34. The parties are at liberty to apply.

DATED, SIGNED AND DELIVERED ON THE 28TH DAY OF SEPTEMBER, 2023

B. O. M. MANANI

JUDGE

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision 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.

B. O. M MANANI

