



**Omoit v County Secretary, Busia County Government & 3 others;
Public Service Commission (Interested Party) (Constitutional Petition
E010 of 2023) [2023] KEELRC 2233 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2233 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CONSTITUTIONAL PETITION E010 OF 2023**

JW KELL, J

SEPTEMBER 28, 2023

**IN THE MATTER OF THE ALLEGED THREAT AND CONTRAVENTION OF
ARTICLE 27(1) & (2), 30, 41, 47(1) & (2), 50(1) AND 23(1) OF THE CONSTITUTION
AND IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, NO.17 OF 2012**

**AND IN THE MATTER OF PUBLIC SERVICE COMMISSION
ACT NO. 10 OF 2017(SECTION 17) AND IN THE MATTER OF
CONSTITUTIONALISM , RULE OF LAW, NATURAL JUSTICE & GOVERNANCE**

BETWEEN

PRISCAH ISEREN OMOIT PETITIONER

AND

**COUNTY SECRETARY, BUSIA COUNTY GOVERNMENT .. 1ST RESPONDENT
GOVERNOR, BUSIA COUNTY GOVERNMENT 2ND RESPONDENT
COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT
BUSIA COUNTY GOVERNMENT 4TH RESPONDENT**

AND

PUBLIC SERVICE COMMISSION INTERESTED PARTY

RULING

(On Notice of Preliminary Objection dated 15th June 2023)

1. The Petitioner filed a Notice of Motion application dated 6th June 2023 and a Petition of even date seeking the following reliefs:-



- (i) conservatory orders staying the advertisements dated 28th March 2023 and 16th May 2023 respectively,
 - (ii) orders staying the recruitment for the position of Director of Budget and Economic Planning by the 4th Respondent, a position allegedly occupied by the Petitioner/Applicant;
 - (iii) orders to reinstate the petitioner to resume her position and access to offices; and
 - (iv) the reinstatement of her salary, allowances and benefits, pending the hearing and determination of the application and Petition.
2. The Respondents in objection to the Petitioner's Notice of Motion and Petition dated 6th June 2023 filed the instant Notice of Preliminary Objection dated 15th June 2023 and received in court on the 19th June 2023, seeking to strike out the said Notice of Motion and Petition and for the costs to be provided for, on the following grounds:-
- a. That the petition has been filed prematurely, hence contravenes Section 77 of the [County Government Act](#), No. 11 of 2012, Laws of Kenya.
 - b. That the Honourable court lacks jurisdiction to entertain the Petitioner's petition.
3. The court on 20th June 2023 directed that the Notice of Preliminary Objection be canvassed first by way of written submissions.
4. The 1st, 2nd, 3rd and 4th Respondents' written submissions were filed by Amani Wekesa Ass. & Co. Advocates and dated the 10th July 2023. The Petitioner's written submissions were drawn and filed by Otieno, Yogo, Ojuro & Company Advocates were dated 14th July 2018. The interested party did not file any response or submissions.

Determination

5. The issue for determination was whether the Notice of Preliminary Objection by the Respondent dated 15th June 2023 was merited. The Jurisdiction of the court must be addressed on priority basis when challenged guided by the decision of the court of Appeal in [Owners of Motor Vessel "Lillian S" - v- Caltex Oil Kenya Limited](#) (1989)eKLR.
6. The gist of the objection is that the issues raised in the Application are subject of appeal before the Public Service Commission pursuant to the provisions of Sections 77 of the [County Governments Act](#), 2012.
7. The Respondents submit that the jurisdiction of the court has been invoked prematurely as follows:-
- a. The issues raised in the Application and petition relate to employment of persons in the County Governments which are subject of an appeal to the Public Service Commission, the body charged in law with the first tier mechanism to resolve the dispute in the Petition and application.
 - b. Section 3 of the [Public Service Commission Act](#), relates to the scope of application of the Act, which provide that the Act shall apply to all public bodies and persons holding office in public service and the petitioner is by virtue of this section not exempted from application of the Act's provisions.
 - c. To the extent that the Public Service Commission under Section 5 of the [Public Service Commission Act](#), No. 10 of 2017, has the power to do or perform all such other things or acts



for the proper discharge of its functions under the Constitution and any other laws, as may be necessary to perform its functions like any other corporate body and has the power to grant the prayers and orders sought by the Petitioner at the first instance.

8. The Respondents submit that the court lacks jurisdiction to entertain the Petition and application as the Public Service Commission, the interested party, which sits as a quasi-judicial body, is duly vested with the mandate to hear and determine the issues raised in the petition.
9. The Respondents submit that the petitioner has not provided proof of any law that bars the Interested Party, from granting the orders and prayers sought by the Petitioner and the court cannot sit and entertain a petition where a first tier dispute resolution forum exists.
10. The Respondents submit in Owners of Motor Vessel "Lilian S" v Caltex Oil(Kenya) Ltd (1989) eKLR, the court of Appeal held that jurisdiction is everything and without it the court must down its tools and submit that this court lacks jurisdiction in the first instance to do that which is a preserve of the Public Service Commission.
11. The Respondents submit that the law is clear and the application and petition violate the provision under Section 87 (2) of the Public Service Commission Act No. 10 of 2017 ('the Public Service Commission Act') which 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”.
12. The Respondent further submits that this court has in the recent past in Sabastian Sunya & 5 others v Busia County Public Service Board & Another, Bungoma ELRC Petition No. E005 of 2022, upheld the position that the court lacks jurisdiction over matters vested in other statutory recognised bodies such as the Public Service Commission, where the Court held that:-

“The court finds that it does not have jurisdiction to grant the orders sought or even determine the petition pursuant to the provisions of Section 77 of the County Government Act.”
13. On the other hand, The Petitioner averred that she was employed by the National Government under the defunct Ministry of Local Government on permanent and pensionable terms in 2006 and on 8th April 2012, she was deployed by the Interested Party as the head of Treasury under the 3rd Respondent, where she was subsequently promoted from the head of treasury to Director of Budget and Economic Planning in 10th October 2017.
14. The petitioner alleged that she was later on 29th March 2018 seconded on contractual basis as a County Chief Officer and during this period applied for a leave of absence from her position of Director of Budget and Economic Planning until 31st July 2022 when she terminated the contract as County Chief Officer to revert to her permanent and pensionable position, a position that was approved by the 3rd Respondent.
15. The Petitioner submits that, she resumed work after her leave; but the Respondent's failed/refused to deploy her or allow her to resume her previous position as director of Budget and Economic Planning and the respondents proceeded to advertise the said position, albeit them having confirmed that she held the said position in their communication to the petitioner.



16. The Petitioner submits that, the 3rd Respondent failed to process her payslips and she had not been paid by the 3rd Respondent and no communication whether she had been sacked or under any disciplinary process communicated to her.
17. The Petitioner contends that she wrote letters dated 22/12/22 and 6/03/2023 requesting clarification of her employment status and her unpaid salaries, but the Respondents have failed to respond to her queries.
18. The Petitioner submits that she is apprehensive that the Respondents having advertised her position, will recruit a new person to the said position in violation of her right to employment.
19. The Petitioner submits that the Public Service Commission does not have jurisdiction nor the legal mandate to issue conservatory orders nor provide any reliefs unless and until the 3rd Respondent either terminates or takes disciplinary action or terminates the employment of an employee in the devolved government and; only the court has jurisdiction in the circumstances to issue conservatory orders under the Constitution to prevent the violation of the petitioner’s rights and to buttress this assertion the petitioner relied on the case of Abdikadir Suleiman v County Government of Isiolo & Another (2015) eKLR.
20. The Petitioner submits that this court has jurisdiction to hear her claim of breach of fundamental rights in employment and labour relations matters and relied on the decisions in United States International University (USIU) V Attorney General(2012)eKLR; Prof. Daniel N. Mugendi v Kenyatta University and 3 others, Civil Appeal No. 6 of 2012; Geoffrey Makana Asanyo v Nakuru Water And Sanitation Services Company and 6 others, Judicial Service Commission v Gladys Boss Shollei & Another (2014) eKLR; Geoffrey Mworira v Water Resources Management Authority and 2 others (2015) eKLR and Karisa Chengo and 2 others v Republic (2015) eKLR.
21. The question the court will further address under the issue is whether the advertisement of the position of the Director of Budget and Economic Planning and the refusal to deploy the petitioner falls within the matters to be appealed to the Public Service Commission.
22. Section 77 of the County Government Act provides that:-
 - “77. Appeals to the Public Service Commission:-
 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 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.”

23. Reading section 77(1) of the County Governments Act; if a person is dissatisfied with a decision made by the County Public Service Board, they can appeal to Public Service Commission. The Petitioner in her application and petition has pointed out that she resumed work but is yet to be deployed or allowed to resume her previous position. The County Public Service board is responsible under Section 59(1) (b) of the County Government Act,2012 for appointing persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments. Further, the County Public Service Board is mandated to advise the county Government on the terms of service of its employees which terms of service include remuneration of the employees.
24. The County Public Service Board has the power to assign an employee’s position and to reinstate salaries, it then follows that the Public Service Commission in exercising its appellate jurisdiction can make a decision either making a recommendation to re-assigning an employee or reinstating their salary or upholding the County Public Service board’s decision.
25. The Petitioner being dissatisfied with the alleged failure by the County Public service Board to set out her terms of service[P10-18(b)] and the processing of her salary[P10-18(a) is mandated to apply to the Public Service Commission to review the decision of the public Service Board.
26. The Petitioner has also raised the issue of the advertisement of her previous position. The advertisement was undertaken by the County Public service board[P10-19(a) & P10-19(b)]. It is the position of the petitioner that she had been seconded on contractual basis to position of county chief officer. I have perused the letter of appointment by the Governor as County Chief Officer dated 29th march 2018 which was subsequently extended to 31st December 2022. On prima facie basis I found no evidence of the petitioner having been seconded to the position taking into consideration the content of the appointment letter as county chief officer (P10-10). I also read her request of leave of absence (P10-9). There is no evidence from the filed documents that the leave of absence was ever approved. I only found subsequent letters of secondment years later which is not the same as leave of absence. Consequently, there was no prima facie case to support the conservatory orders sought. The court finds that the Petitioner’s case is a pure employment grievance concerning her claim to a position she held before appointment as a County Chief Officer
27. By dint of Section 77(2) of the County Governments Act, an issue relating to the recruitment, remuneration and conditions of service that fall within the ambit of the County Public Service Board are appealable to the Public Service Commission on the first instance.
28. The Petitioner in her submissions pointed out that section 77(1) uses the word “MAY” to mean that the appeal to the Public Service Commission is optional and the Petitioner could take other legitimate action such as s filing the instant petition in court. The court finds that the position under section 77 of the County Government Act which by use of word May appear to make the appeal process before Public Service Commission optional has since been replaced by a mandatory process under the Public Service Commission Act section 85 and 86 to wit:-
- ‘85. Appeal from County Government public service:-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.

86. Procedure for appeal (1) Any person who is dissatisfied or affected by a decision made by any authority or person in respect of a County Government public service may appeal to the Commission against the decision.”

29. To bastion the mandatory nature of appeal process before the Public Service Commission is section 87(2) of the *Public Service Commission Act* which reads:-

‘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.’”

That is the law.

30. The court finds that this petition covers both merit of the decision and the process as held by the court of Appeal in Secretary, *County Public Service Board & another v Hulbhai Gedi Abdille* [2017] eKLR where the court allowed appeal as follows:- .

‘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.’”

The issues under the petition are thus amenable to jurisdiction of the Public Service Commission.

31. The Petitioner relied on the decision in *Abdikadir Suleiman v County Government of Isiolo & Another* (2015) eKLR to reiterate her assertion that the Public Service Commission could not issue the prayers sought by the Petitioner in the instant case. Justice Byram Ongaya observed that:-

“...In the instant case, looking at the alleged claims of illegality, unconstitutionality, breach of constitutional rights and the remedies as prayed for, it is difficult to find that the cited



alternative procedure and remedy under section 77 of the Act was available to the claimant. Even if it is said that it was a case of mixed jurisdiction of the Commission and the court, it is the court's opinion that the legitimate path was to invoke the court's jurisdiction to hear and determine the intertwined issues, that being the most efficient and effective manner of disposing the dispute. In the circumstances of this case, the court returns that the provisions of section 77 of the County Government Act, 2012 did not oust or restrict the jurisdiction of the court for want of exhaustion of the procedure and remedies envisaged under the section."

While appreciate the opinion of the court I hold a different view that any decision whether deemed illegal or otherwise by the county public service board on employment is amenable to the appeal jurisdiction of the Public Service Commission. My opinion is informed by the authority by court of Appeal in Secretary, County Public Service Board & another v Hulbbhai Gedi Abdille [2017] eKLR(*supra*) To effect that Section 77 of the County Governments Act has placed no fetter to the jurisdiction of the Public Service Commission. In that authority the court of Appeal recognised that PSC had jurisdiction on both merits of the decision and procedure.

32. The jurisdiction of this court may only be invoked pursuant to compliance with section 85 of the public Service Commission Act, 2017. Section 87 (2) of the Public Service Commission Act No. 10 of 2017 ('the Public Service Commission Act') which 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 added)

33. The Public Service Commission has jurisdiction under Articles 234(2) (1) of the Constitution as read together with Section 85 &86 of the Public Service commission Act to hear and determine Appeals in respect of any decision relating to engagement of any persons in a county Government public service, including a decision in respect of " terms of service".

34. The Court of Appeal in the case of Secretary, County Public Service Board & Another vis- Hulbbhai Gedi Abdille (2017) eKLR determined 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 ... 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".

I do uphold the decision to apply to instant case.

35. The Employment and Labour Relations Court (ELRC) in Sammy Kalundu v Ag. Clerk of the Nairobi City County Assembly (2022) eKLR sustained a similar Preliminary Objection with the court holding as follows:-

"(21). From the foregoing, it is apparent there is an elaborate appeal/review mechanism established by the County Government Act and the Public Service Commission Act. More significantly, it is worth noting that the appeal structure flows primarily from the Constitution.



(22) The court further takes note of the provisions of section 87 (2) of the Public Service Commission Act which provides as follows:-

87.

(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

(23). in view of the foregoing it is therefore apparent that the Applicant has moved the court prematurely as he is yet to exhaust the dispute resolution mechanisms established under the Constitution, various statutes and the relevant Human Resources Policies and Procedure Manual”.

36. Additionally, in James Akelerio alias Muguu & Another v Moses Kasaine Lenolkilal & 3 others (2014) eKLR the court affirmed jurisdiction of the Public Service Commission and stated as follows:-

“The first port of call before coming to the High Court to seek redress would have been the Public Service Commission. It is apparent that the petitioners did not follow the due process provided by Law”.

37. In the upshot, considering that the issues raised by the Petitioner relate to her terms of service, recruitment and remuneration, the said issues fall within the mandate of the County Public Service Board and are therefore pursuant to Section 77 of the County Governments Act appealable to the Public Service Commission as the first instance forum.

38. The Petitioner was mandated to file a review with the Public Service Commission relating to the issues raised in the application and Petition. Consequently, the court’s jurisdiction was invoked prematurely.

39. The court upholds the Notice of Preliminary Objection dated 15th June 2023 by the 1st, 2nd, 3rd and 4th Respondents and the Notice of Motion application and Petition dated 6th June 2023 are hereby dismissed for lack of first instance jurisdiction by the court.

40. No order as to costs.

41. Right of appeal in 30 days

It is so ordered.

RULING DATED, DELIVERED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 28TH DAY OF SEPTEMBER 2023.

JEMIMAH KELI,

JUDGE.

In the presence of:-

Court Assistant:- Brenda Wesonga

For Petitioner:- Okaka holding brief for Yongo

For 1st to 4th Respondents:- Wekesa

Interested Party: Absent

