



**Republic of Kenya v Secretary, County Public Service Board Bungoma
& another; Ongoro (Exparte Applicant) (Judicial Review E004 of 2022)
[2023] KEELRC 2203 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2203 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
JUDICIAL REVIEW E004 OF 2022**

JW KELL, J

SEPTEMBER 21, 2023

**IN THE MATTER OF: THE CONSTITUTION OF KENYA
2010; ARTICLES 19,20,21,22,23,27,41,47,48,50,159 E.T.C.**

AND

IN THE MATTER OF: THE COUNTY GOVERNMENT ACT: 59,63,64,65 E.T.C

AND

**IN THE MATTER OF: THE FAIR AND ADMINISTRATIVE
ACTIONS ACT: SECTION 3,4(1),5(2)(B AND C), 11(1-2)**

AND

IN THE MATTER OF: THE PUBLIC SERVICE COMMISSION ACT LAWS OF KENYA

AND

IN THE MATTER OF: THE PUBLIC SERVICE COMMISSION AND REGULATIONS 2020

**IN THE MATTER OF: HUMAN RESOURCES POLICING
AND PROCEDURES MANUAL FOR THE PUBLIC SERVICE**

BETWEEN

REPUBLIC OF KENYA APPLICANT

AND

**THE SECRETARY, COUNTY PUBLIC SERVICE BOARD
BUNGOMA 1ST RESPONDENT**

BUNGOMA COUNTY GOVERNMENT 2ND RESPONDENT

AND

MOSES OWITI ONGORO EXPARTE APPLICANT



JUDGMENT

1. The Ex parte applicant, pursuant to leave of the court, filed Notice of Motion application dated 24th November 2022 and received in court on the 24th November 2022 under Articles 41,48 and 159 of *the Constitution* and Order 53 Rule of the Civil Procedure (though stated as Order 153) seeking the following reliefs:-
 - a. The prerogative Order of Mandamus directing the Respondents to undertake their statutory responsibility and promote the ex parte applicant to the position he deserves in the service and backdate his promotion to cover known lost opportunities then remunerate and compensate him accordingly.
 - b. The Order of Prohibition restraining the Respondents from subjecting the ex parte applicant to discriminatory treatment , in violation of his rights to fair labour practices and from appointing any persons bereft of the necessary qualifications, experience and seniority to the offices of Inspector of Water Works, Senior Principal Superintendent, Senior Principal Superintendent, Deputy Director and Director Water.

Collorary relief

- c. That the Respondents be directed to pay the ex parte applicant meals allowances and transport amounting to Kshs. 1,500,000/- earned in the supervision of County government projects between 2019 and 2020 which remains unpaid.
 - d. The Ex parte applicant be awarded the costs of the application
2. The application was supported by the affidavit of the ex parte applicant sworn on the 24th November 2022 and the statutory statement of facts dated 18th November 2022. The grounds are as stated in the statement of facts.
3. The Respondent entered appearance and in response filed replying affidavit by Joseph Kisindai, the Director of Human Resource of the County Government of Bungoma sworn on the 20th March 2023 and received in court on the 21st March 2023.
4. The ex parte applicant in reply to the response filed his supplementary affidavit received in court on the 25th April 2023.

Written submissions.

5. The Judicial review application was canvassed by was of written submissions. The ex parte applicant written submissions drawn by Momanyi & Manyoni Advocates were dated 4th March 2023 and received in court on the 16th March, 2023 and another set dated 28th April 2023 and filed in court on the 10th July 2023. The respondents written submissions were drawn by Makokhwa Wattanga & Luyali Associates Advocates were dated 6th July 2023 and received in court on the 7th July 2023.



DETERMINATION

Issues for determination

6. The ex parte applicant addressed the merit of his application and addressed the issue of unpaid supervision allowance which he stated was not contested in response, addressed discrimination and the acting appointment and promotion compensation.
7. The Respondents in their submissions addressed the following issues:-
 - a. Whether the 1st respondent can be sued and or are necessary party in the suit?
 - b. The competence of the judicial review proceedings
 - c. Whether court has jurisdiction
 - d. Whether the proceedings are time barred by the provisions of section 90 of the [Employment Act](#).
8. The court having considered the pleadings and the submissions of the parties was of the considered opinion that the issues placed before it by the parties for consideration in the dispute are as follows:-
 - a. Whether the court had jurisdiction and competence of the judicial review application
 - b. Whether the 1st respondent can be sued and or are necessary party in the suit?
 - c. Whether the proceedings are time barred by the provisions of section 90 of the [Employment Act](#).
 - d. Whether the Ex parte applicant was discriminated against
 - e. Whether the claimant was appointed to acting position and which one
 - f. Whether the ex parte applicant was entitled to the reliefs sought

Issue (a) Whether the court had jurisdiction and competence of the Judicial Review application

9. The issue was raised by the respondent in submissions. There was no pleading on jurisdiction. Nevertheless the court must satisfy itself of jurisdiction as without the same any order issue is a nullity as held by the Court of Appeal in Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (1989)e KLR. The gist of the issue was that the court lacks jurisdiction pursuant to the provisions of section 77(1) and (2) of the County Government Act to wit:-

“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.”

The respondent further relied on provisions of section 87(2) of the *public service commission act* to wit:-

“ 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.”

10. To buttress the application of these provisions of the law the Respondents relied on the following cases which upheld the provision to the extent that the aggrieved employee must exhaust the dispute mechanisms first being Hussein Wanyama Mulebo & 5 Others v County Public Service Board & 2 others (2022) eKLR where court held it had no first instance jurisdiction, similarly In Ismael Noo Onyango & another v Siaya County Public Service Board & Another, decision of court of appeal in Secretary County Public Service Board and another v Hulbhai Gedi Abdulla (2017) eKLR where the Court of Appeal allowed the appeal on the basis that the applicant had failed to utilise the mechanism under section 77 of the *County Governments Act*. The Respondent further relied on the decision of the Court of Appeal in Speaker of the National Assembly v James Njenga Karume (1992) on doctrine of exhaustion.
11. The issue of jurisdiction was not pleaded hence it was not a surprise that the ex parte applicant did not submit on the same. As stated before, the court must satisfy itself of jurisdiction. The court agrees with the decisions cited on the exhaustion of the appeal mechanisms at the Public Service Commission as provided for under section 77 of the *County Governments Act*(supra). This is the law under the doctrine of exhaustion on available alternative dispute mechanisms before invoking the court’s jurisdiction and as succinctly and authoritatively put by the Court of Appeal in Speaker of the National Assembly v James Njenga Karume (1992) that:-

‘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 *the Constitution* or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.’



12. In the instant case, the court finds that the ex parte applicant exhausted the appeal mechanism before filing the suit. Exhibit MOO - 12 was an appeal dated 23rd April 2019 to the Public Service Commission on the issue of discrimination and promotion. The Commission considered the appeal and communicated its decision to the ex parte applicant vide letter dated 7th February 2020(MOO-13). In the circumstances the court holds that the Ex parte applicant is properly before it and that the judicial review application is competent leave of the court having been granted.

Issue (b). Whether the 1st respondent can be sued and or are necessary party in the suit?

13. The Respondents in their response did not raise this issue. The ex parte applicant did not thus have opportunity to respond. The respondent submits that the County Government exercising constitutional authority is a body corporate with perpetual succession as stated in Article 176 of *the Constitution*, Section 5 and 6 of the *County Governments Act*. That section 133 of the Act provides that there is no personal liability of the officers of the county governments in discharging their constitutional and statutory mandate where the act or omission is in good faith. The 1st Respondent is improperly joined in the proceedings as a party not being a legal entity that is capable of being sued and cannot be sued in his personal capacity under section 133 of the *County Governments Act*. While I agree that the 1st Respondent ought not have been sued for not being a legal entity and the Board being a legal entity capable of being sued in its name, the issue was not pleaded. I will not strike out the 1st Respondent from the suit for lack of pleading and notice to the ex parte applicant but at same time the court will uphold the provisions of section 133 of the County Government Act to wit:

‘133 (1)No act, matter or thing done or omitted to be done by—

- (a) any member of the county government or its administration board or committee;
- (b) any member of the county assembly;
- (c) any member of staff or other person in the service of the county government; or
- (d) any person acting under the direction of the county government, shall, if that act, matter or thing was done or omitted in good faith in the execution of a duty or under direction, render that member or person personally liable to any civil liability.”

Issue (c).Whether the proceedings are time barred by the provisions of section 90 of the *Employment Act*.

14. The ex parte applicant submits that the proceedings are time barred under Section 90 of the *Employment Act* which states:-

‘Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.’”

That the claim by the exparte applicant under prayer 3 of the notice of motion for payments for meals and transport allowance was earned in the supervision of county government water projects between 2019 and 2020. That this means the exparte applicant had up to 31st December 2021 to file the instant proceedings after which the Act prohibits the institution or maintenance of claim for unpaid wages and salaries. To buttress the foregoing submissions the Respondent relied on the decision in *George Hiram Ndirangu v Equity Bank Limited*(2015)e KLR which defined continuing injury :-



“15. The logical meaning of the phrase 'continuing injury or damage' would therefore be violation of rights under an employment contract such as salary underpayment or failure to pay accrued dues. A typical memorandum of claim would normally contain a claim for compensation and payment of accrued dues. In my view, 'continuing injury or damage' would connote such accrued dues.”

That the claim falling under the ambit of section 90 of the *Employment Act* having been filed on the 15th November 2021 was outside 12 months and ought to be struck out for being time barred. (The court notes that the claim was filed on the 18th November 2022). The Respondent further relied on decision in Gladys Wamukoya Were v Mumias Sugar Company (2014)e KLR Where the 12 months was upheld for bringing a claim and in Justine S. Sunyai V Judicial Service Commission and another (2017)eKLR Where the court held it had no jurisdiction to extent the limitation period.

15. The ex parte applicant submits that the claim for payment of the supervisory duties for amount of Kshs. 1,500,200 was not denied in the replying affidavit thus was uncontested. That he wrote three letters for the payment and the same received no response. The claim being uncontested the ex parte applicant submits it be allowed.

Decision

16. The ex parte applicant relied on his exhibit MOO-17 as his request for payment which he had shared with employer. These documents were served on the respondent. In response vide the replying affidavit of Joseph Kisindai received in court on the 21st March 2023 the claim was not contested. The facts were unrebutted.

17. The Respondent took the position that the claim was of continuing injury hence ought to have been filed within 12 months. The court finds that the period of 12 months is not clear from the documents. The last letter asking for the payment was of 21st April 2022.

18. The Respondent relied on the court’s decision to effect that the claim was filed after 12 months hence time barred. In the instant case, the ex parte applicant filed the claim while still in service. He had by last letter of 21st April 2022 asked for the payment meaning the injury was continuing. The time of 12 months had thus not started running. In holding so, I am guided by decision of Court of Appeal in G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR

“[20] In the circumstances of this case we find that such ‘unpaid terminal dues’ do not constitute a continuing injury as contemplated under the proviso to Section 90 of the *Employment Act*. The respondents assert claims arising from the termination of their employment and dues that accrued to each of them at the end of each month. Regarding ‘a continuing injury’, the proviso to Section 90 of the *Employment Act* requires that the claim be made within 12 months next after the cessation thereof. The learned Judge did not determine when the continuing injury ceased, for purposes of computing the twelve month period. In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the claimant’s dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred.”

I holds that ex parte applicant was still in service and the injury had not ceased for the claim to be stated as time barred.

19. The claim was specific and was not rebutted in reponse. The only defence being it was time barred in submissions. I find the ex parte applicant proved on balance of probability that he was entitled to the payment of Kshs. 1,500,200/- as sought in the reliefs.



Issue (d). Whether the Exparte applicant was discriminated against

20. The exparte applicant advanced the position that he was discriminated against for non- promotion. That he was assigned duties of higher position but denied promotion. That he was not promoted as he was not a Luhya or Bukusu . That his case was taken up by the Human Resource Advisory committee which approved the promotion and sent its recommendations to the County Public Service Board. That the recommendations were not acted upon. That he appealed to the PSC unsuccessfully (MOO-13).
21. In response under the replying affidavit, the respondent stated that promotion was not a mandatory condition after lapse of 3 years period without promotion. That the County Government of Bungoma promotions are competitively sourced depending on nature of seniority at work, time employed and other priorities and that the respondent did not violate the ex parte applicant's rights to fair labour practices as he was granted the promotion he deserved on the 7th March 2022 , a decision of the County Public Service Board.
22. The Public Service commission exercising its jurisdiction under section 77 of the County Government Act considered the claim and held that the recommendation for promotion was not submitted to the board for decision and the position he sought to be promoted to was competitive and he could only be appointed to it through competitive filling.
23. I have perused the documents relied on and did not find evidence of discrimination based on tribal basis as alleged. The alleged recommendation for promotion was also not produced. I have no basis to fault the decision of the PSC.
24. I find and hold the claim for discrimination was not proved and disallow the same.

Issue (e).Whether the Claimant was appointed to acting position and which one.

25. The ex parte applicant claimed he was appointed in an acting position of Deputy Director Job Group Q(M00-11 appointment letter dated 12th July 2017) and not paid acting allowance contrary to paragraph C.14(1) and D. 9(1) Human Resource policies and procedures manual for the public service May 2016. That his appeal was rejected. In submissions the Exparte Applicant stated that he ought to be confirmed to the position after 6 months and his pay package be backdated to date he was appointed acting as he retired while in acting position.
26. In response the respondent vide the replying affidavit admitted that the exparte applicant was appointed in acting capacity by the County Chief Officer Water and Natural resources for the position of Acting Deputy County Water Director. That the position of appointment was irregular and contrary to section 59 of the County Government Act as the County Chief Officer is only authorised to give an intent for an advertisement and confirm availability of funds. That the ex parte applicant did not attain any promotion under section 59 of the County Government Act and was not eligible to any acting capacity that would demand payment of allowance , furthermore he was acting under the same department performing the same or similar responsibilities.

Decision.

27. I find that the claim for acting position of deputy director as per the appointment letter dated 12th July 2017 was uncontested and indeed the deponent of the respondent replying affidavit admitted he knew of the acting and added that the ex- parte applicant was acting in same department and performing similar responsibilities hence not entitled to acting allowance. The PSC in its decision



stated the recommendations for acting appointment were not forwarded to the County Public Service Board for decision as required(MOO-13).

28. Acting allowance is provided for under the PSC Service Manual 2016. It states:- c.14(1) Where an offices is eligible for appointment to The officer not to act for more than 6 months.”
29. In the instance case the ex parte applicant stated he acted for 2 years. That is June 2017 to January 2019 making 18 months. The claimant attached MOO-9 as calculation of the acting allowance which was not paid. The respondent did not contest the same. I do find the Claimant was appointed by authorized officer, a County chief officer-water as acting Deputy Director, this was a known position by the employer as per the replying affidavit , he performed the acting duties for 18 months and it was unfair labour practice to fail to compensate him for the acting which compensation is also provided for in PSC manual relied on. The manual forms part of the terms of the employment and the exparte applicant was thus entitled acting allowance as a right not favour as appears to be the position of the employer. The Respondents acted unfairly in appointing him to acting position without corresponding payment of acting allowance. That was unfair administrative action.
30. I award as unpaid acting allowance Kshs, 374,018 as calculated by the exparte applicant (M00-9).

Issue (f). Whether the ex parte applicant was entitled to the reliefs sought.

31. The court considered the reliefs sought. The court holds it has no power to promote employees. Secondly that the proved acting position was limited to 18 months hence the court had no basis to declare his acting as confirmation to that position. The court finds that the exparte applicant having since retired on the 23rd February 2023 (JS-2) and having found the acting was terminated, way before the retirement the court finds that the prerogative order of mandamus on promotion was not available. The court held there was no proof of discrimination.

Conclusion

32. The court enters judgment for the exparte applicant against the respondents as follows:-
 - i. An order of Mandamus directed at the 2nd Respondent to pay the ex parte applicant meals allowance and transport of Kshs. 1,500,000/- earned for supervision of Bungoma County Government Water projects between 2019-2020.
 - ii. An order of Mandamus directed at the 2nd Respondent to pay the Exparte Applicant acting allowance of Kshs. 374,018
 - iii. The exparte applicant is awarded Costs of the suit with interest at court rate from date of judgment.
33. Right of appeal in 30 days. Stay granted of 30 days.
34. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 21ST SEPTEMBER 2023

JEMIMAH KELI

JUDGE

In The Presence of:-

For Exparte applicant:- absent



For Respondent:- Ms. Luyali h/b Makokha

