



REPUBLIC OF KENYA



**Otieno & another v County Government of Homa-Bay & 5 others (Petition E051 of 2022) [2023] KEELRC 2547 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2547 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E051 OF 2022  
CN BAARI, J  
OCTOBER 19, 2023**

**BETWEEN**

**MICHAEL KOJO OTIENO ..... 1<sup>ST</sup> PETITIONER**

**EVANCE OTIENO OLOO ..... 2<sup>ND</sup> PETITIONER**

**AND**

**COUNTY GOVERNMENT OF HOMA-BAY ..... 1<sup>ST</sup> RESPONDENT**

**GOVERNOR OF HOMA-BAY COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY PUBLIC SERVICE BOARD OF HOMA-BAY ..... 3<sup>RD</sup> RESPONDENT**

**COUNTY SECRETARY ..... 4<sup>TH</sup> RESPONDENT**

**COUNTY ASSEMBLY OF HOMA-BAY ..... 5<sup>TH</sup> RESPONDENT**

**CLERK OF HOMA-BAY COUNTY ASSEMBLY ..... 6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioners came to Court by a Petition dated 22<sup>nd</sup> October, 2022, and filed in court on even date. They seek the following reliefs:
  - i. A declaration that the purported circular of 21/12/2022 purporting to transfer administrative staff and administrators contravened the principles of the rule of law and good governance under Articles 10, 27(8), 56 and Article 232 of the Constitution of Kenya 2010.
  - ii. An order of judicial review in the nature of prohibition, prohibiting the County Government from promoting, transferring any person and/or approving for appointment until due compliance is met as per Section 58 (1) (a) (c) of the County Government Act 2012 as



read together with Sections 44 (2)(A), 2(B), 2(C) and 2(D) and 58(A)(1) of the County Governments (Amendment) Act 2020, and that if any approval and/or appointment has been done at the point of determination of this petition, the same be quashed.

- iii. An order of Mandamus be directed to the County Governor of Homabay County, compelling her in person, her officers/her employees, or such persons purporting to act on her behalf to perform her functions in due compliance with the Sections cited above and Articles 10, 56, 27(8), 232 of the Constitution of Kenya, 2010.
  - iv. Any order awarding costs of the Petition to cause for being a public interest case.
  - v. Any other or further orders, writs and directions this Honourable Court considers appropriate and just to grant for the purpose of enforcement of the Petitioner's fundamental rights and freedoms.
2. Parties sought to canvass the petition through written submissions. The Respondents filed submissions, while the Petitioners did not.

### **The Petitioners' Case**

3. The Petitioners state that one Erick Onyango Joakim and Nicholas Ayieta Odero were employed outside the establishment and are not county employees.
4. The Petitioners further state that the Respondents violated the provisions of Articles 28, 47 and 201 of the Constitution as well as the Fair Administrative Actions Act and the County Government Act.
5. It is the Petitioners' assertion that the Respondents intend not to comply with the law and that the County Secretary has usurped the powers beyond that given to him by law.
6. The Petitioners further state that the gender equity principle and affirmative action has not been taken into account, hence discriminating against women and marginalized groups.
7. That the circular in issue violates Article 74 (a-i) of the Constitution.

### **The Respondents' Case**

8. The Respondents in an affidavit sworn by one Prof. Benard Muok on 24<sup>th</sup> January, 2023, states that:
  - i. This Court does not have jurisdiction to hear and determine this case as the Petition is a challenge to a purported appointment and inter-departmental transfers allegedly made by the County Secretary of the Government of Homabay, undertaken pursuant to the provisions of Sec 5(2)(f) of the County Government Act, 2020.
  - ii. These proceedings offend the doctrine of exhaustion contemplated under Article 159(2)(c) of the Constitution, since there exists an alternative dispute resolution forum and alternative remedies, including an investigative process by the County Public Service Board under Section 59(4)(f) and 75.
  - iii. An appeal process enshrined under Section 88 of the Public Service Commission Act and Section 77 of the County Government Act bestows the PSC with both Constitutional and statutory jurisdiction, as alternative and effective remedies which ought to have been, and must be pursued first before the jurisdiction of the Court can be invoked.
  - iv. Section 72(2) of the County Government Act gives the 4<sup>th</sup> Respondent (County Public Secretary) the power to redeploy County Public Officers from one department to another.



- v. The circular dated 23/12/2022 was issued by the County Government and it does not breach any laws.

### **The Respondents' Submissions**

9. The Respondents submit that under Article 234(2)(i) of the *Constitution*, Section 87 (1) and (2) of the *Public Service Commission Act*, this Court does not have jurisdiction to hear and determine this case.
10. It is the Respondents' further submission that Article 234 (2)(i) of the *Constitution* mandates the Public Service Commission to hear and determine appeals in respect of decisions made by appointing authorities with regard to the county public service board.
11. The Respondents submit that the 4<sup>th</sup> Respondent was legally appointed by the County Government of Homabay to serve the County in the capacity of County Secretary, and included public participation contemplated by the *Public Appointments (County Assemblies Approval) Act*.
12. It is the Respondents submission that Section 6(2)(c) of the *County Government Act*, 2020 and the doctrine of necessity confers powers to the 4<sup>th</sup> Respondent, to effect transfers and reorganize personnel already serving in the County Public Service. They had reliance in the case of *Paul Jalla Elma 7 9 others v County Government of Marsabit County Public Service Board (Interested party)* (2020) eKLR to buttress this position.
13. It is further submitted that the transfers have already been effected and the affected employees have reported to their duty stations, and reversing the transfer shall be disruptive and against the public interest, and therefore the present proceedings have been overtaken by events. The Respondents sought to rely in the case of *Moses Kirui Toroitich v County Secretary, County Government of Baringo and 2 Others* (2021) eKLR, where the Court agreed with the Respondent counsel's argument stated that transfer or deployment of staff is a management prerogative and which the court will on very rare and exceptional circumstances interfere with.
14. The Respondents further submit that the circular dated 23/12/2022 does not in any way contravene, violate or infringe on the provisions of Articles 10, 27(8) and 56 and Article 232 of the *Constitution*. They had reliance in *Mumo Matemo v Trusted Society of Human Rights Alliance and 5 Others* (2013) eKLR where the court opined thus: -
- ‘a petition should set out with a degree of precision the petitioner’s complaint, the provisions infringed and the manner in which they are alleged to be infringed.’
15. It is their submission that the Petitioners have merely recited Constitutional provisions and principles and have not shown clearly through evidence the way and manner in which any of the Respondents have contravened, infringed or violated the cited Constitutional provisions.
16. It is the Respondents' prayer that the Petitioners suit be dismissed with costs.

### **Analysis and Determination**

17. I have considered the petition, the reply filed by the Respondents and the Respondents' submissions. The issues that fall for determination are:
- i. Whether this Court has jurisdiction to determine this petition.
  - ii. Whether the Petitioners deserve the reliefs sought.



## Whether this Court has the jurisdiction to determine this Petition

18. Nyarangi J in *Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited* [1989] eKLR, had this to say on jurisdiction: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

19. This Court’s jurisdiction in the petition herein, is challenged on the premise of the appellate jurisdiction given to the Public Service Commission under Article 234(2)(i) of the *Constitution* and Sections 87 and 85 of the *Public Service Commission Act* read with Section 77 of the *County Government Act*.

20. Section 87(2) of the *Public Service Commission Act* states: -

“(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 service unless the procedure provided under this Part has been exhausted.”

21. In *Lukale Moses Sande v the County Government of Kakamega & 3 Others* Cause No. 23 of 2020, the Court had this to say on exhaustion of internal mechanisms: -

“The Claimant did not exhaust the appeal procedures in respect to his removal, purported removal and or terms and conditions of service as contemplated by the *Constitution*, the County Government Act and the *Public Service Commission Act*, before moving this court, and the court therefore declines jurisdiction.”

22. Further in *Susan Wanjiru Mwai & 65 Others v County Government of Kirinyaga & 2 Others*, the Court declined jurisdiction premised on the failure of the Applicants to exhaust internal mechanisms on dispute resolution.

23. The decision subject of the petition herein, is one that arose from the County Government Public Service, and which then squarely falls under the mandate of the PSC in the first instance. This then confirms that before the parties herein exhaust this available alternative dispute resolution mechanism, this Court’s jurisdiction is ousted.

24. In light of the foregoing, I find and hold that this suit offends the doctrine of exhaustion, and this Court lacks jurisdiction to hear and determine the petition.

25. The petition is struck out with no orders on costs.

26. Judgment of the court.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 19<sup>TH</sup> DAY OF OCTOBER, 2023.**

**CHRISTINE N. BAARI**



## **JUDGE**

Appearance:

N/A for the Petitioners

Ms. Achieng h/b Mr. Okong'o for the Respondents

Christine Omolo & Erwin- C/As

