



**Ngei v Chief Officer, Public Service Management & Devolution; Migori  
County Public Service Board (Interested Party) (Judicial Review  
E024 of 2023) [2023] KEELRC 2447 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2447 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
JUDICIAL REVIEW E024 OF 2023  
CN BAARI, J  
OCTOBER 12, 2023**

**BETWEEN**

**CPA, MARVIN OMONDI NGEI ..... APPLICANT**

**AND**

**THE CHIEF OFFICER, PUBLIC SERVICE MANAGEMENT &  
DEVOLUTION ..... RESPONDENT**

**AND**

**MIGORI COUNTY PUBLIC SERVICE BOARD ..... INTERESTED PARTY**

**RULING**

1. Before Court is a Notice of Preliminary Objection filed by the Respondent seeking the striking out of the Ex Parte Applicant's motion on the premise that it is incompetent on account of jurisdiction.
2. Ms. Achieng, Counsel for the Respondent argued that the proceedings herein, relate to recruitment, selection and appointment of persons to a county government public service. It is the Respondents' assertion that Section 77 of the *County Government Act*, grants jurisdiction to the Public Service Commission (PSC) to determine disputes arising from the County Government Public Service in form of appeals.
3. It is the Respondent's argument, that Section 87 (2) of the *Public Service Commission Act*, provides that a person shall not file any matter within the jurisdiction of the PSC, and that the provisions are couched in mandatory terms and go to the jurisdiction of the court to hear this matter in the first instance.
4. The Respondent further argues that a party must exhaust these requirements before coming to court. They sought to rely in the cases of *Secretary, County Public Service Board & another v Hulbbhai Gedi*



- Abdille* [2017] eKLR and *Odongo v Nakuru County Public Service Board & 5 others*; to buttress this position.
5. It is the Respondent's further submission that the motion offends the doctrine of exhaustion enshrined in Article 159 (2)(c) of *the Constitution*, on the basis that an appeal before the PSC is both a statutory and a Constitutional requirement, which must be pursued before the jurisdiction of this Court is invoked.
  6. It is the Respondent's further submission that proceedings in this matter were commenced contrary to Section 9 (2) of the *Fair Administrative Actions Act* (FAAA), which requires that a court shall not review an administrative action unless mechanisms including internal mechanisms for appeal or review are exhausted.
  7. Ms. Achieng also submitted that the Applicant lodged the judicial review proceedings herein, without obtaining leave to do so.
  8. Mr. Lusi appearing for the Ex Parte Applicant, opposed the objection arguing firstly, that the Court certified the application as urgent, and further granted leave to the Applicant to institute judicial review proceedings, and that it is pursuant to that leave that he filed the substantive judicial review motion subject of the instant objection.
  9. It is Counsel's submission that the Applicant moved this court urging that the Respondent has violated specific provisions of *the Constitution*, being Articles 27, 29, 36, 38, 47, 50(1) and the Fourth Schedule to *the Constitution* and that the subject matter herein, is not merely a question of recruitment and appointment of employees.
  10. It is the Applicant's further submission that the Respondent has arrogated itself policing functions reserved for the National Government under the *Police Service Act*. It is their further argument that Article 234 of *the Constitution* and Section 85 of the *PSC act* clearly identifies what is appealable to the PSC, while the subject matter spelt out under paragraphs 7A-G, does not include a determination of grievances that the Ex Parte Applicant has submitted to Court. Reliance was had to the case of *Abdikadir Suleiman v County Government of Isiolo & another* [2015] eKLR to emphasis this position.
  11. The Ex Parte applicant further argues that the P.O herein, is not merited. It is Counsel's argument that the judicial review proceedings were instituted as a matter of public interest as the Applicant did not apply for any position at the county, and is only alleging violation of *the Constitution* and for which he seeks opportunity to ventilate. He sought to rely in *R v. Firearms Licensing Board & Another Exparte Boniface Mwaura* (2019) eKLR to underscore the authority of this Court when sitting as a Judicial Review Court
  12. It is submitted that no alternative remedy is available to express the issues raised. Counsel further argues that a fundamental requirement under Section 9(2) of the *FAAA*, is that the alternative remedy must be capable of regressing the issues raised.
  13. Counsel concludes by submitting that the grievances before Court, cannot be remedied elsewhere and pray that the P.O be dismissed.

## Determination

14. I have considered the objection and the oral submissions by both parties. The issue for determination is whether this Court has the jurisdiction to hear and determine the Ex parte Applicant's Judicial Review Motion.



15. Nyarangi J underscored the place of jurisdiction in the case of *Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Limited* [1989] eKLR, as follows: -

“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.”

16. The first issue for determination is whether Article 234(2)(i) as read with Section 77 of the *County Government Act* and Section 87(2) of the *Public Service Commission Act*, 2017, oust this Court’s jurisdiction to entertain this the motion.

17. Section 77 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) .....
  - (e) .....

18. 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.”

19. The issue in dispute herein, is the termination of casual employees of the Respondent and the advertisement of positions meant to replace the causal employees. The Ex parte Applicant’s contention is that the mandate to recruit is that of the County Public Service Board and not the Respondent’s.

20. It is the Applicant’s contention that the Respondent has violated specific provisions of *the Constitution*, being Articles 27, 29, 36, 38, 47, 50(1) and the Fourth Schedule to *the constitution* and that the subject matter herein, is not merely a question of recruitment and appointment of employees



21. The Applicant further contends that he did not apply for any position in the county government of Migori as to be subjected to the requirements of Section 77 of the *County Government Act*, and the provisions of the *Public Service Commission Act* cited by the Respondent in the preliminary objection.
22. Section 77 (1) of the *County Government Act* states:

“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.”
23. The provisions of the *County Government Act* are clear that any one can invoke the appellate power of the Public Service Commission (PSC) in respect of decisions made by a County Public Service Board or a person exercising or purporting to exercise disciplinary control against an officer of the county government. The Ex Parte Applicant is thus not excluded from the appellate mandate of the PSC for reason only that he did not personally apply for any position.
24. Secondly, it is now settled that where there exists other sufficient and adequate avenues to resolve a dispute, a party ought to pursue that avenue and not invoke the court process, if the dispute is one that can be dealt with in the alternative forum. In the case of *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR, the Court of Appeal stated thus: -

“....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 observed without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions....”
25. Further 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.”
26. The Judicial review proceedings herein, were initiated on the basis of violation of specific fundamental rights and freedoms and which have been spelt out in the Applicant’s substantive judicial review motion.
27. The alleged violations are not part of what is contemplated to constitute appeals to the PSC under Article 234(2)(i) as read with Sections 77 of the *County Government Act* and Sections 85,86 and 87 of the *Public Service Commission Act*, 2017.
28. Further, the Applicant seeks judicial review orders which are matters/orders the PSC has no power to grant. I thus return that the issues raised under the motion cannot be remedied elsewhere other than before court.
29. In light of the foregoing, I find the Preliminary Objection lacking in merit and is hereby dismissed with costs.
30. Orders of the Court.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 12<sup>TH</sup>  
DAY OF OCTOBER, 2023.**

**C. N. BAARI**

**JUDGE**

