



**Kiindu & 2 others v Kitui County Public Service Board & 3 others;  
Musyoki & 12 others (Interested Parties) (Petition E093 of 2022)  
[2023] KEELRC 3053 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3053 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E093 OF 2022  
J RIKA, J  
NOVEMBER 30, 2023**

**BETWEEN**

**STANLEY MUNYOKI KIINDU ..... 1<sup>ST</sup> PETITIONER  
CENTRE FOR HUMAN RIGHTS AND CIVIC EDUCATION . 2<sup>ND</sup> PETITIONER  
ROSEMARY MUTHONI KIMATHI ..... 3<sup>RD</sup> PETITIONER**

**AND**

**KITUI COUNTY PUBLIC SERVICE BOARD ..... 1<sup>ST</sup> RESPONDENT  
THE COUNTY GOVERNMENT OF KITUI ..... 2<sup>ND</sup> RESPONDENT  
THE GOVERNOR, KITUI COUNTY ..... 3<sup>RD</sup> RESPONDENT  
THE CECM, FINANCE, ECONOMIC AND REVENUE  
MANAGEMENT ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**SHADRACK KIVUVA MUSYOKI ..... INTERESTED PARTY  
ROSALINE MUKAMI NJIRU ..... INTERESTED PARTY  
JOEL NZYOKI NDIINGI ..... INTERESTED PARTY  
JACOB MUTISYA MAINGI ..... INTERESTED PARTY  
PHILLIP MUSYOKI KIEMA ..... INTERESTED PARTY  
FERNANDES MBINDU MULI ..... INTERESTED PARTY  
GILLIAN JANE WAMBUA ..... INTERESTED PARTY  
REDEMPTA MARY MALITI ..... INTERESTED PARTY  
THOMAS JUMA KIEMA ..... INTERESTED PARTY**



**AUGUSTUS MUSILI KIEMA ..... INTERESTED PARTY**  
**PETER MWEU NGULI ..... INTERESTED PARTY**  
**FRANCIS KITHUKA MUSYOKA ..... INTERESTED PARTY**  
**LAWRENCE MULATYA NDUVA ..... INTERESTED PARTY**

## **RULING**

1. The 1<sup>st</sup> and 3<sup>rd</sup> Petitioners are residents of Kitui County. The 2<sup>nd</sup> is a Civil Society Organization, based at the Kitui County.
2. The Respondents are the County Government of Kitui, its Organs and Executive Officers. The Interested Parties, are Employees of the County Government of Kitui.
3. The Petitioners allege that the Interested Parties were employed by the Respondents un-procedurally, to various positions.
4. The Petitioners pray for orders that: -
  - a. Declaration is made that all the appointments made pursuant to the advert dated 21<sup>st</sup> July 2021, published and circulated by the Respondent pursuant to Section 45 [1][a] of the County Governments Act No. 17 of 2012, declaring various vacancies in the Kitui County Public Service, were unconstitutional and are hereby set aside.
  - b. The Chairperson and Members of the County Public Service Board to reimburse all the funds lost by the County Government of Kitui as a result of the impugned appointments, personally, jointly and severally.
  - c. Respondents to bear the costs of the Petition.
5. The 1<sup>st</sup> Petitioner explains in his Affidavit sworn on 3<sup>rd</sup> June 2022, that the Respondent [it is not specified which Respondent] advertised for job vacancies. There was no shortlisting or interviews after advertisement. The Respondents nonetheless went ahead and employed the Interested Parties to various positions.
6. The Petitioners state that they were aggrieved, and on 24<sup>th</sup> March 2022, they filed an Appeal before the Public Service Commission. They were apprehensive that the Appeal would take long to conclude, and thought it prudent to approach the Court to avoid their dispute from being rendered moot. Some of the appointments made, are based on contract, which the Petitioners fear, would have lapsed in event resolution of the dispute is prolonged.
7. The 12<sup>th</sup> Interested Party filed a Notice of Preliminary Objection dated 29<sup>th</sup> March 2023. Objection is founded on the doctrine of exhaustion. It is submitted that having submitted themselves to the jurisdiction of the Public Service Commission, the Petitioners cannot sustain this Petition parallel with the proceedings before the Public Service Commission.
8. It was directed that the Preliminary Objection is canvassed by way of Written Submissions. It was confirmed by the Petitioners and the 12<sup>th</sup> Interested Party, at the last mention before the Court on 19<sup>th</sup> September 2023, that they had filed and exchanged their Submissions.
9. The Petitioners submit that they have the right to present their Petition under Article 22 of the Constitution. This right cannot be limited by provisions such as Section 77 of the County Governments



- Act, under which the Appeal at the Public Service Commission was made. They have the right to institute this Petition, without any limitation. A statute purporting to oust Article 22 of the Constitution is a nullity. It should be disregarded. Parliament did not enact Section 77 of the County Governments Act, with the intention of creating a stumbling block, to the right of access to justice. The Petitioners submit that Section 77 of the County Governments Act has been abused for 10 years, and it is the high time it was repealed. The Petitioners need conservatory orders, which cannot be obtained at the Public Service Commission.
10. In Zena Achieng' Mohamed v County Public Service Board of Kilifi & 6 others [2021] eKLR, the Court held that a Party seeking interim reliefs, should not be locked out by the Court, on the basis of the doctrine of exhaustion, because if the subject of the Appeal before the Public Service Commission dissipates, the ultimate decision by the Commission will be an exercise in futility.
  11. Lastly, the Petitioners submit that the Court has the power under Article 23 of the Constitution of Kenya to declare statutes as invalid and unconstitutional. The Court is asked to declare Section 77 of the County Governments Act as invalid and unconstitutional.
  12. The 12<sup>th</sup> Interested Party submits that it is not disputed that the Petitioners lodged an Appeal before the Public Service Commission. They have submitted themselves to the jurisdiction of the Public Service Commission. They have not exhausted the special procedure under the County Governments Act, before coming to Court. They disclose that they came to Court because they were impatient with the procedure under the County Governments Act.
  13. Article 234 [2] of the Constitution sets out the functions of the Public Service Commission, which include, to hear and determine Appeals, with regard to County Governments' Public Service.
  14. Section 75 mandates the County Public Service Board to investigate matters within the County Public Service, where it has reason to believe there is fraud or irregularity. It is empowered to revoke such decisions, direct commencement of the process afresh, or take corrective action, including disciplinary process.
  15. Section 77 of the County Governments Act, allows any person, dissatisfied or affected by a decision made by the County Public Service Board or by a person in exercise or purported exercise of disciplinary control against any Public Officer, to appeal the decision at the Public Service Commission.
  16. These provisions are underscored by Sections 85 and 86 of the Public Service Commission Act No. 10 of 2017. The doctrine of exhaustion requires that, if an administrative remedy is provided by statute, a Claimant must seek relief from the administrative body, before seeking judicial relief.
  17. Section 9 of the Fair Administrative Action Act No. 4 of 2015 states that the Court shall not review administrative actions or decisions, unless the mechanisms, including internal mechanism for appeal or review and all remedies available under any written law, are first exhausted. The Court shall direct that the mechanisms are exhausted, if not satisfied the Applicant has exhausted the mechanisms.
  18. In William Odhiambo Ramogi & 3 others v the Attorney-General & 4 others; Muslims for Human Rights & 3 Others [Interested Parties] [2020] eKLR, the Court explained that the doctrine of exhaustion serves the purpose of ensuring that there is postponement of judicial consideration of matters, to ensure that a party is first of all, diligent in the protections of his own interest within the mechanisms in place for resolution outside the Courts.
  19. The 12<sup>th</sup> Interested Party concludes that the Court lacks jurisdiction, to hear and determine the matters raised in this Petition. The 12<sup>th</sup> Interested Party asks the Court to dismiss the Petition with costs to the 12<sup>th</sup> Interested Party.



## The Court Finds : -

20. It is not contested that the Petitioners filed an Appeal at the Public Service Commission against the same actions and decisions subject matter of this Petition, pursuant to Section 77 of the [County Governments Act](#), as read with Sections 85 and 86 of the [Public Service Commission Act](#).
21. They explain that they were apprehensive the process at the Public Service Commission would take long, and there was real possibility that the substratum of their dispute, would collapse. They came to Court because of this apprehension. They submit that Section 77 of the [County Governments Act](#) is an impediment to their right of access to justice, and they urge the Court, in exercise of its mandate under Article 23 [d] of [the Constitution](#), to declare the said law invalid and unconstitutional.
22. There are various reasons why this Court does not agree with the Petitioners, on this unusual plea, for the Court to declare Section 77 of the [County Governments Act](#) invalid and unconstitutional.
23. The Petitioners have already invoked Section 77 of the [County Governments Act](#), by lodging an Appeal to the Public Service Commission. They do not suggest what will happen to their Appeal if the law they invoked is invalidated. They have not explained to the Court why they approached the Public Service Commission under a law they believe to be constitutionally infirm.
24. The Court does not think it is the proper jurisdiction, for Parties to seek declaration of statutes to be invalid and unconstitutional, following the well-publicized, and seismic decision of the Court of Appeal in [National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 Others](#) [2023] KECA 80 [KLR] [3<sup>rd</sup> February 2023] [Judgment].
25. Even if this Court is clothed with jurisdiction, the Petitioners have not moved the Court substantively, to declare the particular law invalid and unconstitutional. They seek to have the declaration made, through their submissions in response to the Preliminary Objection. This is a most unorthodox way of seeking the removal of a provision of the law, from the statute books.
26. Litigants ought to appreciate that statutes do not just happen to be in place; there is a rigorous legislative process, preceding enactment of statutes. The process involves many hours of parliamentary debate by well-educated Legislators, against the background of rigorous public engagement. Statutes should not be declared invalid and unconstitutional at the drop of a hat. In every litigation, Courts should presume statutes enacted by Legislature to be valid and constitutional. Declaration of invalidity and unconstitutionality ought not to be made through preliminary proceedings. The Court does not think that even if it was mandated to act as proposed by the Petitioners, that it would so act, on a Preliminary Objection.
27. And what is to be done with regard to Sections 85 and 86 of the [Public Service Commission Act](#), in advancing the Petitioner's position? The problem is larger than statutes; there is an Article of [the Constitution](#), anchoring this dispute settlement mechanism.
28. Article 234 [2] [i] of [the Constitution](#), mandates the Public Service Commission to hear and determine appeals in respect of County Governments' Public Service. The dispute resolution mechanisms under the [County Governments Act](#) and the [Public Service Commission Act](#), have constitutional anchorage under this Article and cannot be wished away, through declaration of invalidity and unconstitutionality, in whatever jurisdiction. Is the Court to declare Article 234 [2] [i] of [the Constitution](#), unconstitutional?



29. The Court does not think that Parliament or *the Constitution*, intended that the dispute resolution mechanisms under Article 234 [2] [i] of *the Constitution*; Sections 77 of the *County Governments Act*; and Sections 85 and 86 the *Public Service Commission Act*, run parallel with judicial proceedings.
30. The *Fair Administrative Action Act*, under Section 9, is clear that parallel judicial and administrative proceedings are not intended by the law. Alternative administrative remedies and processes must be exhausted, before judicial process is invoked.
31. The Court does not buy the argument that recourse to the administrative process is laborious and would lead to dissipation of the substratum of the subject matter of the dispute. The Public Service Commission is not limited to dealing with the substantive dispute; it can be requested and persuaded by any Appellant, to grant provisional measures. The substratum of the dispute can be protected through the Public Service Commission. Its mandate under Article 234 [2] [i] of *the Constitution*, is broad. It includes the mandate to make provisional and final decisions. The *Public Service Commission [County Appeals Procedures] Regulations, 2022* provide for preliminary proceedings, interim applications and preliminary objections. Regulation 13 allows any party to the Appeal, to apply for any orders or directions to the Commission, before the Appeal is heard and determined. Conservatory measures can be sought before the Commission. The submission about delay in hearing of the Appeal, and dissipation of the substratum, has no weight.
32. The judicial authority cited by the Petitioners, Zena Achieng' Mohamed, was made during an era when the appellate procedure at the Public Service Commission was perhaps, not adequately facilitated through Regulations. The Regulations have enhanced the procedure, but perhaps the Public Service Commission should have the procedure sufficiently devolved, to save Litigants from the Counties from traveling all the way to Nairobi, to seek redress.
33. Access to justice has not been impeded. The Regulations above, have made justice for the Petitioners fully accessible at the Public Service Commission.
34. The Court is satisfied that it does not have jurisdiction to hear and determine the Petition. It is not in this Court's jurisdiction to declare statutes invalid and unconstitutional. It is not in the jurisdiction of the Court to hear and determine matters arising from the County Public Service, which have been presented on Appeal before the Public Service Commission. The Public Service Commission, with the adoption of the *Public Service Commission [County Appeals Procedures] Regulations, 2022*, is now a self-contained dispute resolution mechanism, with little or no need for judicial assistance or intervention. The doctrine of exhaustion must be faithfully embraced by aggrieved County Public Servants and Parties interested in disputes involving County Public Service.

**It is Ordered :-**

- a) The Preliminary Objection is upheld and the Petition declined.
- b) Costs of the Petition to the 12<sup>th</sup> Interested Party, to be borne by the Petitioners.
- c) No order on the costs with regard to the rest of the Parties.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS 2020, THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023.**

**JAMES RIKA**

**JUDGE**

