



**Republic v Secretary, Bungoma County Public Service Board & 2  
others; Munyapara (Exparte Applicant) (Judicial Review E002 of 2023)  
[2023] KEELRC 3158 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3158 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
JUDICIAL REVIEW E002 OF 2023  
JW KELL, J  
NOVEMBER 29, 2023**

**BETWEEN**

**REPUBLIC OF KENYA ..... APPLICANT**

**AND**

**THE SECRETARY, BUNGOMA COUNTY PUBLIC SERVICE  
BOARD ..... 1<sup>ST</sup> RESPONDENT**

**BUNGOMA COUNTY GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**BUNGOMA COUNTY HUMAN RESOURCE DIRECTOR ... 3<sup>RD</sup> RESPONDENT**

**AND**

**BONIFACE TOME MUNYAPARA ..... EXPARTE APPLICANT**

**RULING**

(On notice of preliminary objection filed in court on the 6th september 2023)

1. The Exparte Applicant vide Chamber Summons Ex Parte Application dated 14<sup>th</sup> August 2023 sought for leave to be granted to apply for judicial review Prerogative Orders of Prohibition, Certiorari and Mandamus. The Leave was granted vide Order of Justice Wasilwa sitting under the vacation rules on the 16<sup>th</sup> August 2023. The Application was then fixed for inter-partes hearing on other prayers sought in the application.
2. The Ex Parte Applicant pursuant to the leave granted by the Court filed Judicial Review Application vide Notice of Motion Under Order 53 Rule 3(1) of the Civil Procedure Act dated 18<sup>th</sup> September 2023 seeking the following reliefs:-



- a. That pending the filing and determination of the substantive judicial review application herein , the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents be and are hereby prohibited from violating and continuing to violate the rights of the Ex Parte Applicant who is a person living with disability in his service to the public in the county.
  - b. Pending the filing and determination of the substantive judicial review application herein , the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents be and are hereby compelled to reinstate the monthly salary from the April 2023 and other allowances attached thereto.
  - c. Pending the filing and determination of the substantive judicial review application herein, the Respondents be and are hereby compelled to reinstate the Applicant and assign him a station as meat grader/senior manager at the Webuye slaughter house.
  - d. That the Costs of the Application be awarded to the Exparte Applicant.
3. The Notice of Motion was premised on the grounds that the Respondents failed to follow the law and procedures in place to ensure fairness and impartiality in service. That the Exparte Applicant is a person living with disability and his salary was stopped since the month of April without notice and due procedure. That the Respondents did not follow due procedure when they decided to dismiss the Exparte Applicant from employment.
  4. The Exparte Applicant filed undated verifying affidavit and documents in support of his case and statutory statement filed with the Chamber summons on 15<sup>th</sup> August 2023.
  5. The Respondents entered appearance through the law firm of Makokha Wattanga and Luyali Associates on the 6<sup>th</sup> September 2023 and filed grounds of opposition and notice of preliminary objection on even date. The Respondents further filed a substantive response to the suit vide Replying affidavit of Joseph Kisindai sworn on the 5<sup>th</sup> September 2023 and receive din court on the 6<sup>th</sup> September 2023.
  6. The point of law, from the document titled grounds of opposition and preliminary objection in the opinion of the court was:- “That the Honourable court lacks jurisdiction to hear and determine this claim by virtue of section 77 of the County Governments Act and section 87 of the Public Service Commission Act. “The other issues were on joinder of parties which is not an issue fatal to the suit. Order 1, rule 9 of the Civil Procedure Rules provides: “No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”
  7. The Court directed that the Notice of Preliminary objection be canvased first by way of written submissions as it raised issues of jurisdiction.
  8. The parties complied and filed their written submissions. The Exparte Applicant’s Written submissions drawn by Oira & Company Advocates were undated and received in court on the 16<sup>th</sup> October 2023. The Respondent’s written submissions were dated 30<sup>th</sup> October 2023 and drawn by Makokha Wattanga & Luyali Associates were received in court on the 31<sup>st</sup> October, 2023.

### **Determination**

9. The issue for determination is whether the Court has jurisdiction to hear and determine the suit.



### **The Respondent's submissions**

10. The Respondents submit that the Honourable Court has no jurisdiction to hear and determine this suit pursuant to section 77 of the County Government Act 2012 and section 87 of the [Public Service Commission Act](#), 2017.
11. The Respondent relied on the definition of jurisdiction as the court's power to entertain, hear and determine a dispute before it. The Respondent relied on the Supreme Court of Kenya decision in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited (2012)e KLR where the Court held, "a court jurisdiction flows from [the Constitution](#) or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by [the Constitution](#) or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred by law"
12. To buttress its submission and objection the Respondent relied on decisions of the Court holding it had no first instance jurisdiction pursuant to section 77 of the County Government Act being Hussein Wanyama Mulebo & 5 others v County Public Service Board & 2 others (2022)e KLR and Ismael Noo Onyango & another v Siaya County Public Service Board and another (2018)e KLR .
13. The Respondents further relied on the decision of the Court of Appeal in Secretary of County Public Service Board and Another v Hulbhai Gedi Abdulla (2017)e KLR where while allowing the appeal on the basis that the Respondent had failed to utilise the process under section 77 of the [County Governments Act](#) the Court of Appeal held :- "There is no doubt that the Respondent initiated the Judicial review proceedings in disregard to dispute resolution mechanism availed under section 77 of the Act."
14. The Respondent further relied on the decision of the Court of Appeal in Speaker of the National Assembly V James Njenga Karume(1992) e KLR where it was held that where there is a clear procedure for redress of any particular grievance prescribed [the Constitution](#) or an Act of Parliament that procedure ought to be strictly followed. The Respondent submits that the Ex Parte Applicant ought to have filed the dispute before the Public Service Commission within 90 days of it arising.

### **Ex Parte Applicant submissions**

15. The Ex Parte Applicant submits on the point of law on jurisdiction of the court and states that the Court has original and appellate jurisdiction in all employment and labour matters including constitutional issues under such matters pursuant to Article 162(2)(b) of [the Constitution](#).
16. The Exparte Applicant further submits that the Court enjoys jurisdiction under Section 12 of the [Employment and Labour Relations Court Act](#) and that the employment relationship is not in dispute between the parties.
17. The Exparte Applicant states that on the 22<sup>nd</sup> October 2020 his contract was extended up to 13<sup>th</sup> September 2025 when he is expected to retire. That he was never assigned and posted to any station, being meat grader to head a slaughter house.
18. That he received a show cause letter dated 5<sup>th</sup> April 2023 on the 24<sup>th</sup> April 2023 which was 3 weeks later. That the show cause was supposed to be a warning letter but instead was a disciplinary letter copied to the salary department and his salary was immediately stopped.
19. The Ex Parte Applicant submits that the gist of the Judicial Review Application is about the manner in which the Respondents had proceeded to stop the salary of the Ex Parte Applicant without following



due procedure and failing to perform the administrative actions. That the Application was based on fundamental rights and freedoms under *the Constitution* contravened by the Respondents.

20. The Ex Parte Applicant submits that that Section 77 of the County Government Act uses the word ‘may’ suggesting that the applicant had an option to appeal on the omissions or take any other legitimate action such as filing the present suit. That he was questioning the administrative commissions committed by the Respondents for failure to assign him a station of work and stopping his salary without following the due process as provided for under article 47 of *the Constitution* on fair administrative action which can only be resolved by the High Court and not the Commission.
21. The Ex Parte Applicant submits that the his case falls outside the exhaustion principle which was the basis of the preliminary objection because in taking the impugned action the Respondents failed to follow the disciplinary procedure under section 76 (1) and (2) of the *County Governments Act* by stopping his salary before conducting a disciplinary action against him.
22. To buttress his case the Ex Parte Applicant relied on the decision of the court in *Abdikadir Suleiman v County Government of Isiolo & Another* (2015)e KLR to submit that the fact that *the Constitution* or legislation vests in a person or authority the power to consider or entertain a given dispute or matter as of first instance or appeal shall not be construed as precluding a court from exercising the relevant jurisdiction in relation to any question whether that person or authority has exercised the powers or functions in accordance with *the Constitution* or any other law.

#### **Analysis of the Law and Decision**

23. The Ex Parte Applicant approached this court arguing that the Respondents had failed to among other things, to promote him and have failed to assign him to any station as a meat grader, which he states is discrimination due to his disability.
24. The Ex Parte Applicant’s Salary was stopped by the Respondents which is among the prayers the Exparte Applicant prays for the release of his salary. The Respondents raised a preliminary objection (undated) and received in court on the 6<sup>th</sup> September 2023 in the Judicial Review Application.
25. The Court considered that the only point of law in the preliminary objection by the Respondents and which the Court will consider in this Ruling was with respect to the question of jurisdiction of the Court pursuant to the provision of section 77 of the *County Governments Act* and Section 87 of the *Public Service Commission Act*.
26. The relevant provisions of the law relied on in the preliminary objection as follows:-
27. Section 77 of the *County Governments Act*:-“(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. (3) An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of the Commission, the circumstances warrant it.”



28. 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.”
29. The Ex parte Applicant relied on the decision in *Abdikadir Suleiman V County Government of Isiolo & Another* (2015) eKLR where it was held that:-
- “In considering the constitutional and statutory provisions that empower the Commission to hear and determine appeals in respect of county governments’ public service, the subject matter is set out in section 77 of the Act, but the decisions the Commission may make are not set out in the Act or *the Constitution*. It is this court’s opinion and holding that in appeals to the Commission, the Commission can only make decisions that the County Public Service Board or relevant lawful authority could have made or vary such decision by simply setting it aside or making a decision that was in the Board’s or the other relevant lawful authority’s jurisdiction to make. The court has guided itself that on appeal the appellate authority applies the same substantive law and facts as applied by the primary authority that made the decision appealed against and generally considers facts as they were presented before the primary authority so that an appellate authority, in absence of anything else, may only set aside the decision appealed against or substitute the decision with any of the remedies that the primary authority was empowered to make. In other words, the appeal process deals with the merits or substance of the case and not procedural or legal propriety of the case.”It flows from this decision that; the Public Service Commission’s appellate power is to exercise the powers that are exercised by the Public Service board by either varying the decision made by the Public Service board or to uphold it.
30. The Ex parte Applicant’s Application questions why the Respondents have failed to promote him as a meat grader despite having achieved various qualifications and training and yet they have deployed unqualified persons to so act and stopping his salary. I do find that this is an issue about merit of the decision of the Respondents.
31. 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 Ex parte Applicant stated that he has not been promoted nor deployed to a work station as a Meat Grader and his salary was stopped before a disciplinary hearing was conducted.
32. 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 and promotion.
33. The County Public Service Board has the power to assign employee’s positions and to reinstate salaries, it then follows that the Public Service Commission in exercising its appellate jurisdiction can make a recommendation of re-assigning an employee or reinstating their salary or upholding the County Public Service Board’s decision and considering the grounds for promotion advise the County Public Service Board.
34. The Ex Parte Applicant being dissatisfied with the alleged failure by the Respondents, the Public Service Board, one among them, which in consultation with the County Executive sets the terms



- of contract for employees and processes their salary was mandated to apply to the Public Service Commission to review the decision of the County Public Service Board.
35. There is no proof that the Public Service Commission cannot entertain a review from a person with disability, as the Commission's mandate mirrors the mandate of the County Public Service Board.
  36. The Ex Parte applicant produced the Pay slip of December 2022, which designated him as a Chief Animal Health Assistant. The mandate to deal with promotions of employees falls within the scope of the County Public Service Board. To claim that the Service Board has failed to act means that then the Public Service Commission can compel the Board to act or also maintain the said status as the Service Board.
  37. It is the finding of the Court that since the Abdikadir decision of 2015 (supra) jurisprudence under section 77 of the County Government Act has evolved pursuant to legislation of section 87(2) of the [Public Service Commission Act](#) making the exhaustion of the Public Service Commission jurisdiction mandatory and with the Court of Appeal pronouncing itself in Secretary County Public Service Board & another v Hulbhai Gedi Abdile [2016] eKLR as follows: 'There is no doubt that the respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by Section 77 of the Act. The section provides not only a forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one, specifically tailored by the legislators to meet needs such as the respondent's. 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. The court said 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.'
  38. Similar to Hulbhai Gedi Abdile case, what is before me is a Judicial Review Application questioning the process leading to the Respondents' decisions. The case relates to the terms of service and remuneration of the Ex Parte Applicant that are determined by the County Public Service Board. The County Public Service Board having allegedly failed to promote or deploy the Ex Parte Applicant as Meat Grader and stopping his salary are matters appealable to the Public Service Commission for its review under Section 85 of the [Public Service Commission Act](#).
  39. Section 85 of the [Public Service Commission Act](#) reads:- "85. 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."
  40. The Court of Appeal in the case of Secretary, County Public Service Board & Another vis- Hulbhai Gedi Abdile (2017) eKLR in allowing appeal against decision of the High Court which had assumed



jurisdiction in an application challenging the process leading to a decision by a County public service board held 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”.

41. The Ex Parte Applicant submits that his case was outside the exhaustion principle for failure to comply with section 76(1)(2) of the County Governments Act which states:- “76. Prohibition of punishment contrary to the Constitution (1) In exercising its disciplinary powers, the County Public Service Board shall observe the principles of natural justice. (2) No public officer may be punished in a manner contrary to any provision of the Constitution or any Act of Parliament.” It is my finding that whether or not the decision of the Respondents complied with this procedure it is still a decision of the Respondents amenable to the jurisdiction of the Public Service Commission as provided for under section 85 and 87 of the Public Service Commission Act. The Court notes that unlike section 77 of the County Governments Act which appears to be optional, the law has since evolved to make the process under Public Service Commission mandatory under subsequent section 87 (2) of the Public Service Commission Act of 2017 which 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 public service unless the procedure provided for under this Part has been exhausted.”
42. It is my holding that the Ex Parte Applicant was mandated to in the first instance file appeal with the Public Service Commission relating to the issues raised in the instant suit. I finds the timeline is extendable under section 86 of the Public Service Commission Act to wit “86(2) An appeal under subsection (1) shall be in writing and made within ninety days from the date of the decision: Provided that the Commission may consider an appeal out of time if, in the opinion of the Commission, the circumstances warrant it.”
43. In the upshot, considering that the issues raised by the Ex Parte Applicant, relates to his terms of service and remuneration, the said issues fall within the mandate of the Public Service Board and are therefore, pursuant to Section 77 appealable to the Public Service Commission in the first instance.
44. In Conclusion I hold that the Court’s jurisdiction was invoked prematurely. The Preliminary Objection filed in Court on the 6<sup>th</sup> September 2023 is upheld for failure to exhaust the appeal mechanism before the Public Service Commission. The Judicial Review Application dated 18<sup>th</sup> September 2023 together with all the applications therein is struck out.
45. Taking into consideration the facts raised by the Ex Parte Applicant in the Application and to temper justice with mercy I make no order as to costs.
46. It is so Ordered.

**DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 29<sup>TH</sup> NOVEMBER 2023.**

**JEMIMAH KELI,**

**JUDGE.**



In The Presence Of:-

Court Assistant : Brenda Wesonga

For Claimant : Oira

For Respondent:- Makokha

