



**Cheruiyot v County Government of Uasin Gishu Public Service Board & 4 others
(Petition 10 of 2019) [2023] KEELRC 2874 (KLR) (2 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2874 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
PETITION 10 OF 2019
MA ONYANGO, J
NOVEMBER 2, 2023**

BETWEEN

DANIEL CHERUIYOT PETITIONER

AND

**COUNTY GOVERNMENT OF UASIN GISHU PUBLIC SERVICE
BOARD 1ST RESPONDENT
UASIN GISHU COUNTY 2ND RESPONDENT
COUNTY SECRETARY, UASIN GISHU COUNTY 3RD RESPONDENT
THE MEMBER OF THE COUNTY EXECUTIVE COMMITTEE FOR HEALTH
SERVICES 4TH RESPONDENT
CHIEF OFFICER, HEALTH SERVICE 5TH RESPONDENT**

JUDGMENT

1. The Petitioner herein is an employee of the Public Service Board of Uasin Gishu County, the 1st Respondent herein. The 2nd, 3rd, 4th and 5th Respondents are the County Government of Uasin Gishu, the Secretary to the County Public Service Board, the County Executive Committee Member for Health and the Chief Officer, Health Services of Uasin Gishu County respectively.
2. In the Petition dated 2nd August 2019, the Petitioner alleges that the Respondents breached Article 28, 27(1), 10, 232,236 of *the Constitution* by demoting him without valid reason. The Petitioner seeks the following orders against the Respondents:
 - a. A declaration that the Respondents have contravened the Petitioner’s rights under Article 47 of *the Constitution* by purporting to vary his terms of service without his consent and to be informed in writing the reasons of the intended demotion.



- b. A declaration that the purported deployment as per the letter dated 27/3/2019 is in so far as it affects the Petitioner null and void for contravening Article 41 of *the Constitution*
 - c. A declaration that in making the purported deployment as per the letter dated 27/3/2019, the Respondents offended the National Values and principles set out in Article 10 of *the Constitution*
 - d. A declaration that the Respondents have contravened the guiding principles of leadership and integrity under article 73(2) of *the Constitution*
 - e. A conservative order restraining the Respondents from contravening Articles 10, 47, 73 and 227 of *the Constitution*.
 - f. A conservative order restraining the Respondents from advertising, nominating, appointing or filling anyone to the Petitioner's positions.
3. The Petition is supported by the affidavit of Daniel Cheruiyot, the Petitioner herein.
 4. The Respondents opposed the Petition vide their Answer to the Petition filed on 2nd May 2023.

The Petitioner's Case

5. It is the Petitioner's case that he was employed in 1989 as a Health Records Technician in the Government of Kenya. That on 2nd December 2015 he was deployed as County Health Records and Information Officer, Uasin Gishu, reporting to the County Director of Health and was placed in charge of management and coordination of Health Records and Information Offices, collection, collation and interpretation of health records and information at county level.
6. He contends that vide a letter dated 27th March 2019, the Respondents posted him to Turbo Sub County Hospital as a health records officer which position according to him would take him to the bottom of the ranks to serve at levels lower in rank than a senior officers' level.
7. According to the Petitioner, this posting was not in line with his appointment letter which required him to report to the County Director of Health. He further contends that the said posting order disregards his seniority in Public Service having risen through the ranks and is therefore a demotion.
8. The Petitioner further avers that before the alleged demotion, he ought to have been summoned, given a chance to defend himself and given a fair hearing.
9. The Petitioner avers that under Article 28 of *the Constitution*, employees have inherent dignity and the right to have that dignity respected and protected. According to the Petitioner, demoting him without good reason is in contravention of his inherent human dignity especially in view of the values and principles of Public Service in Article 232 of *the Constitution*.

The Respondents' Case

10. In their response to the Petition, the Respondents aver that vide a letter dated 27th March 2019, the Petitioner was not demoted but was transferred by the 5th Respondent on behalf of the 1st and 2nd Respondents, in exercise of their prerogative as the employer of the Petitioner.
11. According to the Respondents, the Petitioner was not supposed to be subjected to any disciplinary proceedings as this was a normal transfer.
12. The Respondents maintain that the said transfer was horizontal as the Petitioner still earned the same salary and benefits as he did before the transfer.



13. It is the Respondent's Case that the Petitioner's transfer was not arbitrary, but was meant to improve service delivery within the county. That the transfer was pursuant to section B.23 of the 1st Respondent's Human Resource Manual 2015 and the Human Resource Policy & Procedures Manual for Public Service.
14. The Respondents state that the Petitioner appealed against the transfer vide two letters both dated 2nd May 2019 which contents were noted by the Respondents but before the Petitioner's complaints could be addressed, he filed the instant petition.
15. It is the Respondents contention that the employment and labour relations regime in Kenya bestows upon an employer the prerogative to ensure that employees perform their duties as and where they are located and that the transfer of an employee is one such prerogative of an employer subject to reasonable notice to enable the subject employee report to the new station of transfer.
16. The Respondent further filed a notice of preliminary objection dated 14th April 2023 on grounds that:
 - a. The Petition is frivolous, vexatious, ill-conceived and bad in law and an abuse of the court of the process of this honourable court
 - b. The Petition is fatally and incurably defective as it offends the doctrine of exhaustion of the available statutory remedies
 - c. This Petition is fatally and incurably defective as it offends the provisions of section 77(2) of the [County Governments Act](#) and as such cannot stand or be ventilated before this honourable court
 - d. The court's jurisdiction has been prematurely invoked as the petitioner has not exhausted the dispute resolution mechanism established under section 77 of the [County Governments Act](#) and the issues herein ought to be referred to the public service commission for determination at first instance
 - e. The Petition does not meet the threshold of constitutional petition.
17. As directed by the court on 14th June 2023, both the Petition and the Preliminary objection were disposed of by way written submissions.

Respondents' Submissions To The Preliminary Objection

18. In their submissions filed on 27th June 2023 the Respondents submitted that under section 77 of the [County Governments Act](#) 2012 as read together with Clause C.34 of the County Government of Uasin Gishu, Human Resource Policy & Procedures Manual 2015, any decision rendered by the County Public Service Board is subject to appeal to the Public Service Commission.
19. It was the Respondents submission that the Petitioner's grievance ought to have first been referred to the Public Service Commission before the intervention of the court was sought. The case of Secretary, County Public Service Board & Another v Hulbhai Gedi Abdille (2017) eKLR was cited in support of this position.
20. Further, according to the Respondents, under section 85 and section 87(2) of the [Public Service Commission Act](#), the Petitioner is estopped from filing the instant petition before exhausting the procedure provided for in the said provisions of the law. To buttress this position, the Respondents cited the Court of Appeal decision in Nakuru Civil Appeal no. E136 of 2022 as consolidated with Nakuru Civil Appeal No. 137 of 2022, The Clerk, Nakuru County Assembly & 4 others vs Kenneth



Odongo & 7 others eKLR and Geoffrey Muthinja Kabiru vs Samuel Munga Henry & 1756 others (2015) eKLR

21. The court was urged to strike out the Petition in limine with costs to the Respondents as the jurisdiction of this court has been wrongly and prematurely invoked before the exhaustion of other dispute resolution avenues provided by statute.

Petitioner's submissions to the Preliminary Objection

22. The Petitioner on his part filed his submissions dated 6th July 2023 and contended that this court has the jurisdiction to entertain the instant Petition as espoused by Article 162(2)(a) of *the Constitution* and section 12 of the *Employment and Labour Relations Court Act*.
23. The Petitioner submitted that he has made reasonable efforts to exhaust the available remedies albeit with frustrations from the Respondents which informed his decision to approach this court. The Petitioner maintained that he appealed against his transfer which amounted to a demotion in the spirit of exhausting the available remedies through writing a letter to the Respondents but those letters were not respondent to. That this clearly demonstrated the lack of will by the Respondents to grant audience to the Petitioner and therefore justified the approach to this honourable court. The Petitioner cited the case of William Odhiambo Ramogi & 3 Others vs Attorney General & 4 others: Muslims for Human Rights & 2 others (2020) eKLR to support the Petitioner's position.
24. The Petitioner urged this court to dismiss the Preliminary Objection and submitted that the Respondents have failed or refused to grant him a chance to fight for his rights and continue to do so by trying to stop him from seeking justice as the preliminary objection amounts to nothing but obstruction of justice.
25. From the submissions of the rival parties on the preliminary objection dated 14th April 2023, it would be apt that I determine the Preliminary objection first as it may dispose of the Petition.
26. The Court of Appeal has recently had an opportunity to pronounce itself on the question of interpretation of section 77 of the *County Governments Act*, 2012 in the case cited by the Respondents, Secretary County Public Service Board and Another -vs- Hulbhai Gedi Abdulla (2017) eKLR where the court observed:

“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 the only 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.”
27. It is thus settled that the procedure in section 77 of the *County Governments Act* must be exhausted before the court intervention is invoked. Where redress of any particular grievance is prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.
28. Flowing from the above, the instant Petition is premature for failure to exhaust the appellate process established under section 77 of the *County Governments Act* as read with section 87(2) of the *Public Service Commission Act*.
29. Consequently, the preliminary objection dated 14th April 2023 is hereby upheld and the Petition dated 2nd August 2019 is struck out with no orders as to costs.



DATED, DELIVERED VIRTUALLY AND SIGNED AT ELDORET

THIS 2ND DAY OF NOVEMBER, 2023.

M. ONYANGO

JUDGE

