



**Melly v County Government of Uasin Gishu Public Service Board & 4 others  
(Petition 7 of 2019) [2023] KEELRC 2869 (KLR) (2 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2869 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
PETITION 7 OF 2019  
MA ONYANGO, J  
NOVEMBER 2, 2023**

**BETWEEN**

**SAMSON MELLY ..... APPLICANT**

**AND**

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

**JUDGMENT**

1. The Petitioner herein is an employee of the Public Service Board of Uasin Gishu County, the 1<sup>st</sup> Respondent herein. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> 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 2<sup>nd</sup> 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 advertising, nominating, appointing or filling anyone to the Petitioner's positions.
3. The Petition is supported by the affidavit of Samson Melly, the Petitioner herein.
  4. The Respondents opposed the Petition vide their Answer to the Petition filed on 2<sup>nd</sup> May 2023.

### **The Petitioner's Case**

5. The Petitioner averred that at all material times he was an employee of the 1<sup>st</sup> Respondent employed competitively through the 2<sup>nd</sup> Respondent. He secured employment with the Respondent as a Programme Officer - Reproductive Health with effect from 16<sup>th</sup> January 2017 and was later promoted to the position of Chief Registered Nurse, Job group M. His role was based at the County and designated as Senior Officer reporting to the Director, Health Services.
6. The Petitioner states that on 27<sup>th</sup> March 2019, the 5<sup>th</sup> Respondent deployed the Petitioner to Ziwa Sub County Hospital from Uasin Gishu District Hospital to undertake duties as a Nursing Officer.
7. According to the Petitioner, the said deployment would render the services of the Petitioner irrelevant as he is supposed to serve under the Medical Superintendent as indicated in the posting letter.
8. The Petitioner contends that the posting demotes him by several ranks. That before the demotion to the position of a Nursing Officer he was not heard as required under Article 236(b) of the Constitution and has not been subjected to due process of the law. The Petitioner maintains that before the demotion, he ought to have been summoned, heard, 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 a 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 averred that the posting of the Petitioner to Ziwa Sub-County hospital from Uasin Gishu District Hospital vide the letter dated 27<sup>th</sup> March 2019 was not a demotion but rather, a transfer which was done by the 5<sup>th</sup> Respondent on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in exercise of their prerogative as the employer of the Petitioner
11. The Respondents maintain that the Petitioner was transferred and not demoted and that being a transfer, he was not supposed to be subjected to any disciplinary proceedings.
12. The Respondents further aver that the said transfer was horizontal and 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 and was done pursuant to section B.23 of the 1<sup>st</sup> Respondent's Human Resource Manual 2015 and the Human Resource Policy & Procedures Manual for Public Service.
14. The Respondents point out that the Petitioner appealed against the transfer vide two letters both dated 2<sup>nd</sup> 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 at the work place to ensure that employees perform their duties as and where they are allocated and that a 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. Before the Petition was heard, the Respondent filed a notice of preliminary objection dated 14<sup>th</sup> April 2023 based 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 14<sup>th</sup> June 2023, both the Petition and the Preliminary objection were disposed of by way of written submissions.

### **Respondents' submissions to the Preliminary objection**

18. The Respondents in their submissions filed in court on 27<sup>th</sup> June 2023 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. The Respondents submitted 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, counsel for 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 thus 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 6<sup>th</sup> 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 and thus informing 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 responded to which clearly showed the lack of will by the Respondents to grant audience to the Petitioner and therefore occasioning his approach to this honourable court. Counsel for the Petitioner cited the case of William Odhiambo Ramogi & 3 Others vs Attorney General & 4 others and 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, submitting 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. I will determine the Preliminary objection first as it may dispose of the entire 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 this court's intervention is invoked. As observed by the court in the decision above, 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 14<sup>th</sup> April 2023 is hereby upheld and the Petition dated 2<sup>nd</sup> 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**

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**ELRC ELD PET NO. 7 OF 2019 JUDGMENT**

