



**Kenya Union of Clinical Officers v Kajiado County Public Service Board & another
(Cause E483 of 2023) [2023] KEELRC 3392 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3392 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E483 OF 2023
SC RUTTO, J
DECEMBER 20, 2023**

BETWEEN

KENYA UNION OF CLINICAL OFFICERS CLAIMANT

AND

KAJIADO COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT

**THE COUNTY SECRETARY, KAJIADO COUNTY GOVERNMENT 2ND
RESPONDENT**

RULING

1. The genesis of the dispute herein as can be discerned from the Claimant's Notice of Motion and Statement of Claim dated 13th June 2023, is the transfer of the grievant herein, Mr. Ezekiel Meteine Karino, from the headquarters to Loitoktok Sub County Hospital. According to the Claimant, the transfer of Mr. Karino was without clear responsibilities or position at the said hospital.
2. The Claimant further avers that Mr. Karino obeyed the deployment orders and reported to Loitoktok Sub County Hospital. Subsequently, he took his annual leave and appealed his transfer. The Claimant contends that the grievant's efforts to have the transfer formalized or rescinded have been in vain. The Claimant contends that the Respondent's actions of redeploying Mr. Karino are malicious, unprocedural and not based on service need. The Claimant seeks inter alia to have the court declare Mr. Karino's transfer unlawful, null and void.
3. Upon being served with the Notice of Motion and Statement of Claim, the Respondent filed a Response and a Notice of Preliminary Objection both dated 24th August 2023.
4. The Preliminary Objection which is the subject of this Ruling, is premised on the following grounds:
 - i. The court lacks the jurisdiction to hear and determine the matter by dint of Article 234 of *the Constitution* and Section 86 of the *Public Service Commission Act*.



- ii. The matter is sub judice as it is currently pending before the Public Service Commission Appeal board in County Appeal No. 046 of 2023.
5. On 4th October 2023, the Court directed that the Preliminary Objection be canvassed by way of written submissions.

Submissions

6. The Respondent submitted that the Claimant does not contest the facts leading to the Objection and specifically that there exists an appeal at the Public Service Commission. Relying on the determination in the case of *Catherine Gathoni Otenyo v Governor, County Government of Kakamega & 3 others* (2022) eKLR, the Respondent submitted that Article 234 of *the Constitution* has conferred jurisdiction to the Public Service Commission and that the Claimant cannot purport to out the same by reference to Section 74 of the *Labour Relations Act*.
7. Placing reliance on the determination in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1, it was the Respondent's further submission that this Court does not have jurisdiction and should accordingly down its tools.
8. With respect to the question of res judicata, it was the Respondent's further submission that it is not contested that there exists an appeal at the Public Service Commission which is pending ruling. It maintains that the only contest by the Claimant is that it is not a party to the appeal. According to the Respondent, the Claimant has failed to divulge that theirs is a representative suit filed on behalf of the grievant based on the same grounds proffered at the Public Service Appeals Board.
9. The Respondent further submitted that the same appeal is substantially and directly in appeal of the transfer of the said subject herein and which matter pends determination. As such, this matter is no doubt, sub judice. In support of its position, the Respondent relied on the case of *Leonard Omullo v National Land Commission* (2021) eKLR and maintained that the Claimant should not be allowed to abuse the court process.
10. On its part, the Claimant submitted that the referral of the suit to this court is well within the provisions of Section 74(c) of the *Labour Relations Act*. The Claimant further argued that the Preliminary Objection is unmerited for reasons that it is not a party to any appeal pending before the Public Service Commission.
11. It was the Claimant's further submission that the Respondent's Preliminary Objection is unmerited as this court has the original and exclusive jurisdiction under Section 12 of the Employment and *Labour Relations Act* hence the judicial discretion to hear and determine this matter on merit.
12. The Claimant further submitted that the Preliminary Objection does not raise a pure point of law to strike out the Claim as all the grounds relied upon would require proof by way of evidence.
13. In further submission, the Claimant stated that there is no demonstration by the Respondent that its Application and the entire suit offend the set doctrines of res judicata as laid down in the case of *Willie v Michuki & 2 Others* (2004) K.L.R. 357 and that it should therefore not be entertained. The Claimant urged the Court to determine the matter on merit and grant the orders sought.

Analysis and Determination

14. The Respondent's contention is that this Court lacks jurisdiction to hear and determine the matter by dint of Article 234 of *the Constitution* and Section 86 of the *Public Service Commission Act*.



15. Section 86(1) of the [Public Service Commission Act](#) provides as follows:

[86]

- (1) Any person who is dissatisfied or affected by a decision made by any authority or person in respect of a County Government public service may appeal to the Commission against the decision.

16. The power of the Public Service Commission to hear appeals emanating from the decisions of the County Public Service Boards is primarily derived from Article 234 (2) (i) of [the Constitution](#) which provides as follows;

The Commission shall.... hear and determine appeals in respect of county governments' public service....

17. From the foregoing, it is apparent there is an elaborate appeal/review mechanism established under the [Public Service Commission Act](#). More significantly, it is worth noting that the appeal structure flows primarily from [the Constitution](#).

18. The Court further takes note of the provisions of Section 87(2) of the [Public Service Commission Act](#) which provides as follows;

(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.

19. In view of the foregoing, it is apparent that the Claimant has moved the Court prematurely as it is yet to exhaust the dispute resolution mechanisms established under [the Constitution](#) and the [Public Service Commission Act](#).

20. On this issue, I gather support from the determination by the Court of Appeal in the case of [Secretary, County Public Service Board & another v Hulbbai Gedi Abdille](#) [2017] eKLR thus;

“...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.”

21. I fully adopt and reiterate the position taken by the Learned Judges of the Court of Appeal and redirect the Claimant to first seek redress within the established dispute resolution mechanism in the Public Service Commission.

22. The upshot of the foregoing is that this Court lacks jurisdiction to entertain the Application and the Suit as a whole at this instance, and must down its tools. In arriving at this determination, I am guided



by the finding in the case of Owners of the *Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, where Nyarangi JA (as he then was) rendered himself thus;

“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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

23. In the premises, the Court upholds the Preliminary Objection dated 24th August 2023 and strikes out the Notice of Motion Application and the Statement of Claim both dated 13th June 2023, with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2023.

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STELLA RUTTO

JUDGE

Appearance

Mr. Okatch for the Claimant

No appearance for the Respondents

ORDER_

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

