



**Republic v Public Service Commission & another; Kirinya County Public Service Board (Exparte)
(Judicial Review E003 of 2023) [2023] KEELRC 3350 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3350 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
JUDICIAL REVIEW E003 OF 2023
ON MAKAU, J
DECEMBER 20, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

PUBLIC SERVICE COMMISSION 1ST RESPONDENT

KENYA UNION OF CLINICAL OFFICERS 2ND RESPONDENT

AND

KIRINYA COUNTY PUBLIC SERVICE BOARD EXPARTE

RULING

1. This ruling relates to the Notice of Preliminary Objection by 2nd respondent dated 15th September 2023 which seeks for striking out and/or termination of the judicial review application and the proceedings herein for the following orders: -
 - a. The court lacks jurisdiction over the matter.
 - b. The application is time barred.
 - c. The motion is inconsistent with the leave granted.
 - d. The application is fatally defective and bad in law.

Factual Background

2. The applicant dismissed members of the 2nd respondent (grievants) on 8th July, 2019 on account of absenteeism. On 22nd October 2020, the grievants filed an appeal to the 1st respondent (PSC) challenging their dismissal and prayed for reinstatement. Allegedly, the applicant was served with the appeal and a request for response but it failed to file any.



3. As a result, the appeal proceeded ex parte and the PSC rendered a decision on 14th April, 2021 allowing the appeal on ground that the due process was not followed before the dismissal. Further t, the appeal had not been opposed by the employer. The PSC also directed that the period between the dismissal and the day they resume duty will be treated as unpaid leave for purposes of pension.
4. The applicant applied for review of the decision on 30th April, 2021. The PSC rendered its decision on 28th March, 2023. The applicant was aggrieved and sought leave to apply for judicial review to quash the impugned decision vide the chamber summons dated 14th July, 2023. The leave was granted on 19th July, 2023 and the applicant filed the review application vide the notice of motion dated 7th August, 2023.
5. The motion seeks the following orders: -
 - i. That an order of Certiorari to remove and bring to this Honourable court for the purposes of quashing, the decision by the 1st respondent delivered on 14th April, 2021 between the members of the 2nd Respondent and the Ex-parte Applicant reinstating the members of the 2nd respondent to their previous employment and the refusal to vary the said decision dated 28th March, 2023.
 - ii. That an order of Prohibition do issue prohibiting the 2nd Respondent through their servants, agents, employees or directly from enforcing the 1st respondent's decision delivered on 14th April, 2021 or occupying in any way the Ex-parte Applicant's premises, or continuing enforcement proceedings in ELRC MISC NO.E002 of 2021; Kenya Union of Clinical Officers v Kirinyaga County Public Service Board & Others.
 - iii. That any other and further relief that this Honourable court may deem fit and just to grant in the circumstances.
 - iv. That costs of this application be provided for.
6. The 2nd respondent responded by filing the instant notice of preliminary objection.

2nd Respondent's submission

7. Mr. Ataka Advocate argued the objection on behalf of the 2nd respondent. On the first point, he submitted that the orders sought by the motion are at variance with the leave granted on 19th July, 2023. He argued that the leave granted was specific to the decision dated 14th April, 2021 and not the decision rendered on 28th March, 2023. He further argued that under order 53 of the Civil Procedure Rules judicial review orders can only be sought if leave has been granted. He cited the case of [*Ntulele Group Ranch v Sankale Ole Kisotu*](#) (2014) eKLR where the court held that the prayers in the notice of motion must be aligned with the prayers set out in the statutory statement filed with the leave application.
8. As regards the second point, the counsel submitted that the judicial review proceedings are statute barred as they were commenced two years from the date of decision rendered on 14th April, 2021. He contended that under section 9(2) of the [*Law Reform Act*](#) as read with Order 53(2) of the [*Civil Procedure Rules*](#) an order for quashing a decision by a public body ought to be sought within six months of the decision.
9. With respect to the third point, the counsel submitted that Order 2 as sought in the motion essentially seeks to prohibit the court from doing its work. Further no leave was granted by the court to apply for an order prohibiting 2nd respondent from prosecuting its application for adoption of the decision of the PSC.



Applicant's submissions

10. Ms.Small opposed the preliminary objection and submitted that the prayers sought by the motion are not dissimilar to the leave granted by the court. She denied that the motion seeks orders in respect of the decision rendered on 28th March, 2023 and maintained that the decision intended to be quashed is the one rendered by the PSC on 14th April, 2021. She further denied the alleged inconsistency between the orders sought by the motion and those indicated in the leave application.
11. The counsel submitted that the preliminary objection is overtaken by events since the stay granted was intended to last pending hearing the application which has been heard.
12. As regards the issue of limitation period, it was submitted that the motion was filed within 21 days after the leave order as required by Order 53 of the Civil Procedure Rules. Besides, the judicial review had to wait for the administrative process to be exhausted as required by section 87 of the Public Service Commission Act. She submitted that under section 87 of the Act, no proceeding can be filed in court before exhaustion of the procedure at the PSC.
13. She further submitted that it was impossible to file judicial review proceedings before the final decision of the PSC was rendered on 28th March, 2023. She contended that in view of section 87 of the PSC Act, the six months within which to apply to quash the impugned decision starts to run from the date when the final decision by the administrative body is rendered, which in this case was on 28th March, 2023.
14. The counsel submitted that the motion is properly before the court since the leave granted has not been challenged by appeal or review. Consequently, she submitted that the leave order is still in force and the applicant is entitled to substantive justice. For emphasis, she relied on the case of Republic v County Council of Kwale & 57 others (2022) eKLR where the court held that leave is not for barring litigants from substantive justice but to eliminate vexatious litigants.
15. Finally, the counsel submitted that the court has unlimited jurisdiction to enlarge time because there is no express prohibition from that extension by the statutes. Therefore, the court was urged to dismiss the objection for being frivolous.
16. In his rejoinder, Mr.Ataka submitted that section 87 (2) of the PSC Act only precludes institution of matters within the jurisdiction of the PSC and that does not extend to judicial review which does not fall within the jurisdiction of the PSC. Finally, he maintained that an objection on jurisdiction can be raised even after leave is granted as it happened in the Ntulele Group Ranch case. Consequently, he urged the court to allow the objection as prayed.

Issues for determination

17. Having considered the pleadings, the notice of preliminary objection and the submissions by counsel, the following issues fall for determination: -
 - a. Whether the objection by 2nd respondent meets the legal threshold.
 - b. Whether the application for judicial review is statute barred.
 - c. Whether prayers sought by the motion are in accordance with the leave granted on 19th July, 2023.
 - d. Whether the application is fatally defective and bad in law.



Legal threshold

18. The legal threshold for a preliminary objection remains the same since the celebrated case of *Mukisa Biscuits manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 699 where the court held that:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implications out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertain or if what is sought is the exercise of judicial discretion.”

19. In this case the objection raised several grounds including limitations of actions which goes to the question of jurisdiction of the court. Consequently, I am satisfied that the objection meets the legal threshold of a preliminary objection and I now proceed to consider it on merits.

Statute barred Application

20. The motion seeks for an order of certiorari and prohibition in respect of the decision rendered by the PSC on 14th April, 2021. The applicant contends that by dint of section 87 of the [PSC Act](#), it was impossible for it to file any court proceeding within six months of the said decision. The 2nd respondent however contends that section 87(2) of the [Act](#) only bars court proceedings in matters which fall within the jurisdiction of the PSC which does not extend to judicial review.

21. Section 87 (2) of the [PSC Act](#) provides that: -

“A person shall not file any legal proceedings in any court of law with respect to matters with 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.”

22. The foregoing express provision is clear that only matters falling within the exclusive jurisdiction of the PSC under section 85 of the [PSC Act](#) as read with section 77 of the [County Government Act](#) are excluded from courts of law until the appeal process before the PSC is exhausted. Such process deals with merits of the decision by the County Board.

23. However, a reading of section 87 (2) of the [PSC Act](#) above and section 9 (2) of the [Fair Administrative Action Act](#) gives the impression that no court action can be commenced in respect of matters presented for alternative remedy unless certain conditions are met. Section 9 (2) of the [Fair Administrative Action Act](#) provides that:-

“The High Court or a subordinate court under subsection (1) should not review an administrative action or decision under that Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law were first exhausted.”



24. I gather support from the case of the speaker of the *National Assembly v James Njenga Karume* (1992) eKLR, where the Court of Appeal held that:-

“..... where there was a clear procedure for redress of any particular grievance prescribed by the *Constitution* or Act of Parliament this procedure should be strictly followed.”

25. I gather more support from the case of *William Odhiambo Ramogi & 3 others v The Attorney General & 4 others and Muslims for Human Rights & 2 other Interested parties* (2020) eKLR where the High Court held that: -

“52. The question of exhaustion of administrative remedies arises when the litigant, aggrieved by an agency’s action seeks redress from a court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine 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 protection of his own interest within the mechanisms in place for resolution outside the courts.”

26. The court went on to state the principles upon which the exhaustion doctrine may be exempted, thus: -

“60 ...the first principle is that the High Court may, in exceptional circumstances consider and determine that the exhaustion required would not serve the values enshrined in the *Constitution* or law and allow the suit to proceed before it. It is also essential for the court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the courts to consider valid grievances from parties who lack the adequate audience before the forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting court’s jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* (2018) eKLR.

62. In the instant case, the petitioners allege violation of constitutional rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in the Bill of Rights language as a pretext to gain entry to the court, it is not barred by the doctrine of exhaustion. This is especially so because enforcement of fundamental rights and freedoms is a question which can only be determined by the High Court.”

27. In the instant case, the applicant did not trouble itself with the burden of satisfying the court to hear it before the appeal mechanism at PSC was exhausted. It faithfully respected and observed the doctrine of exhaustion. It should therefore not be penalized for being faithful to the law which expressly postponed the right to approach the court until the administrative appeal process was exhausted. Consequently, I overrule the objection on the ground of limitation period of six months set out under Order 53 rule 2 of the Civil Procedure Rules.



Variance with the leave order

28. The respondent submitted that the orders sought in the motion are at variance with the leave granted on 19th July, 2023. I have considered the orders sought in the motion dated 7th August 2023 and in the chamber summons dated 14th July, 2023. The notice of motion seeks the following orders: -
- v. That an order of certiorari to remove and bring to this Honourable court for the purposes of quashing, the decision by the 1st respondent delivered on 14th April, 2021 between the members of the 2nd Respondent and the Ex-parte Applicant reinstating the members of the 2nd respondent to their previous employment and the refusal to vary the said decision dated 28th March, 2023.
 - vi. That an order of prohibition do issue prohibiting the 2nd Respondent through their servants, agents, employees or directly from enforcing the 1st respondent's decision delivered on 14th April, 2021 or occupying in any way the Ex-parte Applicant's premises, or continuing enforcement proceedings in ELRC MISC NO.E002 of 2021; Kenya Union of Clinical Officers v Kirinyaga County Public Service Board & Others.
 - vii. That any other and further relief that this Honourable court may deem fit and just to grant in the circumstances.
 - viii. That costs of this application be provided for.
29. The orders sought in the chamber summons were:-
- a. That this Application be certified urgent and service thereof be dispensed with in the first instance.
 - b. That leave be granted to the Ex-parte Applicant to apply for an Order of Certiorari to remove into this court and quash the ex-parte decision contained by the 1st respondent in Appeal filed by Kenya Union of Clinical Officers on behalf of Mr. Josephat Muchiri Muriuki and 46 other former Clinical Officers-v-Kirinyaga County Public Service Board which decision is dated 14th April, 2021 the same having been granted in contravention of the law and the Constitution of Kenya, 2010.
 - c. That leave be granted to the Ex parte Applicant to apply for an Order of Prohibition to prohibit the 2nd Respondent from conducting any further proceeding or any further dealing with respect of the 1st Respondent's decision Kenya Union of Clinical Officers on behalf of Mr. Josephat Muchiri Muriuki and 46 other former Clinical Officers-v-Kirinyaga County Public Service Board which decision is dated 14th April, 2021 pending the hearing and determination of the substantive Judicial Review Application herein.
 - d. That the grant of leave herein does operate as stay of execution of the decision made by the 1st Respondent in appeal filed by Kenya Union of Clinical Officers on behalf of Mr. Josephat Muchiri Muriuki and 46 other former Clinical Officers-v-Kirinyaga County Public Service Board which decision is dated 14th April, 2021 pending the hearing and determination of the substantive Judicial Review Application herein.
 - e. That the costs of and occasioned by this Application be provided for.



30. There is no doubt that the prayer for certiorari in the motion is slightly different from the leave order sought in the chamber summons. The leave order did not mention the decision dated 28th March, 2023. The variance is in the addition of the following words after the leave order:

“and the refusal to vary the said decision dated 28th March, 2023.”

31. There is also another variance in that the order sought in the motion does not mention, as in the chamber summons, that the impugned decision was in respect of:-

“Appeal filed by Kenya Union of Clinical Officers on behalf of Mr. Josephat Muchiri Muriuki and 46 other former Clinical Officers-v-Kirinyaga County Public Service Board.”

32. In my view, the said variance in the order of certiorari sought by the motion is not fatal to the motion. It can be cured by an amendment. The court should sustain suits where any defect complained of can be cured by amendment. Such is the substantive justice contemplated by Article 159 2(d) of the Constitution .

33. As regards the prayer for order of prohibition, the variance between the motion and the chamber summons is quite substantial. In the leave application the prohibition order was intended for interim purposes while in the motion it morphed to a substantive prayer. Such variance is not allowed. Therefore the motion is incompetent to that extent since the leave order cannot morph from interim to a substantive prayer. Consequently, the preliminary objection succeeds with respect to prayer for order of prohibition which is materially inconsistent with the leave granted on 19th July, 2023.

Conclusion

34. I have found that the applicant’s judicial review action is not time barred in view of the exhaustion doctrine codified under section 9 (2) of the FAA Act and section 87(2) of the PSC Act. I have further found that save for the prayer of prohibition, the notice of motion dated 7th August, 2023 is not fatally defective since the slight inconsistency between the order of certiorari sought in the motion and the leave granted is curable by an amendment. Consequently, I overrule the preliminary objection and allow the prosecution of the motion subject to amendment as pointed above. The motion shall be concluded within 90 days of today. I make no order as to costs.

35. This ruling shall apply to Nyeri ELRC JR No.E001 of 2023, Republic v Public Service Commission and Kenya Union of Medical Laboratory Technical officers & 2 others, Ex parte Kirinyaga County Public Service Board whose facts and the law applicable is the same.

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

ONESMUS N MAKAU

JUDGE

ORDER

THIS RULING HAS BEEN DELIVERED TO THE PARTIES VIA TEAMS VIDEO CONFERENCING WITH THEIR CONSENT, HAVING WAIVED COMPLIANCE WITH RULE 28 (3) OF THE ELRC PROCEDURE RULES WHICH REQUIRES THAT ALL JUDGMENTS AND RULINGS SHALL BE DATED, SIGNED AND DELIVERED IN THE OPEN COURT.

ONESMUS N MAKAU

JUDGE

