



**Omao v County Government of Kisii & 3 others (Petition E010 of 2023)
[2023] KEELRC 3252 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3252 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E010 OF 2023
CN BAARI, J
DECEMBER 7, 2023**

BETWEEN

VINCENT MARITA OMAO PETITIONER

AND

COUNTY GOVERNMENT OF KISII 1ST RESPONDENT

HON PAUL SIMBA ARATI GOVERNOR KISII COUNTY 2ND RESPONDENT

KISII COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

COUNTY GOVERNMENT OF KISII 4TH RESPONDENT

RULING

1. This ruling relates to the respondents' notice of preliminary Objection, dated 29th of March, 2023, wherein, they contend that: -
 - a. This honourable court lacks jurisdiction to entertain part of this petition namely, plea at paragraph/prayer (d) seeking an order that a declaration that employment of the chairperson of the 3rd respondent as well as one board member was irregular and or unprocedural thus null and void *ab initio*.
 - b. The applicant does not meet the precision threshold required of constitutional petitions as held in *Anarita Karimi v Republic* (1979) eKLR.
 - c. The petition as far as it relates to the complaints anchored on paragraph (a), (b) and (c) and paragraph (g) has not exhausted all internal dispute resolution mechanisms before mounting the current judicial proceedings.
 - d. By a further preliminary objection dated the 26th of April, 2023, the respondents contend that the Petitioner lacks locus standi to bring this Petition.



2. The respondents' prayer is that this court strikes out the Petitioner's application dated March 27, 2023, and the petition, with costs.
3. Parties filed submissions on the preliminary objection.

The 1st, 2nd, 3rd and 4th Respondents' Submissions

4. The respondents submit that the preliminary objection herein, is raised purely on points of law which they believe will dispose of the entire petition at this stage of the proceedings. They had reliance in the decision in *Mukbisa Biscuits Manufacturing Co. Ltd v West End Distributors* (1969) EA 696
5. It is the respondents' submission that the petitioner's prayer (d) of the petition that "the employment of the chairperson of the 3rd respondent as well as one board member was irregular, and/or unprocedural and thus null and void "ab initio" disqualifies this honourable court from having jurisdiction over this petition by dint of section 58(5) of the [County Government Act](#)
6. The respondents further submit that issues to do with the process of hiring the chairperson and board members are handled by the county assembly and not this honourable court.
7. It is submitted for the respondents that the petition is a shell that falls short of the threshold required in a constitutional petition. It is submitted that other than enumerating articles of the [Constitution](#), there is nothing in the petition to show how the petitioner's and or the alleged workers' constitutional rights have been infringed and/or violated, not even an affidavit has been sworn by any of the alleged workers to particularize instances on how their rights have been violated by the Respondents. The respondents placed reliance in the Supreme Court of Kenya decision in [Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others](#) (2014) eKLR to buttress this position.
8. It is further submitted for the respondents that article 234(2)(i) of the [Constitution](#) of Kenya read together with section 77 (1) and (2) of the [County Governments Act](#) and sections 85, 86, and 87(2) of the [Public Service Commission Act](#), are clear that the Public Service Commission has the first instance jurisdiction (and not the court) whose County employees who feel aggrieved should appeal to. They sought to rely in [Secretary, County Public Service Board and another v Hulban Gedi Abdille](#) (2017) eKLR to support this assertion.
9. It is their final submission that the petition herein, together with the notice of motion application dated March 27, 2023, should be dismissed with costs.

The Petitioner's Submissions

10. It is submitted for the petitioner that the preliminary objection taken out by the respondents is argumentative and too convoluted with factual issues which calls for examination of evidence, which disqualifies the same from being a preliminary objection.
11. It is further submitted that the petitioner is challenging the process of appointment of the the chairperson of the 3rd respondent, as well as one of the Board members into office and not their removal, hence the court will basically be examining the statutory and Constitutional provisions to ascertain whether the entity that had been bestowed with the responsibility of recruiting into office the said persons, duly followed the necessary applicable Laws.
12. It is further submitted that if indeed the said process was not adhered to, the court will then proceed and quash their said purported appointment into their respective positions, which cannot be mistaken to construe removal from office of the said persons.



13. The petitioner submits that the Constitution under article 23 empowers this Court with jurisdiction, to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the bill of rights.
14. It is further submitted for the Petitioner that article 163 as read with article 165(3)(d) of the Constitution , grants this Court jurisdiction to hear any question on the interpretation of the Constitution including the determination of the question of whether anything said to be done under the authority of the Constitution , or of any law is inconsistent with or in contravention of the Constitution .
15. The Petitioner submits that he has comprehensively set out the provisions of the Constitution which the petition is predicated upon, and the manner in which the actions of the Respondents have violated the Constitutional provisions. He had reliance in Trusted Society of Human Rights Alliance v AG & 2 others (2012) eKLR to support this position.
16. It is the petitioner's submission that under the new constitutional dispensation, technicalities are no longer tenable as Court are now inclined towards sustaining cases as opposed to preliminary striking them out, thus driving out parties from the seat of justice.
17. It is the petitioner's submission that the subject matter of the appeal over which the public service commission can entertain vis a vis the facts together with the reliefs sought by the petitioner in the subject petition herein, falls outside the jurisdiction of the commission and that it is this honourable court which is vested with the requisite Jurisdiction to entertain the same.
18. The petitioner submits that he approached this Court in the public interest in view of the provisions of article 22(1) and (2)(c) of the Constitution , and that his claim on the violations and infringement of the Constitution can only be properly addressed before this Court and not the Public Service Commission. The Petitioner sought to rely on the holding of Justice Ongaya in Abdikadir Suleiman v County Government of Siaya (2015) eKLR where the judge held that the Public Service Commission (PSC) did not have jurisdiction on matters touching on Constitutional reliefs.
19. It is the petitioner's further submission that the petition raises novel and weighty constitutional questions that makes it imperative for the Court to make its determination thereon.
20. The petitioner urges the court to find the preliminary objection by the respondents' to be without any merit and proceed to dismiss it with costs.

Analysis and Determination

21. Upon careful consideration of the Respondents' Preliminary Objection together with the rival submissions, the issue that arise for my determination is whether the objection satisfies the requirements set out in *Mukhisa Biscuits Manufacturing Co. Ltd v West End Distributors* (1969) EA 696
22. In the *Mukhisa Biscuits Manufacturing case* (*supra*) the Court held thus on preliminary objections: -

“A point of Law which has been pleaded, or which arises in the course of the pleadings and which, if argued as a preliminary point may dispose of the suit.....

It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”
23. The Petitioner's application and petition subject of this objection can be summarized as relating to the confirmation into office of various cadres of county employees, their admission into the payroll,



confirmation into permanent service of the County Government of Kisii and the appointment of the chairperson and one member of the 3rd respondent.

24. The issues surrounding the appointment, confirmation and admission into the payroll of employees of the 1st respondent or the failure to confirm and admit them to the payroll, are no doubt questions of facts that require that facts are ascertained through the examination of evidence. This requirement alone, removes the petition and by extension the application from what constitutes a point of preliminary objection for not raising pure points of law.
25. In the premise, the prayer to strike out the application and petition on this basis, is found to lack legal basis and is for dismissal.
26. On the issue concerning the doctrine of exhaustion, section 77 of the [County Governments Act](#) provides for Appeals to the Public Service Commission as follows: -

- “(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;.....”

27. Further, section 87(2) of the [Public Service Commission Act](#) provides thus: -

- “(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 service unless the procedure provided under this Part has been exhausted.”

28. Further, it has variously been held that the requirement to appeal to the Public Service Commission on matters arising from the county government public service, is couched in mandatory terms. In [Lukale Moses Sande v the County Government of Kakamega & 3 others](#) Cause No. 23 of 2020, the Court had this to say on exhaustion of internal mechanisms:

- “The Claimant did not exhaust the appeal procedures in respect to his removal, purported removal and or terms and conditions of service as contemplated by the [Constitution](#) , the



County Government Act and the [Public Service Commission Act](#), before moving this court, and the court therefore declines jurisdiction.”

29. The petitioner in his petition seeks declaratory orders to confirm certain cadres of employees into the service of the 1st respondent, their admission to the payroll and also raises issues on recruitment of staff of the 1st respondent.
30. This are matters directly falling within the public service commission’s appellate jurisdiction, and which are not within the jurisdiction of this court in the first instance.
31. Further, a question of jurisdiction is a pure point of law and where a court arrives at a finding that it does not have jurisdiction, it is left with no option but to down its tools, and which I hereby do.
32. Consequently, the respondents’ preliminary objection succeeds with the result that the petitioner’s application dated March 27, 2023, and the petition evenly dated are struck out with costs.
33. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 7TH DAY OF DECEMBER, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Marita h/b for Mr. Mainga for the Petitioner

Mr. Nyandieka present for the Respondents

Erwin Ongor- C/A

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