



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT BUNGOMA**

**ELRC PETITION NO. E012 OF 2021**

**IN THE MATTER OF ARTICLE 2,10,22,23,47,48,259,165,232,235, AND 258 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ENFORCEMENT OF THE NATIONAL VALUES AND PRINCIPLES OF GOOD GOVERNANCE UNDER ARTICLE 10 AND THE PRINCIPLES OF PUBLIC SERVICE UNDER ARTICLE 232 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 52,59,63,65,66,67 AND 68 OF THE COUNTY GOVERNMENT ACT**

**AND**

**IN THE MATTER OF SECTION 85,86,87,88 AND 89 OF THE PUBLIC SERVICE COMMISSION ACT**

**AND**

**IN THE MATTER OF THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT**

**BETWEEN**

**OLIVER MUKHEBI AND 28 OTHERS..... PETITIONERS**

**AND**

**COUNTY PUBLIC SERVICE BOARD OF BUNGOMA....1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF BUNGOMA .....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

1. The Petitioners filed a Petition dated 17<sup>th</sup> November 2021 seeking an order of permanent injunction restraining the Respondents whether by themselves, their servants/agents from deploying and causing the recruited candidates to assume office as village administrators pursuant to the advertisement dated 2<sup>nd</sup> November 2021 (in main petition advertisement date is indicated as 2<sup>nd</sup> November 2020) before the hearing, determination and final disposal of the appeal lodged at the Public Service Commission by the Petitioners against the decision.

2. Concurrently, the Petitioners sought interim orders vide a Notice of Motion application supported by affidavit of Oliver Mukhebi, the 1<sup>st</sup> Petitioner sworn on the 18<sup>th</sup> November 2021. The Notice of Motion seeks temporary injunction to restrain the Respondents from deploying and causing the recruited village administrators to assume office pending hearing and determination of the Petition, and of the disposal of the appeal lodged at the Public Service Commission.

3. The Respondent filed a Preliminary Objection dated 30<sup>th</sup> November 2021 seeking for the suit to be struck out with costs on 2 grounds:-

i. That the Honourable court lacks jurisdiction to hear and determine this matter in accordance with Section 77 of the County

ii. That Oliver Mukhebi, the 1<sup>st</sup> Petitioner herein, does not have authority to execute and sign documents on behalf of the other Petitioners and cannot therefore prosecute for orders against recruitment of all the two hundred and thirty six (236) village administrators posts in the entire Bungoma County.

4. The Respondents also filed Replying affidavit sworn by Abidan Kimkerick Kapchanga on the 3<sup>rd</sup> December 2021 in reply to the Notice of Motion.

5. This Ruling is on the Preliminary Objection dated 30<sup>th</sup> November 2021 and the Notice of Motion dated 18<sup>th</sup> November 2021. The Petitioners' case argued by Bryan Khaemba Advocate and the Respondents'/ Objectors' case by Cyril Wany'ongo Advocate and the court wishes to thank both counsel for their diligence in the case. The Preliminary Objection ground 1 is hinged on the law. The County Government Act 2012, Section 77 (1) provides that 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 over any County Public officer may appeal to the Public Service Commission against the decision.

6. In section 77 (2) County Government Act 2012, the decisions include recruitment, selection, appointment and qualifications attached to any office. Section 87 (2) of the Public Service Commission Act states "A person shall not file any legal proceedings in any court of Law in 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. Counsel for Respondent relied on the court decided cases in *Fred Marmelei Loronyokwe v County Government of Samburu and Another (2020)* eKLR and the case of *Chrispinus Likuyuni Lumiti v County Chief Officer Public Service Kakamega County and 3 Others (2021)*eKLR where the court declined jurisdiction at first instance.

7. The Respondents submitted that except Petitioner No. 29 in the Petition, all the Petitioners have admitted they applied and were shortlisted for interviews and upon being unsuccessful have appealed to the Public Service Commission through their Advocates by way of letter dated 15<sup>th</sup> November 2021 seeking to revoke the appointments and for fresh recruitment. The Counsel for Respondents submitted that under Paragraph 9 of the Appeal to Public Service Commission dated 15<sup>th</sup> November 2021 also replicated in Paragraph 9 of the supporting affidavit of Oliver Mukhebi the Petitioners state the majority of appointees are qualified hence the Respondent does not understand what the appeal is about.

8. On the Notice of Motion Application, Counsel for Petitioners relied on supporting affidavit of Oliver Mukhebi sworn on the 18<sup>th</sup> November 2021 and further affidavit sworn on the 14<sup>th</sup> December 2021 by the 1<sup>st</sup> Petitioner. Counsel submitted that the Petitioners are not in contradiction of Section 77 of the County Governments Act and Section 87 of the Public Service Commission Act to extent that such appeals lie before the Public Service Commission. In essence the Petitioners agree the court has no jurisdiction over the appeal. The Petitioner submitted that they had filed appeal before the Public Service Commission on 16<sup>th</sup> November 2021 hence are aware of the process under the law.

9. However, the Petitioner's counsel submit that they came to court because decisions are being implemented and the Public Service Commission has no powers to issue injunction orders which they seek for preservation.

10. The Petitioner's Counsel submits that the court has powers to issue interim orders and relies on the case of *Zena Achieng Mohammed -vs- County Public Service Board of Kilifi and 6 Others (2021)* eKLR where the Petitioner sought similar orders upon filing appeal to Public Service Commission and in granting the orders Lady Justice Ndolo said in Paragraph 16 found that the doctrine of exhaustion under the County Governments Act and the Public Service commission Act cannot lock out a party seeking interim relief for if the subject of appeal before the Public Service Commission dissipates, the ultimate decision of the appeal could as well be an exercise in futility.

11. The Applicant relied and cited the decision *Zena Achieng Mohammed -vs- County Public Service Board of Kilifi and 6 Others (2021)* eKLR in the Application to buttress the point that the court has jurisdiction to issue the interim relief of temporary injunction sought.

12. The Counsel for Petitioner submitted that the cases cited by Respondents in *Fred Marmelei Loronyokwe v County Government of Samburu and Another (2020)* eKLR and the case of *Chrispinus Likuyuni Lumiti v County Chief Officer Public Service Kakamega County and 3 Others (2021)*eKLR were distinct from decision *Zena Achieng Mohammed -vs- County Public Service Board of Kilifi and 6 Others (2021)* as in those cases no appeal had been filed before the Public Service Commission in the first instance. The court finds indeed the cases are distinct. This court is not bound by the decisions of the court however the decisions are persuasive.

### **Determination of the Preliminary Objection**

13. On ground 1 of the preliminary objection, the Court of Appeal has now settled the question of interpretation of Section 77 of the County Governments Act, 2012 and upheld that the procedure therein must be exhausted before the court intervention is involved. In the Court of Appeal case of *Secretary County Public Service Board and Another -vs- Hulbhai Gedi Abdulla (2017)* eKLR (*Makhandia, Ouko & M Inoti JJA*) the court allowed the appeal on basis that the Respondent had failed to utilize the process under Section 77 of the County Government Act as follows:-

" 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." Counsel for the Respondents to buttress their point that the court has no jurisdiction pursuant to Section 77 of the County Governments Act and Section 87 of the Public Service Commission Act further submitted that Article 234 (2) (i) bestows on the Public Service Commission powers to hear and determine appeals from the decision of the Counties'.

14. In view of the binding authority of Court of Appeal in *Hulbhai Gedi Abdullahi* (supra) this court has no jurisdiction over appeals from recruitment and appointments by the Respondents. To that extent ground one of the Preliminary Objection is upheld.

15. The ground 2 of the Preliminary Objection is dismissed as such procedural issues can be cured under Article 159 (2) (d) of the Constitution.

#### **Determination of the Application dated 18<sup>th</sup> December 2021.**

16. The court has to bear in mind that it does not have jurisdiction over the substantive dispute which lies before the Public Service Commission having upheld ground 1 of the Preliminary Objection

17. Can the court having found it has no jurisdiction in the subject matter of recruitment by the Respondents grant the interim injunction orders sought? The order sought is of temporary injunction to effect of stopping the assumption to office/ deployment of the village administrators. Both parties have told the court that the selection process is complete and the successful candidates have appointment letters. 28 unsuccessful candidates drawn from 9 villages out of the 236 are before the court as petitioners. The Applicant under paragraph 8 of the Application ( Notice of Motion) states that the selected candidates have been invited for induction as village administrators ( exhibit “OM 5”). The said 236 village administrators are now employees of the Respondents.

18. The Petitioner has annexed a letter concerning the appointment of one Elizabeth Toil by Assistant Chief of Kamusinga sub-location which states in part “ *Due to the Community concern over the above named person who is newly appointed as the village administrator of the devolved Khwiroro village Unit*”. I cite this as further evidence that the said village administrators have been employed and are in office whether or not they have commenced their duties. The court’s attention has been drawn to the decision in *Zena Achieng Mohammed -vs- County Public Service Board of Kilifi and 6 Others (2021) eKLR* where the Petitioner sought similar orders upon filing appeal to Public Service Commission and in granting the orders Lady Justice Ndolo and in Paragraph 16 found that the doctrine of exhaustion under the County Governments Act and the Public Service commission Act cannot lock out a party seeking interim relief for if the subject of appeal before the Public Service Commission dissipates, the ultimate decision of the appeal could as well be an exercise in futility. The court addresses the said decision later in this decision.

19. Jurisdiction is a critical issue which the court must establish to exist when raised. In this case does the court have jurisdiction to grant the orders sought? This court is guided by the landmark case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR** where the Court of Appeal Nyarangi JA held:- ‘*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*’.

20. Further Nyarangi JA, in the same case(supra) cited with approval a passage from *Words and Phrases Legally defined – Volume 3: I – N* Page 113 to wit:-

‘The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

21. Applying the authority in **Owners of the Motor Vessel “Lillian S” (supra)** the court proceeds to determine if it has jurisdiction to issue the orders sought. The court finds that it does not have jurisdiction given under the statute on appeals on recruitment of persons by the respondents. That is not in dispute. The application is hinged under Article 23 of the Constitution and *Mutunga rules*. The said provision under part 3 provides that in any proceedings brought under Article 22 a court may grant relief including injunctions. Article 22 (1) provides that ‘*Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened*’. Further the Applicant relies on Rule 17 (1)(5) and (6) of the Employment and Labour Relations Court (Procedure rules) 2016. The court having examined the law and rules relied on by the Applicant finds that to grant the temporary injunction it must have jurisdiction over the subject matter being the appeal from the recruitment exercise. The court will have to examine the merits of the dispute on *prima facie* basis to determine if the interim orders sought are justified. Under Article 22 of the Constitution the subject matter of the infringement or violation of the Bill of rights by way of petition should be before the court. Under the Rule 17 (1)(5) and (6) of the Employment and Labour Relations Court (Procedure rules) 2016 it is envisaged the suit under which the temporary injunction is sought is before the court. This position is consistent with the law on injunctions as established in *Giella Cassman Brown* case being the court has to establish a *prima facie* case. The Court of Appeal upheld the said decision in paragraph 9 in ***Florence Khayanga Musanga v Transnational Bank Ltd & another [2020] eKLR*** where it states:- ‘*Did the Judge correctly exercise her discretion in refusing the order of injunction? It is obvious that the two courts below were acutely aware of the guiding principles in granting an order of injunction as they referred to the often cited case of Giella -vs- Cassman Brown Co. Ltd (supra) and recited the principles set out therein to wit: -*

- a. The applicant had established a prima facie case with a probability of success;
- b. The applicant stood to suffer irreparable loss which would not be adequately compensated by an award of damages; and
- c. If the court was in doubt, the application would be determined on a balance of convenience.’

22. In deciding whether or not to grant or not to grant temporary injunction order the discretion of the court is guided by the above principles in *Giella Cassman Brown Case*. The court can only determine existence of the 3 principles under that authority when it has jurisdiction over the subject matter. The court is aware that the issuance of conservatory orders in constitutional petitions is guided as settled in a decision cited by the Applicant being *Law Society of Kenya v Office of the Attorney General & Another, Judicial Service Commission (interested party)(2020) eKLR* as cited In Paragraph 24 and among others is for the Applicant to demonstrate they have a *prima facie* case. That *prima facie* case can only be established by the court having jurisdiction over the subject matter in dispute. In this case the appeal.

23. The Applicants argue that their appeal will be rendered nugatory if the orders are not issued. The court is guided by the court of Appeal decision in *Hulbhai Gedi Abdille (2017) Eklr (Supra)* where the court held that: '*Section 77 of the County Governments Act has placed no fetter to the jurisdiction of the Public Service Commission*'. The court opines that the Public Service Commission in exercise of its unfettered jurisdiction may give any directions to the respondents it deems fit and in any case if the appeal is successful the appointments will be null and void. The court further notes that the court does not have jurisdiction to set aside employment contracts of the successful candidates which would be the result if the orders sought were granted.

24. For the foregoing reasons the court deviates from the authority in *Zena Achieng Mohammed -vs- County Public Service Board of Kilifi and 6 Others (2021) eKLR*. The court on finding it has no jurisdiction over the subject matter then it cannot have jurisdiction to issue interim injunction orders as that would be tantamount to interfering with the jurisdiction of the Public Service Commission by finding there is a *prima facie* case on a subject matter it has no jurisdiction over. In any event without jurisdiction the court acts in vain.

24. In the alternative, if I am wrong on the lack of jurisdiction, the court finds that the persons appointed as village administrators have vested employment rights which cannot be taken away without them being heard, a cardinal principle of justice. None of the said appointees have been sued in this case. They hold rights exclusive of the Respondents. The court notes that in the *Zena Achieng Mohammed case*, the appointee whose appointment was appealed against before the Public Service Commission was the 3<sup>rd</sup> Respondent in Application before the court.

26. Secondly, again if I am wrong on the lack of jurisdiction, the court considers the question of prejudice that the Petitioners/Applicants may suffer if the orders sought are not issued. The Applicants did not demonstrate the prejudice they would personally suffer if the orders are not issued no was the issue of prejudice pleaded. On the other hand, the appointees who were successful in the interviews have appointment letters and vested employment rights. The court is aware and recognizes the common law principle of regularity of public official actions until evidence is presented to the contrary. The order of temporary injunction sought would deprive the appointees, who the common law presumes to have been appointed regularly by the Respondents exercising their statutory powers, of the vested employment rights without a hearing.

26. Finally the court, notwithstanding the finding of lack of jurisdiction, and further in the alternative if it is wrong on the issue of lack of jurisdiction, is of the opinion that it is not in Public Interest to issue the orders sought. Public resources have been spent on the recruitment process which is complete and most important employment rights have vested on the 236 village administrators. The legislator in its own wisdom excluded the courts from the process in legislating the law and hence the reason it failed to provide for court's jurisdiction in the appeals for issuance of interim orders as it happens under the Arbitration Act, 1995 where the jurisdiction is provided for. The village administrators offer services to the members of the public in the various villages. It is would be against the greater public interest to issue order of injunction without jurisdiction to determine the dispute as the court has no control over the timelines of the Public Service Commission.

27. For foregoing reasons being the finding of lack of jurisdiction to issue orders sought in the petition and the notice of motion and in public interest and justice, I decline to grant the Orders sought in the Notice of Motion dated 18<sup>th</sup> November, 2021. The Notice of Motion application dated 18<sup>th</sup> November 2021 is dismissed. The preliminary Objection dated 30<sup>th</sup> November 2021 ground 1 is upheld and the Petition dated 17<sup>th</sup> November 2021 is hereby struck out. Each party to bear own costs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 25<sup>TH</sup> DAY OF JANUARY, 2022**

**J. W. KELI,**

**JUDGE.**

**In the presence of**

Court Assistant: Brenda Wesonga

For Applicant/ Petitioners: Brian Khaemba

For Respondents : Cyril Wanyong'o

County Attorney.