



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT BUNGOMA

MISC. CAUSE NO. E010 OF 2021

LUKALE MOSES SANDE.....APPLICANT

VERSUS

THE GOVERNOR, COUNTY OF KAKAMEGA.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF KAKAMEGA.....2ND RESPONDENT

KAKAMEGA COUNTY PUBLIC SERVICE BOARD.....3RD RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER

FOR PUBLIC SERVICE AND ADMINISTRATION.....4TH RESPONDENT

RULING

1. This ruling is on the Preliminary Objection by Respondents dated 14th December 2021 to the Applicant's Notice of Motion Application dated 30th November, 2021.

2. The Application is brought under Articles 22, 23 and 47 of the Constitution of Kenya 2010, order 51 Rule 1 of the Civil Procedure Rules and Rule 3 and 19 of the Constitution of Kenya (protection of Rights and Fundamental Freedoms) practice and procedure Rules 2013, Section 13 and 31 of the Office of the County Attorney Act 2020 and any other enabling provisions of the law and sought the following reliefs:-

(a) That for reasons to be recorded this application be certified urgent, service thereof be dispensed with and the Application be heard exparte in the first instance in respect of prayer (2) hereof:-

(b) That a conservatory order of Temporary injunction be and is hereby issued restraining the Respondent and or their agents, servants, employees and any other person whosever acting at their behalf from interviewing any candidates for, appointing submitting from vetting, confirming or offering employment to any person to the position of County Attorney of Kakamega County pending the hearing and determination of this application inter -parties.

(c) That costs of this application be provided for.

3. The grounds of the Application which the court will address in the ruling are listed in the Application supported by the Affidavit of the Applicant sworn on the 30th November, 2021 annexing documents relied on.

4. The Respondents filed Notice of Appointment of Advocates of Mukele Moni & Company Advocates on the 15th December, 2021 together with Notice of Preliminary Objection dated 14th December 2021 and a replying Affidavit by Vivianne Mmbale Komonyo sworn on the 26th January 2022.

5. The court on the 9th February, 2022 gave direction or filing of written submissions on canvassing of the Notice of Preliminary Objection dated 14th December 2021. The Notice of Preliminary Objection is canvassed by way of written submissions.

6. The Notice of Preliminary Objection dated 14th December 2021 by the Respondents is based on the following ng grounds:-

- (a) That this court lacks the requisite jurisdiction to hear and determine this Application by virtue of the ruling delivered by the Honourable Justice Stephen Radido in *Lukale Moses Sanda -vs- County Government of Kakamega & 3 others (Kisumu)* on the 17th Day of November 2021 (herein the ruling) in which the court declined jurisdiction over the same. The Applicant has not sought to either appeal or review of the ruling.
- (b) That the Application herein offends the mandatory provisions of Section 7 and 8 of the Civil Procedure Act Chapter 21 (Laws of Kenya) the same having heard and determined by a court of similar jurisdiction.
- (c) That the Application is resjudicata by dint of the ruling aforesaid in which the court found that the Claimant had failed to exhaust the appeal procedure in respect of his removal or purported removal and or terms and conditions of service as contemplated by the constitution, the County Governments Act and Public Service Commission Act before moving the court.
- (d) That this court is functus officio in relation to the orders sought in the Application.
- (e) That there is no substantive action before this court to form a basis for the grant of the orders sought.
- (f) That this court lacks the jurisdiction to issue conservatory orders in the manner and style prayed by the Applicant in respect of an appeal pending before the Public Service Commission . The Application is devoid of legal basis.
- (g) That in any event there is no competent appeal which has been filed before the relevant organ to warrant the grant of orders sought.
- (h) That the Applicant is guilty of material non-disclosure and has deliberately and mischievously misled this court.
- (i) That the Application herein is misconceived, frivolous, vexatious incurably defective and abuse of the process of this Honourable court.

Whether the court has jurisdiction to hear and determine the Application.

7. The question of jurisdiction of this court is the most important issue under the preliminary objection for without jurisdiction the court must down its tools and cannot take any further step in the proceedings. This position has been upheld by all superior courts with the landmark decision by Nyarangi JA (as he then was) in *Owners of the Motor vessel "Lilian S". -vs Caltex Oil (Kenya) Ltd (1989)* where the Judge held as follows:-

“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 or continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction “.

8. The Respondent /Objector to buttress his objection relies on the decision of the Supreme court in *Samuel Kamau Macharia & Another -vs- Kenya Commercial Bank Limited & 2 Others (2012) eKLR* where the court held in part:- “(68) a court’s jurisdiction flows form either the constitution or legislation or both. Thus a court of Law can only exercise jurisdiction as confirmed by the constitution or other written law. It cannot arrogate itself. Jurisdiction exceeding that which is conferred upon it by law..”

9. The Respondent/Objector further submits that the ruling in *Lukale Moses Sande (Applicant herein) -vs- County Government of Kakamega & 3 others (Kisumu)* by Justice Radido delivered on 17th November 2021 , the court declined jurisdiction to hear and determine the claim. Further that the conservatory order of temporary injunction sought by the Applicant in the Application before this court is in effect similar to orders sought by the Applicant in the Application dated the 24th Day of November 2020 and the 24th Day of August 2021. That the issues raised in the Application arise from the same set of facts and circumstances as considered by this court in its ruling delivered in *Kisumu*. The Applicant submits that in view of the Ruling by Justice Radido the court is precluded for granting the orders sought since similar action will be tantamount to sitting on appeal over its own decision. In the impugned Ruling by my brother Justice Radido the court found the Application before the court to offend the mandatory provisions of the Public Service Commission Act which expressly bestows upon the Public Service Commission jurisdiction to hear and determine appeals arising from County government Public Service. In that Ruling the Judge upheld the decision in *Alfred Sifa Dena -vs- Benjamin Kai Chilumo (2020) eKLR* where the Petitioner filed a petition together with a Notice of Motion application seeking inter alia conservatory orders against the Respondent for enforcing a letter dated 9th January 2020 by which the Petitioner was suspended for exercising the duties of his office as Direction, Revenue Management in the Department of Finance and planning of the County Government Kilifi and in declining jurisdiction held (in paragraph 23) ‘it seems to me that in exercising these powers, the Commission is free to inquire into any aspect of the decision and action complained of, including the legitimacy of the process adopted in effecting the decision. In light of these findings, I agree with the Respondent that the present Petition is prematurely before the court. I therefore decline to assume jurisdiction in the matter”.

10. The Objector/Respondent further submits that after the Ruling by Justice Radido declining jurisdiction over the claim which prompted the Applicant to purport to lodge an appeal before the PSC and in effect now purports to pursue proceedings before both the PSC and this court in effect denying the PSC opportunity to execute its mandate as required by Law.

11. The Respondent further submits that the same order in the instant application is sought before the PSC. The court’s attention is drawn to order (d) of the Applicant’s Application dated 30th November 2020 to PSC which states “d” *‘an order directing the Respondents to stop any process of replacement of the Appellant pending the determination of this matter”.*

12. The Respondent further submits that by making application for similar orders before court the Applicant offends the doctrine of subjudice which is defined under Section 6 of the Civil Procedure Act (Cap 21 Laws Kenya) and to buttress his submission that the application is subjudice relies on the decision in *Triba Min. Hydro Co. Ltd -vs- Josphat Kani Ndiwga (2013) eKLR* , where the court defined subjudice and further submits that the Applicant having filed appeal before PSC his rights will be taken care of in the pending suit since the window of appeal or review will be available to him if dissatisfied with the orders of the PSC. The Respondent to buttress his submission cites the case of *Delaila Nasimiyu Wafula -vs – Attorney General & 5 others 92021) eKLR* which supports his submission that same issues are before another forum.

13. The Applicant is opposed to the Preliminary objection and files submissions dated 5th February, 2022. On the question of jurisdiction, the Applicant submits that jurisdiction has emerged as acritical comment in litigation. The Applicant cites definitions of the term jurisdiction in Halsbury’s Laws of England. (4th edition) vol 9 at page 350 as “ the authority by which the court has to decided matters that are litigated before it or take cognizance of the matter presented in a formal way for decision”.

14. The Applicant further cited definition of term jurisdiction under Black Law Dictionary to be, ‘ *the power and authority constitutionally conferred upon(or constitutionally recognized as existing in)a court or judge to pronounce the sentence of law, or to award the remedies provided by law , upon a state of facts, proved or admitted, referred to the tribunal for decision and authorized by law to be the subject of investigation or action by the tribunal and in favour of or against (or a res) who present themselves or who are brought , before the court in some manner sanctioned by law as proper and efficient.*’

15. The Applicant states the chronology of events before filing the instant Application as follows:-

“ (i) On 26th November 2020 the Applicant filed a memorandum of Claim in ELRC NO. E023 of 2020 (Kisumu) Lukale Moses Sande -vs County Government of Kakamega & 3 Others.

(ii) On 17th November 2021 the Hon. Justice Stephen Radido delivered a ruling in which he declined jurisdiction and struck out the claim . To be precise the court stated in its ruling that:-

37. The Claimant did not exhaust the appeal procedure in respect of his removal or 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 the court and this court therefore declines jurisdiction.

“38) The memorandum of claim filed in court on 26th November 2020 is struck out with no order as to costs”.

(iii) Following the ruling the Applicant then moved to the Public Service Commission and filed his appeal on 29th November 2021 . 12 days after the Ruling of Justice Radido.

16. The Applicant further submits that Article 234 (2) (i) of the Constitution of Kenya grants Public Service Commission powers to :- (i) Hear and determine appeals in respect of County Government’s Public Service”.

17. The Applicant submits that Public Service Commission does not sit as a court of law. It cannot issue conservatory orders. That only this court can issue conservatory orders of the nature the Applicant seeks. That in event that one files and appeals before the Public Service Commission, then one is then at liberty to approach the court for conservatory orders to preserve the subject of contention, in this case the Position of County Attorney . It would be of no purpose if the Respondent moved and filed the very position the Applicant lays claim over, hence the need for the conservatory orders.

18. The Applicant submits that this court in *Bungoma ELRC Petition No. E009 of 2021 Catherine Gathoni Otenyo -vs Governor, County Government of Kakamega & 3 others* issued conservatory orders against recruitment of Petitioner’s replacement as Secretary and CEO of Kakamega County Public Service Board pending hearing and determination of the Petitioner’s appeal to the Public Service Commission for the purported termination of her appointment. The Applicant submits that the instant case is similar and failure to consider the Applicant’s application on basis that this court lacks jurisdiction would be disparate treatment of similarly situated individuals discriminatory, manifest injustice and misapplication of the law.

19. The Applicants submits that following Justice Radido’s Ruling that the court had no jurisdiction and striking out that claim the case was extinguished forever. The Applicant submits that the court has authority to grant orders sought under Article 162 (2) (a) of the Constitution. That Article 23 (3) (c) of the Constitution provided that in any proceedings brought under Article 22 of the Constitution, the court may grant appropriate relief, including conservatory orders. That Rule 23 of the Constitution of Kenya (Protection of rights and Fundamental Freedom) practice and Procedure Rules, (2013) hereinafter referred to as “ Mutunga Rules” provides (i) despite any provision to the contrary, a Judge before whom a Petition under rule 4 is presented shall hear and determine an application for conservatory order or interim relief.

20. The Applicant submits his case is not subjudice as conservatory orders issued earlier by Radido Judge were interlocutory and are of no consequence the court having found it had no jurisdiction as appeal to Public Service Commission had not been filed.

DETERMINATION

Whether court has jurisdiction to grant conservatory order sought under the Application.

21. Jurisdiction is everything and without it the court must down its tools as stated by Nyarangi JA in the land mark decision of *Owners Of Motor vessel "Lilian S"* (supra paragraph 7). This court pronounced itself on a similar issue on jurisdiction over matters falling under Section 87 of the Public Service Commission and Section 77 of the County Government Act (2012) in its ruling dated 25th January 2022 in **Bungoma ELRC NO E012 OF 2021, Oliver Mukhebi and 28 Others -vs- County Public Service Board of Bungoma and Another** where the Petitioner sought conservatory orders pending hearing of his appeal by Public Service Commission. The court upholds its finding in that decision. The court in paragraph 13 of the said ruling of *Oliver Mukhebi case(supra)* found it had no jurisdiction over appeals for recruitments and appointments by the County Government. The Court then considered if it had jurisdiction consider and grant conservatory orders as sought in the instant case. The Court in paragraph 21 of its ruling found that, for the court to grant the temporary injunction sought it must first have jurisdiction over the subject matter being the appeal for the recruitment exercise. That the court will have to examine the merits of the dispute on *prima facie* basis to determine if the interim orders sought are justified. The Court also stated that 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. There is no such Petition before the court in the instant case. The court also found that under Rule 17 (1) (5) and (6) of the Employment and Labour Relations Act (Procedure Rules) (2016) , it is envisaged there is a suit under which the temporary injunction order is sought . There is no suit before the court. The court findings in *Oliver Mukhebi case* were consistent with law on injunctions established in *Giella Cassman Brown Case* being that the court has to establish existence of a *prima facie* case. The Court then held that it can only establish a *prima facie* case if it has jurisdiction over the subject matter. The court upheld the decision in *Law Society of Kenya v Office of the Attorney General & Another, Judicial Service Commission (interested party) 2020 eKLR*, where in paragraph 24, it held that the Applicant has to demonstrate a *prima facie* case for grant of conservatory order.

22. The court in the *Oliver Mukhebi case(supra)* was further guided by court of Appeal in *Secretary County Public Service Board & Another -vs- Hulbahi Gedi Abdille (2017) eKLR (Makhandia, Ouko & Minoti JJA)* 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 interpreted the Court of Appeal to be stating 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 succeeded, the appointments will be null and void.

23. The court has not been persuaded to shift its position in the *Oliver Mukhebi Case* in the instant case. The Applicant has presented its case before Public Service Commission and sought similar order in that forum. The Public Service Commission is the forum with jurisdiction. There is no constitutional violation pleaded with precision outside the employment law process. The court has no basis of meddling with the jurisdiction of the Public Service Commission by issuing orders while it has no jurisdiction over the subject matter. To that extent the instant application is subjudice.

24. The court having considered the submissions by the parties and considering its decision in *Oliver Mukhebi case* holds it has no jurisdiction to grant the conservatory orders of temporary injunction as sought under the Application dated 30th November 2021.

On whether there is precedent of granting conservatory orders to similar application.

25. The Applicant submits that this court granted conservatory order in matter pending Public Service Commission on 5th November 2021 in *Bungoma ELRC Petition No. E009 of 2021 Catherine Gathoni Otenyo - vs The Governor County Government of Kakamega*. The court notes that the said order was granted *ex parte* before hearing the opponent party hence that did not form any precedent to justify the submissions of the Applicant that this court in declining jurisdiction would be disparate treatment of similarly situated individuals, discriminatory, manifest injustice and misapplication of the law. Indeed under paragraph 3 of the grounds of the Application the Applicants cites stay orders granted to him by my Brothers Justice Radido and Nzioki Wa Makau at *ex parte* stage and later vacated. The court after hearing the opponents story at interparte stage is always free to change its Orders issued at *ex parte* stage based on facts and the law. Consequently the court finds that the order in *Bungoma ELRC Petition No. E009 of 2021* does not form precedent on the subject matter of conservatory orders on appeals pending before the Public Service Commission. Indeed a Ruling is pending in the said case the court having later heard both parties. The court has created a precedent in *Oliver Mukhebi Case(supra)* and has not found a reason in the instant case to deviate from that precedent. The court reiterates it has no jurisdiction to grant orders sought.

26. Whether the matter is subjudice.

The court has found that there being an appeal before a competent body the Public Service Commission with jurisdiction drawn from the Constitution and statute, the instant application is subjudice.

27. On whether there is a substantive action before the court to form a basis for the grant of orders sought.

The court agrees with the Respondent the application ought to have been anchored on a substantive suit or Petition as temporary order sought under Application are usually interlocutory pending hearing of subject matter for final orders. The court upholds the decision cited by the Respondent/Objector in *Wilson Kaberia Nkunja -vs- The Magistrate and Judges Vetting Board & others (2016) eKLR* and among other Principles of granting conservatory orders being “ *whether, if the conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory*”, and the authority in *SFA -VS AOA (2021) eKLR* where court held that, “ *to grant the orders in the manner sought will amount to granting substantive orders with finality in an application*”.

The court finds that temporary injunction orders under Application cannot be granted in vacuum.

On whether the court is functions officio.

28. The Respondent submits that the court in entertaining the instant Application would be tantamount to this court sitting on appeal on its own ruling. The Respondent to buttress his submission relies on the decision in *ICEA Lion General Insurance -vs- Julius Nyaga Chomba (2020) eKLR* where the court cited with approval the Supreme court decision which expounded on the doctrine of *functus Officio* in *Election Petition Nos 3,4 & 5 Raila Odinga -vs- IEBC & Others (2013) eKLR* that cited with approval Daniel Malan Pretorius in “ the origins of the

functus Officio doctrine, with specific Reference in this application in Administrative law, “ (20005) 122 SALJ 832 in the following terms:-

“The functus officio doctrine is one of the mechanisms by which the law gives expression to the Principle of finality . According to the Principle a person who is vested those powers, may as a general rule, exercise those powers only once in relation to the same matter. The Principle is that one such a decision has been given, it is subject to any right of appeal to a superior body or functionality) final and conclusive. Such a decision cannot be revoked or valued by the decision matter.’

The Respondent to further buttress the submission relied on in the decision in *Telkom Kenya Limited – vs- John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Ltd (2014) eKLR*

29. The court has already held it has no jurisdiction to grant orders sought. The court also held that the suit not having been heard on merit in ruling by Radido Judge the case is not resjudicata. Nevertheless, the court finds it is functus Officio on the issue of lack of jurisdiction on the subject matter. Radido Judge having held this court to lack jurisdiction pursuant to Section 87 of the Public Service Commission Act. The Applicant has lodged the appeal before Public Service Commission the right forum and approached the court for conservatory orders. The court has found it has no jurisdiction to hear the Application.

30. In conclusion the Notice of Motion Application dated 30th November 2021 is dismissed for want of jurisdiction with costs to the Respondents.

It is so ordered.

DATED , SIGNED AND DELIVERED AT BUNGOMA THIS 10TH MARCH, 2022.

J. W. KELI,

JUDGE.

In the presence of:

Court Assistant : Ms Wesonga

For Applicant : - Malala Advocates

For Respondent :- Ativa Advocate holding brief for Mukele Moni Advocate.