



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. E032 OF 2021

**IN THE MATTER OF ARTICLES 2(1), 10(2)(c), 21(1), 23(1) & (3), 27, 41, 47(1), 50(1), 75(1)(c), 175(a), 236, 258 AND 259 OF THE
CONSTITUTION, 2010**

AND

IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT ON THE FUNDAMENTAL RIGHTS OF THE PETITIONER

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

AND

IN THE MATTER OF THE PUBLIC SERVICE COMMISSION ACT, 2012

AND

IN THE MATTER OF PUBLIC SERVICE RULES & REGULATIONS

AND

IN THE MATTER OF EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS & FUNDAMENTAL FREEDOMS)
PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

DOMNIC OYIETE OKELO.....1ST PETITIONER

BOAZ OWUOR ODUOL.....2ND PETITIONER

VALLARY JEROTICH..... 3RD PETITIONER

LYDIA OTIENO.....4TH PETITIONER

HIGHLINE AJIAMBO RAGERO.....5TH PETITIONER

VERSUS

JUDGMENT

1. In a Petition lodged with the Court on 7 May 2021, the Petitioners alleged that the County Government of Homa Bay and the County Public Service Board, Homa Bay (the Respondents), had violated their rights to fair administrative action and fair labour practices, amongst other rights by stopping the payment of their remuneration from November 2017.
2. The Petitioners also alleged that the Respondents had unfairly terminated their contracts through a press release on or around 10 April 2018.
3. In the same Petition, the Petitioners asserted that the County Secretary served them notices of termination of service(s) in June 2018 with an effective date of 1 July 2018.
4. Filed with the Petition was a Motion seeking interim conservatory orders.
5. When the Motion was placed before the Court on 10 May 2021, it directed the Petitioners to serve the Respondents ahead of further directions on 18 May 2021.
6. Despite service, the Respondents did not attend the Court on 18 May 2021.
7. Despite the non-attendance, the Court directed the Respondents to file and serve responses to both the Motion and Petition, and mention was set for 2 June 2021 to confirm compliance.
8. When the Petition was called on 2 June 2021, there was no evidence that the Petitioners had served the Respondents with a mention notice and the Court rescheduled another mention for 21 June 2021.
9. None of the parties attended the Court on 21 June 2021.
10. The Respondents caused a replying affidavit to be filed on 26 January 2022.
11. The next time the Petition was placed before the Court on 27 January 2022, the Respondents proposed that the Petition be canvassed through the record and submissions to be filed.
12. The Court directed the parties to file and exchange submissions within set timelines addressing the issues in dispute as well as the jurisdictional question in view of Article 234(2)(i) of the Constitution. None of the parties filed submissions within the set timelines.
13. The Court has considered the Motion, Petition, and affidavits on record.

Jurisdiction

14. The cause of action advanced by the Petitioners relates to removal from office and terms and conditions of service.
15. Pursuant to Article 234(2)(i) of the Constitution as read with section 77(2)(b) & (e) of the County Governments Act and sections 85, 86 and 87(2) of the Public Service Commission Act, a party who is aggrieved by a decision of a county public service board over terms and conditions of service or termination of employment should at the first instance appeal to the Public Service Commission of Kenya.
16. The Petitioners herein did not suggest or demonstrate that they exercised the avenue provided to them to appeal.
17. Addressing the question of exhaustion of alternative dispute avenues, the Court of Appeal held in *Speaker of the National Assembly v Karume* (1992) KLR 21 that:

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

18. Without exhausting the dispute resolution avenue set out in the aforesaid provisions of the law, this Court declines jurisdiction.

Failure to file submission

19. The parties agreed to proceed by way of the record and submissions to be filed.
20. By failing to file the submissions, the Petitioners' action amounted to a failure to prosecute the Petition, and the same is for dismissal.

Unfair termination of employment

21. Under section 47(5) of the Employment Act, 2007, an employee should demonstrate at the first instance that an unfair termination of employment occurred.

22. Despite contending in paragraphs 18, 19, 26, 27 and 28 of the Petition, and paragraphs 23, 24, 25, 33 and 34 of the supporting affidavit, that there was an unfair termination of their contracts, the Petitioners did not place an iota of evidence of such decision or action on the part of the Respondents.

24. The Court notes that the Petitioners even pleaded different dates for the alleged termination of employment(s).

Parallel/related proceedings

25. The Petitioners referred to related proceedings filed in the Court in 2018. Surreptitiously, the details and particulars of the case were not disclosed.

25. The Petitioners appear not to have been candid and truthful in their disclosures.

26. They approached the Court with dirty hands and do not merit an exercise of the court's discretion in their favour.

Breach of contract

27. The Petitioners alleged that the Respondents were in breach of contract by stopping their wages from November/December 2017.

28. Unfortunately, the Petitioners did not place any verifiable evidence before the Court that they were in any lawful contractual relationship with the Respondents.

Conclusion and Orders

29. For the above reasons, the Court not only declines jurisdiction but finds no merit in the Motion and Petition.

30. The Motion and Petition are dismissed.

31. The parties did not file submissions as directed, and the Court makes no order on costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 11TH DAY OF APRIL, 2022

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Petitioners Omonde Kisera & Co. Advocates

For Respondents Otieno, Yogo, Ojuro & Co Advocates

Court Assistant Chrispo Aura