



Musumba & 37 others v Kakamega County Water and Sanitation Company & 5 others (Petition 1 of 2022) [2022] KEELRC 68 (KLR) (26 May 2022) (Ruling)

Neutral citation: [2022] KEELRC 68 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
PETITION 1 OF 2022**

JW KELI, J

MAY 26, 2022

**IN THE MATTER OF IN THE MATTER ARTICLES
1,2,3,10,19,20,21,22,23,25,27,28,30,41,43,47,50,232,
AND 258 OF THE CONSTITUTION OF KENYA, 2010**

AND

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

AND

**IN THE MATTER OF THE TRANSFER OF SERVICE OF 38 EMPLOYEES
FROM KAKAMEGA COUNTY WATER AND SANITATION COMPANY**

AND

**IN THE MATTER OF SECTIONS 10 (5) OF THE EMPLOYMENT ACT AND
SECTIONS 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

BETWEEN

YONAH MUSUMBA & 37 OTHERS PETITIONER

AND

**KAKAMEGA COUNTY WATER AND SANITATION COMPANY 1ST
RESPONDENT**

**KAKAMEGA COUNTY RURAL WATER AND SANITATION
COMPANY 2ND RESPONDENT**

**CECM, ENVIRONMENT, WATER, NATURAL RESOURCES AND CLIMATE
CHANGE 3RD RESPONDENT**

COUNTY GOVERNMENT OF KAKAMEGA 4TH RESPONDENT



RULING

1. The Ruling is on the Notice of Preliminary Objection by the 1st, 2nd, 3rd and 4th Respondents dated March 15, 2022 in the Petition dated February 8, 2022 to the effect that the court lacks jurisdiction to entertain the matter and for the suit to be struck out from the court’s record with costs for the following reasons:-

(1) That the Petitioner’s ought to have exhausted the available internal employee dispute resolution mechanisms provided for by the following provisions of the law-

a. Article 234(2) (a) (c) of the Constitution Kenya.

“ 234 Functions and Powers of the Public Service Commission.

The functions and powers of the Commission are as set out in this article,

The Commission shall-

i. Hear and determine appeals in respect of county governments
public service’

b. Section 77 of the County Government’s Act, 2012 provides-

’77.Appeals to the Public Service Commission

(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 against any county public officer may appeal to the Public Service Commission against the decision”.

c. sections 85(c) and 87(2) of the Public Service Commission Act 2017 –

‘PART XV- HEARING AND DETERMINATION OF APPEALS IN
RESPECT OF COUNTY GOVERNMENT PUBLIC SERVICE

85. The Commission shall, in order to discharge its mandate under Article 234(2)(i) of the constitution, hear and determine appeals in respect of any decision relating to engagement of any person in a County Government including a decision in respect of –

a) recruitment, selection, appointment and qualification attached to any office

b) remuneration and terms of office;

g) any other decision the Commission considers to fall within its constitutional competence to hear and determine an appeal in that regard.”



- d. 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 for County Government Public Service unless the procedure provided for:- under this part has been exhausted.
- e. Human Resources Policies and Procedures Manual for the Public Service 2016 Appeals. K.10 (1) an officer who dissatisfied by a decision made by an authorized officer may appeal to the Commission within a period of thirty (30) days from the date of the letter conveying such decision, provided that the Commission may consider an appeal that is made out of time if in the opinion of the Commission the circumstances warrant such consideration.
- f. The Objector states that Clause P.11 of the Kakamega County Human Resources Policies and Procedures Manual 2016 has incorporated Clause K.10 above of the PSC 2016 Human Resources Polices and Procedures Manual (supra).

(2) That the suit is premature , misplaced and a blatant abuse of the court process rendering it incurable and fatally defective.

The objector cites several case authorities thereunder.

2. The Court directed that the Notice of Preliminary Objection be canvassed by way of written submission.
3. The Respondent written submissions on their Notice of Preliminary Objection are dated March 30, 2022 drawn by Vivianne Mmbaka Komwonyo Advocate for 1st, 2nd, 3rd & 4th Respondents and received in court on April 1, 2022.
4. The Petitioner’s written submission on the Notice of Preliminary Objection are April 22, 2022 drawn by M/S J. O. Makali & Company Advocates and received in court on the April 25, 2022.

Determination

5. The Notice of Preliminary Objection by the 1st, 2nd, 3rd and 4th Respondents challenges the Jurisdiction of this court to handle and determine the instant petition. It is trite law that jurisdiction is everything and without it the court must down its tools. The law is settled on the question of jurisdiction as per landmark decision of Nyarangi JA in *Owners of the Motor Vessel Lilian “S” v Caltex Oil (Kenya) Ltd* [1989] eKLR where the court of Appeal stated :-

“Jurisdiction is everything without it , a court has power to make one more step. A court of law downs tools in respect of the matter before court the moment it holds the opinion that it is without jurisdiction”.



6. The above decision was upheld by the Supreme Court of Kenya in its advisory opinion reported as “ *in Re The matter of the Interim Independent Electoral Commission* [2011] eKLR in paragraph 30 where it is said: “ *The Lilian “S” case* [1989] KLR 1 establishes that jurisdiction flows from the law, and the recipient – court is to apply the same, with any limitation embodied therein. Such a court may not arrogate itself jurisdiction through the craft of interpretation, or by any of endeavors to discern or interpret the intentions of parliament, where the wording of legislation is clear and there is not ambiguity”.
7. The two decisions (*Supra*) are binding on this court. The court will proceed then to establish if it has jurisdiction in the instant case. The challenge on the jurisdiction in the instant case is based on the failure by the Petitioners to exhaust the statutory dispute resolution mechanisms of appealing to the Public Service Commission under the Constitution article 234, section 77 of the county governments Act and Section 87 of the Public Service Commission Act. The Respondents submit that the petition is premature for failing to exhausting those mechanisms in the first instance.
8. The Respondents submit that the Petitioners in Petition dated 8th February 2022 and Notice of Motion Application of even date challenge the decision of the 1st Respondent to transfer their services to the 2nd Respondent.

Issues for Determination

9. The Applicant/Respondents’ submits that the issue of determination is whether the Petition is premature. On the other hand the Petitioner submits that the single issue for determination is whether the preliminary objection as raised by the 1st, 2nd, 3rd, & 4th Respondents has merit and whether it should be allowed. The court upon considering the submissions by both parties finds that the issue to be determination in this ruling is whether the Preliminary Objection dated 15th March 2022 has merit .

Whether the Preliminary Objection dated 15th March, 2022 has merit.

10. The Objector(1st to 4th Respondents) says the Petition challenges decision of the 1st Respondent to transfer the services of the Petitioners to the 2nd Respondent hence falling under Section 77 of the County Governments Act where any appeal on the decision lies to the Public Service Commission. The Petitioner in response submits that this calls for consideration of 2 issues:-
 - i. Is the County Public Service Board of Kakamega the employer of the Petitioners?
 - ii. Is the Public Service Commission the appropriate forum for the purposes of the Petitioners grievances raised the Petition.
11. The Petitioners submit they are not employees of the County Public Service Board as envisaged under Section 56, and Section 59 of the County Government Act. The Petitioners submits they are employees of a water service provider within the meaning of the Provisions of Section 55 of the Water Act No. 8 of 2002. Their annexed letters of employment are by Kakamega County Water and Sanitation Company and not the County Public Service Board.
12. The court finds that the facts on who is the employer are not settled. Parties have taken different positions calling for court determination as to who is the employer. The merit of the Preliminary Objection cannot be decided when the facts are in dispute. The court is guided by the landmark case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors* [1969] E. A 696 where the court stated:- “ a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are on objection to the jurisdiction of the court... it raises a pure point of law which is argued



on the assumption that all the facts pleaded by the others are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion”. (emphasis given).

13. I uphold the above decision to apply in the instant case for the reason that the facts of who was the employer of the Petitioners has to be ascertained. The court notes that the Respondent is yet to file substantive response to the Petition hence facts are not settled.
14. The court agrees that jurisdiction is an issue that can be raised under a Preliminary Objection and the law is settled that challenge to decisions of the County Public Service Board have to first be appealed to the Public Service Commission under Section 77. In the instant Preliminary Objection, it is not a settled fact that the Petitioners are employees of the Service Board. The court has original jurisdiction to determine that fact of who is the employer on merit basis and any other employment dispute.
15. The court determines that the instant Notice of Preliminary Objection does not meet the threshold of a preliminary objections as the court has to ascertain fact of terms of employment and who is the employer of the Petitioners. The *Mukisa Biscuits case (Supra)* was upheld by the Supreme Court of Kenya in case cited by Petitioners in *Independent Electoral & Boundaries Commission v Jane Cheperrenger and 2 others* [2015] eKLR as follows:-

“As to whether a Preliminary Objections is one of merit, this court has already pronounced itself on the threshold to be met. The court endorsed the *Principle in Mukisa Biscuits Manufacturing Co. Ltd -vs West End Distributors [1969] EA 696*. In the case of *Hassan Ali Joho & another v Suleiman Said Shalbal & 2 others* (Petition No. 10 of 2013) [2014] eKLR paragraph 31”.
16. In conclusion and for the foregoing reasons and guided by case law(Supra) the court finds the Notice of Preliminary Objection dated 15th March 2022 by the 1st, 2nd, 3rd & 4th Respondents is not properly raised as the facts in the dispute are not settled.
17. The court holds that it has original jurisdiction over all employment disputes hence where the facts are in dispute a preliminary objection based on jurisdiction cannot be upheld even where doctrine of exhaustion is invoked like in the instant case.
18. The Notice of Preliminary Objection dated 15th March 2022 is dismissed. Costs in the cause.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 26TH DAY OF MAY, 2022.

J. W KELI

JUDGE

In the presence of:-

Court Assistant : Brenda Wesonga

Petitioners:- Mr. Musumba h/b Mr. Makali

Respondents: -Mr. Wabuko h/b Ms.Mmbaka

