



**Nasurutia v Kiboi & 6 others (Employment and Labour Relations Petition
E013 of 2021) [2022] KEELRC 1518 (KLR) (5 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1518 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS PETITION E013 OF 2021**

JW KELI, J

MAY 5, 2022

**IN THE MATTER OF ARTICLE 21(1), 22(1)23,27(4)27(5)41(1)56(1)165(3)
(B),232(1)(C),235, AND 258 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ENFORCEMENT OF THE CONSTITUTION OF
KENYA (SUPERVISORY) JURISDICTION AND PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL
(HIGH COURT PRACTICE AND PROCEDURE RULES 2013**

BETWEEN

JOSEPH WANYONYI NASURUTIA PETITIONER

AND

METRINE TEMKO KIBOI 1ST RESPONDENT

GLENN KIPROP ROTICH 2ND RESPONDENT

MZEE MICHAEL NDIWA 3RD RESPONDENT

PROTUS MACHOWERA KIBOI 4TH RESPONDENT

MARTIN NDIEMA NDIWA 5TH RESPONDENT

TOBIAS KIMTAI OSIBO 6TH RESPONDENT

COUNTY GOVERNMENT OF BUNGOMA 7TH RESPONDENT

RULING

1. The Ruling is on the Preliminary Objection by the 7th Respondent dated February 3, 2022 challenging jurisdiction of the court to hear and determine the instant petition. The Preliminary objection was canvassed by way of written submissions.



2. The Petitioner filed a Petition dated November 25, 2021 seeking the following orders:-
 - a. A declaration that the action by the 7th Respondent of employing all the 6 village administrators from only one community in a cosmopolitan Elgon Ward is null and void for being unconstitutional.
 - b. A declaration that the employment of one Metrin Temko Kiboi as a village administrator for Kipchiraia /Madindet village is null and void.
 - c. An order that the employment of the 1st to 6th respondents as Elgon Ward administrators by the 7th Respondent be quashed.
 - d. Costs of this petition be provided for.
3. The Petition is supported by the affidavit of the Petitioner sworn on the November 25, 2021. The affidavit annexes the National identity card of the Petitioner, advert by the County Public Service Board for recruitment of 236 village administrators, unsigned memorandum by residents of Kaptola and Msindet Villages of Elgon ward addressed to the 7th Respondent and copied to the leadership of Bungoma county and document with names of persons alleged to have attended the meeting appending their signatures. map sketches of the ward and details of Mt. Elgon ward proposed villages.
4. The 7th Respondent entered appearance, and filed notice of preliminary objection dated February 3, 2022 seeking for the petition to be struck out on the ground:-
 - i. That the Honourable court lacks jurisdiction to hear and determine this matter in accordance with Section 7 (sic) of the County Governments Act, 2012 and Section 87 (2) of Public Service Commission Act 2017.
5. The other respondents did not enter appearance.
6. The Ruling is on the Preliminary Objection dated February 3, 2022 which was canvassed by way of written submissions. The Objectors/7th Respondent's written submissions are dated February 3, 2022. The Petitioner's written submissions are dated February 26, 2022.
7. The Petitioner submits that the following facts are not in dispute:-
 - a. That the Bungoma County Public Service Board published in the standard newspaper of November 2, 2020 an advertisement inviting qualified residents of the respective 236 village units of Bungoma county for the position of village administrators (JWN2)
 - b. That many qualified residents of the Bungoma county applied for the positions
 - c. That the interviews for the shortlisted candidates were conducted on various dates between May 31, 2021 and June 2, 2021.
8. The 7th Respondent/objector submits that the court lacks jurisdiction to entertain the suit. The preliminary objection is hinged on the law. Article 234(2)(1) of the Constitution grants the Public Service Commission jurisdiction to determine appeals in respect to county government public service. 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 any County Public officer may appeal to the Public Service Commission against the decision. In part (2) 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”.
9. Counsel for the objector further submits that the decision on recruitment and deployment of the village administrators by the Bungoma county public service board can only be appealed to the public service commission. That section 77(2) of the County Government Act and section 87(2) of the Public service Commission are couched in mandatory terms by use of term ‘shall”.
 10. The objector to buttress its submission relies on the decision of Court of Appeal in Secretary Wajir County Public Service Board v Hulbal Gedi Abdile [2017] eKLR whether the Court of Appeal held that a party cannot bypass the provisions of section 77 of the County Government Act and come to court by way of a constitutional petition. This decision was upheld in the case of Martin Kabubii Mwangi v County Government of Laikipia [2019] eKLR by the court upholding the principle of exhaustion in Speaker of the National Assembly v James Njenga Karume [1992] eKLR and holding as follows:- ‘the exhaustion principle enunciated in precedents such as the case of Secretary County Public Service and another v Hulbai Gedi Abdille [2017] eKLR does not permit an election to the parts of the statute that one should rely on. Put another way, it removes discretion on the part of a litigant from choosing whether to follow the provision or not. In this case the petition was filed before the exhaustion of the remedy under section 77 of the County Government Act, the Claimant ought to have appealed against his removal to the Public Service Commission before moving the court. As he did not appeal as provided for in law, the suit is a non- starter and is accordingly struck out.”
 11. The Objector further cites other cases upholding the doctrine of exhaustion of section 77 of the County Government Act by the court in James Tunai Murete v County Government of Kajiado & 22 others [2015] eKLR, Junet Mohammed Ibrahim & another v County Governmmnet of Mandera & 3 others [2019] e KLR , Fred Marmelei Loronyokwe v County Government of Samburu &another [2020] eKLR and the case of Chrispinus Likuyuni Lumiti v County Chief Officer Public Service Kakamega County and 3 others [2021] eKLR where in all the cases which challenged the decisions of the county public service boards the court declined jurisdiction at first instance.
 12. The Respondent submits that Article 2 of *the Constitution* provides for the supremacy of *the Constitution* of the Republic of Kenya and any law including customary law that is inconsistent with *the Constitution* is void to the extent of the inconsistency and any act or omission in contravention of *the Constitution* is invalid. Further in the instant petition the Petitioner complained of infringement of constitutional provisions for which a clear procedure for how to approach the court is provided under Constitution of Kenya (Protection of human rights and fundamental freedoms practice and procedure rules 2013)(herein after referred to as the Mutunga rules).
 13. The Respondent further submits that the provisions of Article 234 of *the Constitution* does not take away the powers of the court to hear and determine petitions of this nature and by provisions of Article 2 of *the Constitution* of the supremacy of this Constitution. Section 77 and 87 (sic)of the County Government Act do not oust the jurisdiction of the court to hear and determine issues raised in this petition, that the doctrine of exhaustion of alternative remedies does not oust the jurisdiction of this court. That the objection should dismissed with costs.

Determination of the Preliminary Objection

14. The Petition is brought under Article 23 of *the Constitution* and the 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 .

15. The Petitioner submits that Article 234 of the Constitution and section 77 of the county government act and section 87 of the Public Service Commission Act do not oust my jurisdiction under the Constitution and the Employment and Labour Relations Court to deal with constitutional petitions.
16. The Court of Appeal has now settled the question of interpretation of Section 77 of the County Government Act by holding that the procedure therein must be exhausted before the court intervention is invoked. In the Court of Appeal case of Secretary County Public Service Board and another v Hulbal Gedi Abdulla [2017] eKLR (Makhandia, Ouko & M Inoti JJA) 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’.

17. The court further notes a similar petition was presented before the court in Oliver Mukhebi & 28 others v County Public Service Board of Bungoma & another [2022] eKLR where the petitioner challenged the same recruitment of the 236 village administrators in Bungoma County under the annexed advert by the Petitioner (JWN-2). The Petitioner may be different but the substance of the case and prayers have same consequences as they seek to nullify the decision of the Bungoma County Public Service Board of employing the said village administrators. In the said decision I upheld the decision of the court of Appeal in *Hulbal Gedi Abdullabi (supra)*.
18. In view of the binding authority of Court of Appeal in *Hulbal Gedi Abdullabi (supra)* this court has no jurisdiction over appeals from recruitment and appointments by the Public Service Board of County Governments. I find and hold that impugned employment of the 6 village administrators was a decision of the Bungoma county public service board and not the 7th Respondent pursuant to the annexed advertisement (JWN-2). I further uphold my decision in Oliver Mukhebi & 28 others v County Public Service Board of Bungoma & another [2022] eKLR.
19. I uphold the notice of preliminary objection dated February 3, 2022 by the 7th Respondent and determine that I have no jurisdiction to hear and determine the instant petition. The petition dated November 25, 2021 is struck out. Each party to bear own costs in the Notice of Preliminary Objection and the Petition.

It is so ordered.

DATED , SIGNED AND DELIVERED ONLINE THIS 5TH MAY OF 2022

J. W. KELI

JUDGE.

In the presence of

Court Assistant : Brenda Wesonga

For petitioner...Absent



For 7th Respondent... Absent

