



REPUBLIC OF KENYA



**KENYA LAW**  
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**JUMA v SIAYA COUNTY PUBLIC SERVICE BOARD (Cause E060 of 2021) [2022] KEELRC 6 (KLR) (4 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 6 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E060 OF 2021**

**S RADIDO, J**

**MAY 4, 2022**

**IN THE MATTER OF VIOLATION OF ARTICLES 1, 2, 3, 4,10, 19, 20, 21, 22, 23, 73, 75, 159, 174, 175, 232, 235, 251, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER OF THE VIOLATION OF THE PETITIONER'S BASIC AND FUNDAMENTAL HUMAN RIGHTS AS ENSHRINED UNDER ARTICLES 27, 28, 29, 41, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**ERICK JUMA ..... PETITIONER**

**AND**

**SIAYA COUNTY PUBLIC SERVICE BOARD ..... RESPONDENT**

**RULING**

///**ARGUMENTS**

1. On or around 23 November 2018, the County Public Service Board, Siaya (the Board), advertised for the position of Principal Finance Officer (Analyst).
2. Eric Juma Ochola (the Petitioner) applied for the vacancy, was interviewed, and was issued an offer of an appointment on 5 April 2019.
3. The offer letter indicated that an appointment letter would be issued once the Petitioner accepted the offer and the Petitioner accepted the offer on 10 April 2019.
4. The Board did not issue the appointment letter and on 30 September 2020, the Petitioner sought the assistance of the Public Service Commission in light of section 77 of the *County Governments Act*.
5. The Petitioner made a follow up with the Board through a letter dated 7 January 2021, and on 25 January 2021 the Board responded stating that the issuance of appointment letters had been suspended



- due to concerns of increased wage bills, re-allocation of funds to address the COVID19 public health pandemic and that further decision from the Executive was awaited.
6. However, on a date which is not clear from the material placed before the Court, the Board advertised for various positions including for Senior Principal Fiscal Analyst with a deadline of receipt of applications set for 12 March 2021.
  7. On 30 November 2021, the Petitioner moved to Court alleging violation of his rights and breach of contract and he sought orders:
    - i. A declaration that the conduct of the Respondent is in breach of the relevant provisions of Articles 27, 28, 41, 47, 50, 249 and 259 of the Constitution of Kenya, 2010.
    - ii. An order of mandamus be and is hereby issued directing the Respondent to issue the Petitioner an appointment letter within 14 days of this Honourable Court's judgment.
    - iii. A declaration that the Petitioner be allowed to report to work within 14 days of this Honourable Court's judgment.
    - iv. An award of general damages for unfair labour practices and violation/breach of the Petitioner's constitutional rights.
    - v. Maximum compensation of 12 months' salary inclusive of benefits for the unlawful, illegal malicious and unfair actions by the Respondent.
    - vi. Costs of the Petition.
    - vii. Any other reliefs as the Court may deem just and expedient to grant.
  8. The Board filed a replying affidavit in answer to the Petition on 4 January 2022 and it followed it up with a Motion on 24 January 2022, seeking orders:
    - (1) ...
    - (2) That the Petition dated 29<sup>th</sup> November 2021 be struck out.
    - (3) Cost of the Petition and application to the Respondent/applicant.
  9. The Board filed its submissions on the Motion on 25 January 2022.
  10. The Petitioner filed Grounds of Opposition to the Motion and submissions on 31 January 2022.
  11. The crux of the Motion by the Board was that the Petition was premature because the Petitioner had not exhausted the alternative dispute resolution avenues set out in section 77 of the [County Governments Act](#) and thus the Court lacked jurisdiction.
  12. To buttress the Motion, the Board submitted that a plain reading of Section 77(1) & (2) of the [County Governments Act](#) shows that the first port of call for the Petitioner should have been the Public Service Commission.
  13. The Board relied on numerous authorities to urge the alternative dispute resolution point, among them, [Geoffrey Mutbinja & another vs Samuel Muguna Henry & 1756 Others](#) (2015) eKLR, [Speaker of the National Assembly vs James Njenga Karume](#) (1992) eKLR and [Martin Kabubii Mwangi vs County Government of Laikipia](#) (2019) eKLR.
  14. The Board also submitted that for an order of *mandamus* to issue, a party must demonstrate that a public body had refused to perform a duty. It was the Board's contention that they had not refused to



- perform any duty, and that in the absence of any document communicating their refusal, then there was no basis upon which an order for *mandamus* could be issued.
15. The Petitioner was of the view that the application was misconceived, incompetent, incurably defective and an abuse of the court process.
  16. It was the Petitioner's submission that an employer-employee relationship had not been created between himself and the Board, that would bring into operation Section 77(2) of the [County Governments Act](#).
  17. It was the Petitioner's further submission that Section 12 (1) of the *Employment and Labour Relations Court Act* gives this Court jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the [Constitution](#).
  18. On the exhaustion doctrine, the Petitioner submitted that its applicability presupposes that there is an alternative means of resolving a dispute, which he argued was not the case herein as there was no employer-employee relationship.
  19. The Petitioner also asserted that the Board had not made a decision that would cloth the Public Service Commission with jurisdiction to hear and determine an appeal.
  20. The Petitioner prayed for dismissal of the application with costs.
  21. The Court has considered the Motion, affidavits, Grounds of Opposition, and submissions.
  22. Before examining the merits of the Motion, the Court wishes to address the Petitioner's contention that there is/was no employer relationship between the Board and himself.
  23. In the Court's view, if indeed it is correct that an employer and employee relationship does (did) not exist, then this Court would have no jurisdiction to entertain the Petition in the first place.
  24. The primary jurisdiction of this Court is founded upon disputes arising out of a contract of service or employment contract.
  25. On whether the Motion is merited, it is clear to the Court that the Petitioner's cause of action primarily relates to the terms and conditions of service, which are ordinarily set out in an appointment letter or contract document as demanded by section 9(2) of the [Employment Act](#), 2007.
  26. Article 234(2)(i) of the [Constitution](#) vests the Public Service Commission of Kenya with the function of hearing and determining appeals from certain decisions of county public service boards.
  27. The appellate function has been partly contextualised in section 77(2) of the [County Governments Act](#), which provides that:
    - (2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government, including a decision in respect of—
      - (a) recruitment, selection, appointment and qualifications attached to any office;
      - (b) remuneration and terms and conditions of service;
      - (c) .....
  28. The appellate function is further adumbrated in sections 85, 86 and 87(2) of the [Public Service Commission Act](#), which denies the Court first instance jurisdiction in disputes concerning appointment into the county public service and terms and conditions of service (among others) until the appellate avenue is exhausted.



29. The exhaustion principle within the context of the county public service was the subject of examination by the Court of Appeal in *Secretary, County Public Service Board & another v Hulbbai Gedi Abdille* (2017) eKLR.
30. The Court of Appeal stated therein:  
QUOTE  
"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. The section provides not only a forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one, specifically tailored by the legislators to meet needs such as the respondent's. In our view, the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance..... Her contention that she disregarded the appeal because it could not afford her an opportunity to question the procedure followed by the appellant is, in our view, without basis because Section 77 has placed no fetter to the jurisdiction of the Public Service Commission".
31. The decision is binding on this Court.
32. The Petitioner appealed to the Public Service Commission. It was not disclosed to the Court whether the Commission had determined the appeal.
33. Without that disclosure, there is a risk of the Court not only usurping first instance jurisdiction of the Commission but also making a determination that may compromise the Commission's decision.
34. The appellate jurisdiction of the Public Service Commission under Article 234(2)(i) of the *Constitution* is a quasi-judicial function. It is amenable to the Court's supervisory jurisdiction under the Fair Administrative Actions Act and other statutes.
35. The Petitioner did not make the Public Service Commission a party to the proceedings to shed light on the status of the prayer for its intervention.

### **Conclusion and Orders**

36. From the foregoing, the Court finds that the Petition herein was premature, and jurisdiction is declined.
37. The Petition is struck out with costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 4<sup>TH</sup> DAY OF MAY 2022.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

### **Appearances**

For Petitioner Onsongo & Co. Advocates

For Respondent Office of the County Attorney, County Government of Siaya

Court Assistant Chrispo Aura

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