



REPUBLIC OF KENYA



KENYA LAW
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**Omuga v Migori County Public Service Board & 2 others (Petition
E024 of 2022) [2022] KEELRC 1418 (KLR) (29 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1418 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E024 OF 2022
S RADIDO, J
JUNE 29, 2022
IN THE MATTER OF ARTICLES 1, 2, 4(2), 10,
27, 41(1), 47, 73, 232, 234,
236, 249(2)(B) AND 259(1)
OF THE CONSTITUTION OF
KENYA
AND
IN THE MATTER OF SECTIONS 41, 43 AND 45
OF THE EMPLOYMENT ACT
AND
IN THE MATTER OF SECTION 5 OF THE
LABOUR RELATIONS ACT,
2007
AND
IN THE MATTER OF SECTIONS 57, 59, 76(1) &
(2) OF THE COUNTY
GOVERNMENTS ACT, 2012
AND
IN THE MATTER OF SECTIONS 3, 4, 6 AND 7
OF THE FAIR
ADMINISTRATIVE ACTIONS
ACT
AND



**IN THE MATTER OF ARTICLE 23(1) OF THE
UNIVERSAL DECLARATION
OF HUMAN RIGHTS
AND
IN THE MATTER OF THE DOCTRINE OF
LEGITIMATE EXPECTATION**

BETWEEN

SAMUEL OTIENO OMUGA PETITIONER

AND

MIGORI COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT

MIGORI COUNTY GOVERNMENT 2ND RESPONDENT

GOVERNOR, COUNTY GOVERNMENT OF MIGORI 3RD RESPONDENT

JUDGMENT

1. Samuel Otiemo Omuga (the Petitioner) was appointed as Chief Officer, Finance and Economic Planning on 20 November 2014 for 3 years by the Governor, Migori County (the contract was extended through a letter dated 20 November 2020).
2. Over time, the County Public Service Board, Migori (the Board), received complaints concerning the finances and engagement of casuals within the county, and it commenced investigations.
3. As part of the investigations, the Board invited the Petitioner to appear before it on 27 September 2021 and 19 October 2021. The Petitioner did not honour the invitations.
4. On 3 November 2021, the Board wrote to the Petitioner instructing him to arrange to pay all pending wages to casual employees.
5. On 4 February 2022, the Board sent the Petitioner on compulsory leave of 30-days to facilitate further investigations. Because of the compulsory leave, the Petitioner's duties were assigned to another officer on 7 February 2022.
6. The decision prompted the Petitioner to move the Court on 9 February 2022, asserting that his rights to fair labour practices, administrative action and due process had been violated (Kisumu Petition No. E005 of 2022).
7. On 11 February 2022, during the pendency of the Petition, the Board issued a show-cause notice to the Petitioner and gave him 7-days to respond (the Petitioner responded to the show-cause on 21 February 2022).
8. On 11 March 2022, the Board met and resolved to suspend the Petitioner.
9. The Petitioner was notified of the suspension through a letter dated 14 March 2022. The letter set out the allegations against the Petitioner and invited him to attend a disciplinary hearing on 22 March 2022.



10. The Petitioner appeared for the disciplinary hearing with his advocate, and the Board met on 5 May 2022 to decide the Petitioner's fate. The Board resolved on summary dismissal, and a letter to that effect was issued to the Petitioner on 9 May 2022.
11. The Petitioner was aggrieved and lodged a Petition with the Court on 30 May 2022, alleging that the suspension prior to dismissal was illegal, unlawful and without justification. He also contended that the dismissal was null and void because his constitutional rights had been violated.
12. The Petitioner sought the following remedies:
 - (a) A declaration that the decision by the 1st Respondent to suspend the Petitioner as contained in the suspension letter dated 14th March and the subsequent decision of the 1st Respondent to dismiss the Petitioner as contained in the dismissal letter dated 9th May 2022 was unlawful and unreasonable and in breach of articles 41, 47 and 48 of *the Constitution* of Kenya, 2010 and based on unlawful and illegal process contrary to section 71 of the *Public Service Commission Act*, 2017 hence null and void.
 - (b) An order of certiorari to bring this Honourable Court for purpose of being quashed and to quash the decision by the 1st Respondent to suspend the Petitioner as contained in the suspension letter dated 14th March 2022 and the subsequent decision of the 1st Respondent to dismiss the Petitioner as contained in the dismissal letter dated 9th May 2022 without following the due process of the law.
 - (c) THAT the Petitioner be reinstated as County Chief Officer forthwith.
 - (d) A permanent injunction do issue restraining the Respondents from taking any disciplinary process against the Petitioner without following the due process of the law.
 - (e) Costs of the Petition and any other order that the Court may deem fit and appropriate.
13. Filed with the Petition at the same time was a Motion under a certificate of urgency seeking interim conservatory orders.
14. On 3 June 2022, the Board filed a Notice of Preliminary Objection against the Petition and motion contending:

Take Noticethat on a date fixed for hearing of this suit or any other application, the 1st Respondent shall raise a Preliminary Objection on a pure point of law in that this Court lacks the statutory jurisdiction as the Petitioner has not exhausted the local dispute mechanism before the Public Service Commission under section 77 of the *County Governments Act* and hence this Petition should be struck out with costs.
15. When the parties appeared before the Court on 2 June 2022, it gave directions, including the filing and exchanging submissions on the jurisdictional question raised by the Board.
16. The Petitioner filed a further affidavit and submissions on 14 June 2022 and the Board on 21 June 2022. The Board filed its submissions on 21 June 2022.
17. The Court has considered the Petition, Motion, affidavits, and submissions.

Jurisdiction of the Court over disciplinary decisions of county public service boards
18. It is not in dispute that the Board was exercising or purporting to exercise its powers of disciplinary control when it suspended the Petitioner on 14 March 2022 or when it dismissed him on 9 May 2022.



19. Article 234(2)(i) of *the Constitution* mandates the Public Service Commission of Kenya to hear and determine appeals in respect of decisions made by a county public service board with regard to the county governments' public service (including disciplinary decisions).
20. To further the appellate jurisdiction of the Public Service Commission, section 77(1) and (2)(c) of the *County Governments Act* requires persons dissatisfied with the decisions of a Board in the exercise of disciplinary powers to appeal to the Public Service Commission.
21. Similarly, section 87(2) of the *Public Service Commission Act* inhibits the commencement of judicial proceedings in the Courts before the exhaustion of the appeal procedures outlined in Part XV of the Act.
22. The Court of Appeal has addressed its mind severally to the exhaustion of alternatively anchored dispute resolution processes within the context of the county public service.
23. In *Geoffrey Muthinja & Ar v Samuel Muguna Henry & 1756 Ors* (2015) eKLR, the Court held:

It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews... as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of Courts.
24. In *Secretary, County Public Service Board & Ar v Hulbhai Gedi Abdille* (2017) eKLR, the Court of Appeal said of the application of section 77 of the *County Governments Act*:

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.
25. The doctrine of exhaustion of statutorily provided alternative dispute resolution mechanisms has become so entrenched in the jurisdiction that the Supreme Court stated in *Albert Chaurembo Mumba & 7 Ors* (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v *Maurice Munyao & 148 others* (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) (2019) eKLR:

Accordingly, jurisdiction cannot be "optional" unless such parallel avenues are provided with certain limitations by any written law (see Samuel Kamau Macharia (supra) and neither can jurisdiction be acquired or exercised depending on the unique facts and circumstances of each particular case. Jurisdiction is not an equitable remedy.

.....



The jurisprudence emanating from this Court and the lower Courts, which has been restated with notoriety to the effect that, where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by *the constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance.

.....

In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.

Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action rests, not alone on the disinclination of the judiciary to interfere with the exercise of the statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts upon a claim or grievance. Such formulation underlies the analogous cases, frequently cited for the exhaustion doctrine, in which the court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted the complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not allay. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action.

26. These decisions are binding on this Court. It is of no moment that the word may is used in section 77(1) of the *County Governments Act*.
27. The record shows that the Respondents might have had a mind to get rid of the Petitioner whichever way, but the hands of the Court are tied as its jurisdiction is a deferred jurisdiction.
28. The Petitioner should have exhausted the appellate procedures contemplated by *the Constitution*, the *County Governments Act*, and the *Public Service Commission Act* before commencing the proceedings herein.

Conclusion and orders

29. Flowing from the above, the Court must down its pen and decline to assume first instance jurisdiction.
30. The Petition is struck out with no order on costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 29TH DAY OF JUNE 2022.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Petitioner Nelson Jura & Co. Advocates

For 1st Respondent Bruce Odeny & Co. Advocates



For 2nd & 3rd Respondents did not participate

Court Assistant Chrispo Aura

