



Ouko v Kisumu County Public Service Board & 2 others; Ethics and Anti-Corruption Commission (Interested Party) (Petition E007 of 2020) [2022] KEELRC 1506 (KLR) (15 June 2022) (Judgment)

Neutral citation: [2022] KEELRC 1506 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E007 OF 2020**

S RADIDO, J

JUNE 15, 2022

**IN THE MATTER OF ARTICLES 22(1) & (2)(C), 23(1), 258(2)(C) AND 259(1)(A), (B) & (C) OF THE CONSTITUTION OF KENYA, 2010 AND
IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 2(1), 3(1), 10, 41(1), 73, 232(1)(E), (G) & (I), 235(1)(A) & (B) OF THE CONSTITUTION OF KENYA, 2010 AND
IN THE MATTER OF URBAN AREAS AND CITIES ACT, 2012 AND IN
THE MATTER OF THE COUNTY GOVERNMENTS ACT, 2012 AND
IN THE MATTER OF THE HUMAN RESOURCE POLICIES AND PROCEDURES MANUAL FOR THE PUBLIC SERVICE, MAY 2016**

BETWEEN

BENARD OMONDI OUKO PETITIONER

AND

KISUMU COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT

COUNTY GOVERNMENT OF KISUMU 2ND RESPONDENT

MICHAEL ABALA WANGA 3RD RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

JUDGMENT

1. On or around 25 September 2020, the County Public Service Board, Kisumu (the Board) caused to be published in the Standard newspaper of even date a vacancy for City Manager. The vacancy



- announcement referred to Article 184 of *the Constitution* and section 29 of the *Urban Areas and Cities Act*.
2. The vacancy announcement set the deadline for receipt of applications as 8 October 2020 and drew the attention of interested persons to its website for more details.
 3. At the same time, the Board appointed Michael Abala Wanga (acting City Manager) to serve as City Manager for a period of 6-months or until the substantive appointment of a City Manager.
 4. The Board thereafter published the names of 5 shortlisted applicants for the position of City Manager, and these included the acting City Manager. The interviews were to be held on 20 November 2020.
 5. Benard Omondi Ouko (the Petitioner) was aggrieved with the recruitment process and wrote a complaint letter to the Board on 12 November 2020. He implored the Board to take corrective action.
 6. The Petitioner did not get a response to his complaint and on 17 November 2020, he commenced legal action against the Board, the County Government of Kisumu (County Government) and the acting City Manager) (collectively referred to as the Respondents), alleging that the recruitment process of the City Manager was illegal, unconstitutional, null and void.
 7. According to the Petitioner, the Board had shortened the application process from a minimum of 21-days to 13-days. It had also included qualifications which were not contemplated by sections 29 and 30 of the *Urban Areas and Cities Act*.
 8. The Petitioner further challenged the qualification/competence of the acting City Manager to serve in a public office on the ground that he was a criminal convict and his conviction had not been overturned by a competent Court.
 9. The Petitioner sought the following orders:
 - (i) A declaration that the impugned advert calling for applications from competent and qualified persons to fill the vacancy in the office of City Manager, the City of Kisumu and contained in the 1st Respondent's advert carried in the Standard newspaper dated 25th September 2020 at page 26 and posted on the 2nd Respondent's website was calculated at locking out potential applicants hence it is illegal, unconstitutional, null and void.
 - (ii) A declaration that the 3rd Respondent is not qualified to be appointed as public officer and /or in the public service and that his appointment (sic) and an order of certiorari do issue directed at the 1st Respondent to remove into the High Court of Kenya and quash the 1st Respondent's decision contained in its letter dated 25th September 2020 appointing the 3rd Respondent as acting City Manager for the City of Kisumu.
 - (iii) An order of certiorari do issue directed at the 1st Respondent to remove into the High Court of Kenya and quash the 1st Respondent's advert carried in the Standard newspaper dated 25 September 2020 at page 26 and posted on the 2nd Respondent's website and other consequent processes and/or decisions including shortlisting of candidates for interviews, interviewing candidates and final appointment of a City Manager Kisumu City.
 - (iv). Costs of this Petition be borne by the 1st Respondent.
 10. Together with the Petition was a Motion under Certificate of urgency seeking injunctive reliefs against the Respondents.
 11. The Court directed the Petitioner to serve the Petition and Motion.



12. The Board's Chief Executive Officer filed a replying affidavit in response to the Motion on 19 November 2020. He deposed in the affidavit that the interviews scheduled for 20 November 2020 had been postponed indefinitely after the service of the court process.
13. The Court thereafter took brief oral submissions from the parties and, in a short Ruling, declined to grant the injunctive orders. The Court directed the parties to file and exchange responses ahead of further directions on 11 December 2020.
14. The Board caused a replying affidavit opposing the Petition and Motion to be filed on 10 December 2020.
15. On the same day, an application to join an Interested Party was filed.
16. The acting City Manager filed his replying affidavits in opposition to the Motion and Petition on 11 December 2020.
17. A second application seeking the joinder of another Interested Party was filed on the same day.
18. The Court dismissed the two joinder applications in a Ruling delivered on 24 March 2021.
19. When the parties appeared in Court for directions on 2 November 2021, the Petitioner proposed that the Petition be determined based on the record and submissions to be filed. The Court agreed with the proposal and directed the filing and exchange of submissions.
20. The Ethics and Anti-Corruption Commission (the Commission) was granted leave to file a replying affidavit.
21. When the Petition was mentioned on 24 January 2022 to confirm compliance, the acting City Manager sought leave to file a Cross-Petition.
22. The Court allowed the request and also issued other directions on the filing and exchange of further affidavits/responses. On 14 March 2022, the Court issued final directions with judgment set for today.
23. The Cross-Petition was filed on 17 February 2022, the Commission filed a Reply to the Cross Petition on 1 March 2022, and the Petitioner filed his Reply on 31 March 2022. The Petitioner filed a replying affidavit to the Cross-Petition on 27 April 2022.
24. While giving directions on 14 March 2022, the Court requested the parties to address in their submissions the question of whether this Court has first instance jurisdiction in light of Article 234(2) (i) of *the Constitution* as read with section 77 of the *County Governments Act* and sections 85, 86 and 87 of the *Public Service Commission Act*.
25. The Commission filed its submissions on 17 May 2022, the Petitioner on 20 May 2022 and the acting City Manager on 27 May 2022.
Jurisdiction is everything
26. It is not in dispute that the Petition herein seeks to challenge the recruitment process of the City Manager Kisumu and the eligibility of the acting City Manager to hold public office. The recruitment is to a county public service office.
27. The Petitioner and the Commission urged the Court to assume jurisdiction.
28. The Petitioner asserted that the Court had jurisdiction because the issues raised were of a Constitutional moment, and the Board and the Public Service Commission did not have the mandate to determine questions on enforcement and violation of such rights.



29. According to the Petitioner, there was an exemption from the exhaustion of alternative dispute resolution mechanisms where the dispute revolved around allegations of violation of constitutional rights.
30. The authority of *R V Firearms Licensing Board & Ar ex parte Boniface Mwaura* (2019) eKLR was cited for submission.
31. The Petitioner also cited *United States International University (USIU) v Attorney General* (2012) eKLR and *Daniel N. Mugendi v Kenyatta University & 3 Ors* (2013) eKLR to urge that in cases of constitutional violations, jurisdiction was reserved to the Courts.
32. The Commission sought the Court to assume jurisdiction because the Board had failed to act on representations made to it by the Petitioner through the letter of 12 November 2020 and that the Board had not made any decision as envisaged by section 64(5) of the *County Governments Act* capable of being appealed to the Public Service Commission.
33. In the view of the Commission, an overview of case law (United States International University (USIU) v Attorney General (2012) eKLR, *Mugendi v Kenyatta University* (2013) eKLR, *Sollo Nzuki v Salaries and Remuneration Commission & 2 Ors* (2019) eKLR and *A.O.O. & 6 Ors v Attorney General & Ar* (2017) eKLR) and Article 162 of *the Constitution* as read with section 12(1) of the Employment and *Labour Relations Act* left no doubt that the Court had jurisdiction.
34. The acting City Manager took the position that the Court should decline jurisdiction on two grounds.
35. The first ground was because the Petitioner had not allowed the Board sufficient time to address his complaint through the letter dated 12 November 2020 as he moved the Court on 17 November 2020, and second, that he had not exhausted the appellate dispute resolution avenues outlined in section 77 of the *County Governments Act* and sections 85, 86 and 87(2) of the *Public Service Commission Act*, 2017.
36. The Court finds no merit in the objection by the Respondents that the Petition was premature on the ground that the Petitioner moved the Court before allowing the Board sufficient time to address his complaints in the letter of 12 November 2020. The Court makes the conclusion because the Board had already set a date for interviews.
37. The Court will now examine the place of the appellate jurisdiction of the Public Service Commission.
38. Article 234(2)(i) of *the Constitution* vests the Public Service Commission with a function of hearing and determining appeals from certain decisions in respect of county governments' public service.
39. The constitutional function has been actualised or given context in at least two statutes.
40. Section 77(2) of the *County Governments Act* endows the Public Service Commission with powers to entertain appeals on any decision relating to employment of person in a county government, including a decision in respect of
 - a. Recruitment, selection appointment and qualifications attached to any office:
.....
 - b. any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.
41. Sections 85, 86, and 87(2) of the *Public Service Commission Act* also address the appellate function of the Public Service Commission.



42. The aforesaid legal provisions extend beyond decisions made by a County Public Service Board in exercise of its powers of disciplinary control over the county public service.
43. Section 87(2) of the Act strictly forbids a person from filing legal proceedings in Court with respect to matters within the jurisdiction of the Public Service Commission until all appellate avenues as provided in the Act are exhausted.
44. A first glance at the Petition herein shows that the Petitioner has not exhausted the statutorily laid down procedure before approaching Court as envisaged by the statutes listed above.
45. The Court of Appeal had occasion to pronounce itself on the exhaustion principle with respect to the county public service and decisions of County Public Service Boards in *Secretary, County Public Service Board & Anor Vs Hulbbhai Gedi Abdille* (2017) eKLR when it stated 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. 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. In terms of *Republic v National Environment Management Authority* (supra), we discern no exceptional circumstances in this appeal that would have warranted the bypassing of the statutory appellate process by the respondent. 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.”
46. In the instant case, when the Board caused a vacancy notice to be published and set out the qualifications, it made a decision capable of being appealed to the Public Service Commission.
47. When the Board appointed the acting City Manager, it made a decision pursuant to its powers under the *County Governments Act*. The appointment was, with due respect to the Commission, a decision capable of being challenged on appeal before the Public Service Commission.
48. The appellate jurisdiction of the Public Service Commission under Article 234(2)(i) of *the Constitution* is quasi-judicial. It is susceptible to the Court’s supervisory jurisdiction under the Fair Administrative Actions Act and other statutes.
49. And while exercising the appellate function under Article 234(2)(i) of *the Constitution*, the Public Service Commission is ordained by Articles 2(1), 3(1), 10, 20 and 259 of *the Constitution*. The argument, therefore, that the Public Service Commission cannot handle claims or allegations of violations of constitutional rights within their competence cannot legally hold.
50. In the absence of evidence that the Petitioner exhausted the appellate process contemplated in Article 234(2)(i) of *the Constitution*, section 77 of the *County Governments Act* and sections 85, 86 and 87(2) of the *Public Service Commission Act*, the Courts finds that it lacks first instance jurisdiction to entertain the dispute.
51. With the above conclusion, it would serve no purpose for the Court to engage in an exegesis of the case brought by the Petitioner and supported by the Commission on the merits.



Conclusion and Orders

52. Regrettably, the Court comes to the conclusion that it must down its pen for want of jurisdiction.

53. The Petition is struck out with costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 15TH DAY OF JUNE 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Petitioner Mr Muhuyu instructed by Litoro & Omwebu Advocates

For 1st and 2nd Respondents Ms Awuor Otieno instructed by the County Attorney

For 3rd Respondent Mr Mongeri instructed by Mongeri Kinyanjui & Co. Advocates

For Interested Party Ms Gladys Jepchirchir Rutto, Advocate

Court Assistant Chrispo Aura

