



**Hynes & 4 others v Vihiga County Government (Claim
76 of 2021) [2022] KEELRC 1551 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1551 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CLAIM 76 OF 2021
JW KELI, J
JULY 28, 2022
(FORMERLY KISUMU ELRC CAUSE NO. 66 OF 2020)**

BETWEEN

NDOLI HYNES & 4 OTHERS CLAIMANT

AND

VIHIGA COUNTY GOVERNMENT RESPONDENT

RULING

(On the Respondent's Notice of Preliminary Objection dated 6th April 2019)

1. The Respondent filed a Notice of Preliminary Objection dated 6th April 2022 and filed in court on the 7th April 2022 seeking to strike out and or dismiss the Claim on the following grounds:-
 - a. The Claim falls within the province of the Appellate Jurisdiction of the Public Service Commission by the application of Section 77 of the County Governments Act.
 - b. The jurisdiction of this Honourable court is further ousted by Section 87(2) of the Public Service Commission Act.
 - c. The Claim is sub judice as it raises the same issues as in Kisumu ELRC Cause No, 113 of 2019 which is pending.
 - d. The Claim is incompetent for being filed in court without the requisite pecuniary jurisdiction.
 - e. The Claim amounts to abuse of the process of the Honourable court.
2. The Preliminary Objection was canvassed by way of written submissions.
3. The Respondent's written submissions on the Preliminary Objection drawn by James Mukabi, Vihiga County Solicitor are dated 17th May 2022 and received in court on the 6th June 2022.



4. The Claimant’s written submissions on the Preliminary Objection drawn by Kamau Kuria & Company Advocates are dated 17th June, 2022 and received in court on the 23rd June 2022.

Determination

Issues for determination

5. The issues for determination in the Preliminary Objection are as follows:
- a. Whether the court has jurisdiction
 - b. Whether the claim is sub judice
 - c. Whether the claim is incompetent on basis of pecuniary jurisdiction

Whether the court has jurisdiction

6. The Respondent states that the Claim falls within the appellate jurisdiction of the Public Service Commission by the application of Section 77 of the [County Governments Act](#).
7. That the jurisdiction of the court is ousted by Section 87 (2) of the [Public Service Commission Act](#).
8. The question of jurisdiction is cardinal in the determination of disputes as was held in the landmark decision of Nyarangi JA(as he then was) in the case of the *Owners of Motor vessel ‘Lillian S’ v Caltex Oil Kenya Limited* (1989) KLR1 to the extent that jurisdiction is everything and without it the court has no power to make one step and must down its tools.
9. The court is guided by the Supreme court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR where at paragraph 68 it held that jurisdiction flows from either [the constitution](#) or legislation or both. The Court further held that the issue of whether the court had jurisdiction to entertain a matter before it is not a matter of procedural technicality but goes to the very heart of the matter and without jurisdiction the court cannot entertain the proceedings.
10. The court is further guided by the landmark decision of the defunct Court of Appeal for East Africa decision of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 676-701 where it was stated that a Preliminary Objection should be in the nature of what used to be demurrer and should be raising a pure point of law in the open eye of the court that can dispose of the suit in limine.
11. The Respondent relies on the provisions of Section 77 of the [County Governments Act](#) reads:-
- “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 control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the “Commission”) against the decision.
 - (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) disciplinary control;
- (d) national values and principles of governance, under Article 10, and values and principles of public service under Article 232 of *the Constitution*;

12. On appeals the respondent relies on the provisions of 85 of the *Public Service Commission Act* of 2017 which reads:-

“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 qualifications attached to any office;
- (b) remuneration and terms and conditions of service;
- (c) disciplinary control;
- (d) national values and principles of governance, under Article 10 and values and principles of public service under Article 232 of *the Constitution*;

13. Section 87 (2) of the *Public Service Commission Act* which reads:-

“A person shall not file any legal proceedings in any Court of law with 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.”

14. The Respondent submits the first point of call for the Claimant aggrieved with the decision of the Respondent was the appeal to the Public Service Commission.

15. The Respondent to buttress its position that there exists alternative remedy that ought to be exhausted first before coming to court relies on several authorities. In *Kenya County Government Workers Union v Nyeri County Government and Another* (2019)eKLR the Court upheld the decision of the Court of Appeal where the court upheld the alternative mechanism Under Section 77 of the County Government Act and in allowing the appeal held that the Judge wrongly assumed jurisdiction; In *James Tinai Murete & Others v County Government of Kajiado & 22 others* (2015) eKLR and *Wilson Mutegi Nyaga and Others v the County Public Service Board Kitui County & 2 Others* (2016) eKLR where it was submitted that the petitioner had initiated these proceedings in utter disregard for the procedure set out in the County Government Act where both parties cited the case in Republic v National Police Service Exparte Daniel Chacha Chacha where Odunga J citing Michael Fordham’s Judicial Review Handbook 4th Edition at page 1007 held; ‘Procedural fairness is a flexi principle. Natural justice has always an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair.’ And The petitioner was in communication with the 1st Respondent regarding the harmonisation process. In view of the foregoing Michael Fordham treatise there is some element of procedural fairness. That as it may be the matter falls under section 77 of the *County Governments Act* and the court would be falling in error to permit the petition as the decision of the Court of Appeal in Hulbai Gedi Abdille held where there exists other sufficient and adequate venue to resolve a dispute a party ought to pursue that avenue and invoke the court. Lastly the decision in *John Kakindu Makau v County Government of Makueni & 6 others* (2018)eKLR where the court said that the petitioner ought to have invoked the alternative forum and only when that forum does not provide satisfactory



and efficacious answer can the petitioner move the court. The court held that the petitioner had proved the alternative remedy was unsatisfactory.

16. The Respondent submits that the PSC has jurisdiction to determine the issue of reinstatement and payment of salary to the claimant. The Respondent submits that the Claimants have never instituted any suit in respect of an appeal against its decision declining to recruit various youth polytechnic instructors. The Respondent relies on the doctrine of exhaustion and submits that it was paramount to exhaust the appeal jurisdiction under Public Service Commission before coming to court as this is a clear dispute on recruitment of various youth polytechnic instructors by the Respondent and the court has no jurisdiction and should not be seized of jurisdiction.
17. The Claimant submits any one making a Preliminary Objection is required to accept all facts as stated by the other side and then raise that objection. In this case the Respondent could only raise objection on the basis of the acceptance of the facts as pleaded by the Claimants and petitioners in their respective memoranda of claim and petition respectively. The Respondent to buttress their position relies on the decision of Honourable Justice Newbold whom they submit stated the law at page 701 letters A and B of *Mukisa Biscuits v Westend*(1969) EA 696 as follows:-

‘ a preliminary objection is in the nature of what used to be a demurr, it raises a pure point of law which is argued on the assumption that all facts pleaded are correct . It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.’”

In the same decision(*Mukisa Biscuits*) at page 700 paragraph D Law J.A held, ‘ so far as I am aware, 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 the suit.’”
18. The *Mukisa Biscuits* decision has been upheld by the superior courts as a proper authority on preliminary objection. The court upholds the authority to apply in the instant case.
19. I have perused the court file and found that the Respondent is yet to file its defence in the claim and the other related matters. The court finds that submissions are not pleadings. The facts are not settled. At this point the Respondent has not demonstrated whether it accepted facts as pleaded in the claim as correct. This is contrary to the authority in *Mukisa Biscuits* decision. The court in the circumstances finds that the notice of Preliminary Objection is prematurely raised. It is not proper.
20. The court determines that the preliminary objection is improperly raised. The Notice of Preliminary Objection dated 9th August 2022 is dismissed.
21. This decision to apply to *Bungoma ELRC Cause No. 89 of 2021 Kennedy Elly Osiolo v County Government of Vihiga*, *Bungoma ELRC Cause No. 85 of 2021 Nahashon Odhiambo & Eunice Lenya v The County Government of Vihiga* and *ELRC Petition No. E003 of 2022 Linet Maxmillah Indiazi & 23 Others v County Government of Vihiga*.
22. Costs in the cause.
23. Parties to take steps towards the hearing of the dispute.
24. The court grants orders/directions that the Respondent is granted leave of 21 days to file and serve response to the claims and petition. The Claimant will be at liberty to file reply to response upon service.
25. Parties to exchange agreed issues or file separate. Parties to ensure compliance with order 11 of the [*Civil Procedure Rules*](#).



26. Pretrial directions date to be issued by court.

27. It is so ordered.

RULING DATED, DELIVERED AND SIGNED THIS 28TH DAY OF JULY 2022 IN OPEN COURT AT BUNGOMA.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:-

Court Assistant:- Brenda Wesonga

For Claimant :-Munyori

For Respondent:-Absent

