



**Onsare v Trans -Nzoia Public Service Board & 2 others (Petition
1 of 2017) [2022] KEELRC 3788 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3788 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
PETITION 1 OF 2017**

**JW KELI, J
JULY 21, 2022**

BETWEEN

BEATRICE KERUBO ONSARE PETITIONER

AND

TRANS -NZOIA PUBLIC SERVICE BOARD 1ST RESPONDENT

DORIS TENDWA 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The ruling is in the Notice of Preliminary Objection dated April 22, 2022 by the 1st respondent against the petition dated January 27, 2016 filed in court on the January 27, 2016 and seeking the following reliefs:-
 - i. A declaration that the actions of the respondents are unconstitutional for violating the constitutional rights of the petitioner.
 - ii. A declaration that the petitioner has been discriminated upon.
 - iii. General and exemplary damages.
 - iv. A declaration that your humble petitioner has under the hands of the 1st respondent suffered indignity, discrimination and deprivation contrary to the *constitution*.
 - v. Pending the determination and disposal of this petition the 1st respondent be barred by orders of the court from filling and /or intermeddling howsoever with and /or filling the post of the caregiver at Rafiki Primary School by any other person including but not limited to Doris Tendwa howsoever sourced.



- vi. Your humble petitioner be granted her job vide letter of appointment reference no CGTN/CPSB/EDU/10/10/1 dated Wednesday, January 25, 2016 under signature of C, Claire S Wanyama (Mrs) Board Secretary County Public Service Board, Trans-Nzoia – County as Care at Rafiki Primary School.
- vii. The petitioner be paid costs of this petition plus interest.
2. The petition is opposed. The 1st respondent entered appearance through the law firm of Sifuna & Sifuna Advocates and filed grounds of opposition dated February 27, 2016 and filed the instant Notice of Preliminary Objection together with written submissions.
3. The 2nd respondent filed replying affidavit sworn by herself on the May 16, 2016 and received in court on even date.
4. The 3rd respondent filed grounds of opposition dated February 29, 2016 and filed in court March 3, 2016.
5. The court on the May 18, 2022 gave directions that the Notice of Preliminary Objection dated April 22, 2022 be determined first by way of written submissions.
6. The petitioner was granted 21 days to file her written submissions in response to the Notice of Preliminary Objection by the 1st respondent and the date of June 29, 2022 given to confirm compliance and issue a ruling date.
7. On the June 29, 2022 when the matter was mentioned in court all parties were absent and the court gave a date for delivery of a ruling on the Notice of Preliminary Objection. The court served the Notice of ruling on the parties.
8. The Notice of Preliminary Objection dated April 22, 2022 by the 1st respondent is on the grounds that the court lacks jurisdiction to entertain the instant petition and that the same should be dismissed with costs for reasons that :-
 - a. There was no employer employee relationship between the 1st respondent Trans-Nzoia County Public Service Board and the petitioner or any employment contract or relationship as the petitioner never accepted or signed acceptance of the board's offer of employment.
 - b. The petitioner's grievance, the subject matter of this petition, is not justiciable as in terms of section 77 (1) and (2)(a) of the *County Governments Act* (Act No 17 of 2012) a party dissatisfied or affected by such a decision or act of the County Government public service board on any appointment or recruitment should appeal to the Public Service Board.
9. The 1st respondent submits that their Notice of Preliminary Objection falls within the legal threshold in 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 the suit in limine.



Determination

Issue for determination

Whether the Notice of Preliminary objection is merited

10. The Mukisa Biscuits decision (*supra*) has been upheld by superior courts in Kenya as a proper authority on the nature of preliminary objections and one of the proper grounds is the question of jurisdiction. The court finds the instant preliminary objection on point of law questioning the jurisdiction of the court as properly raised.
11. The 1st respondent submits that the court lacks jurisdiction to determine the petition on the grounds that the matter is not justiciable as in terms of section 77(1) and (2)(a) of the [County Governments Act](#), a person dissatisfied or affected by such appointment should appeal to the Public Service Commission. The 1st respondent submits that there was no employer-employee relationship between the 1st respondent and the petitioner. The 1st respondent submits that since the petitioner's letter of employment was cancelled before her acceptance of the same then there was no contract between the parties and no employer-employee relationship. That the letter of appointment addressed to the petitioner dated January 13, 2016 (Annexure BK08 of the petitioner) is not accepted under the acceptance clause.
12. Further, the 1st respondent submits that the petitioner ought to have appealed to the Public service commission and not to this honourable court hence has not exhausted the remedies prescribed by the law. Section 77(1) of the [County Governments Act](#) provides that a person dissatisfied or affected by the a decision made by the County Public Service Board or a person in exercise or purported exercise of a disciplinary control against any county officer may appeal to the Public Service Commission against the decision.
13. Section 77(2) of the [County Governments Act](#) provides that the commission shall entertain appeals on any decision relating to the employment of a person in a county government including a decision in respect of recruitment, selection, appointment and qualifications attached to that office.
14. The 1st respondent to buttress its submission that the court lacks jurisdiction relies on the decision of Justice Radido in [Muswabili Ladtema v Vihiga County Public Service Board and others](#) (2021) where the court upheld a similar preliminary objection and dismissed the petition for failure to exhaust the appellate process established under section 77 of the [County Governments Act](#) as read together with section 87(2) of the [Public Service Commission Act](#) and in the said case upheld the decision of the court of Appeal in [Secretary of Court Public Service Board v Hulbbhai Gedi Abdille](#) (2017)eKLR.
15. The Court of Appeal has now settled the question of interpretation of section 77 of the [County Governments Act](#), 2012 and upheld that the procedure therein must be exhausted before the court intervention is involved. In the Court of Appeal case of [Secretary County Public Service Board and Another -vs- Hulbbhai Gedi Abdille](#) (2017) eKLR (Makhandia, Ouko & M'Noti JJA) the court 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. The section provides not only the 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.”

16. The court finds that the 1st respondent made a decision on the appointment of the petitioner vide the letter dated January 25, 2016 cancelling her appointment as ECDE care giver at Rafiki Primary School (Annexure BK09 by the Petitioner).
17. The 1st respondent having made a decision then if aggrieved the decision was subject of appeal in the first instance to the Public Service Commission under section 77(1) and (2) of the [County Governments Act](#).
18. In view of the binding authority of Court of Appeal in Hulbhai Gedi Abdille (*supra*) this court has no jurisdiction over appeals from recruitment and appointments by the 1st respondent in the first instance.
19. The Notice of the Preliminary Objection by the 1st respondent dated April 22, 2022 is upheld. The petition dated January 27, 2016 is dismissed.
20. Each party to bear own costs.

DATED, SIGNED AND DELIVERED THIS 21ST DAY OF JULY 2022 IN OPEN COURT AT BUNGOMA

J W KELI,

JUDGE.

In the presence of :-

Court assistant: - Brenda Wesonga

For petitioner: - absent

1st respondent: -Prof Sifuna

2nd respondent: -Prof Sifuna

3rd respondent: -Prof Sifuna

