



REPUBLIC OF KENYA



KENYA LAW
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Monai & another v Kisii County Public Service Board & 2 others (Employment and Labour Relations Petition 3 of 2022) [2022] KEELRC 4121 (KLR) (28 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 4121 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
EMPLOYMENT AND LABOUR RELATIONS PETITION 3 OF 2022

S RADIDO, J

SEPTEMBER 28, 2022

(ORIGINALLY KERICHO ELRC PETITION NO E003 OF 2022)

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 22, 24, 25, 27, 28, 33, 35, 48, 50, 52, 165 AND 232 OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF VIOLATION AND/OR
INFRINGEMENT OF FUNDAMENTAL RIGHTS**

AND

**IN THE MATTER OF THE COUNTY GOVERNMENTS ACT,
2012, SECTIONS 64, 65, 66, 67, 68, 70, 76, 77, 88, 95 AND 96**

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

AND

**IN THE MATTER OF THE EMPLOYMENT AND
LABOUR RELATIONS COURT ACT, NO 20 OF 2011**

AND

IN THE MATTER OF ACCESS TO INFORMATION ACT NO 31 OF 2016

AND

IN THE MATTER OF KISII COUNTY GOVERNMENT

AND

**IN THE MATTER OF ARBITRARY AND UNCONSTITUTIONAL
APPOINTMENT OR EMPLOYMENT OF PERSONS**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURE RULES, 2013**



BETWEEN

ROBIN BORUBA MONAI 1ST PETITIONER

KENNEDY NYABUTO 2ND PETITIONER

AND

KISII COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT

KISII COUNTY GOVERNMENT 2ND RESPONDENT

KISII COUNTY SECRETARY 3RD RESPONDENT

JUDGMENT

1. The petitioners moved the court sitting in Kericho on May 10, 2022 alleging (amongst other allegations):
 - i. that the recruitment of a chairperson and member of the county public service board (Kisii) were unlawful.
 - ii. The respondents had recruited unqualified persons to offices within the county public service.
 - iii. The respondents had recruited/appointed persons to offices within the county public service without advertisements or complying with procedures in place.
 - iv. The respondents had unilaterally and irregularly promoted staff.
 - v. The respondents had failed to appoint a substantive secretary to the board.
 - vi. The respondents had not considered regional balance and disability in recruitment.
2. The court directed the petitioners to serve the petition and accompanying motion.
3. On May 18, 2022, the respondents filed a notice of preliminary objection objecting to the territorial jurisdiction of the court in Kericho. The respondents also objected that there was a pending petition, Kisumu Petition No E014 of 2022, Thomson Kerongo & Ar v Kisii County Public Service Board, raising the same issues.
4. When the parties appeared before the court in Kericho on May 19, 2022, it directed that the petition be transferred to this court.
5. The respondents thereafter caused grounds of opposition and a replying affidavit sworn by the county secretary to be filed on May 25, 2022.
6. When the file was placed before this court on May 25, 2022, it issued certain directions including the filing and exchange of submissions including on a jurisdictional question.
7. The petitioners' submissions were not on record by the agreed timeline of July 15, 2022, and the respondents submissions were filed on August 5, 2022.
8. The court has considered the petition, motion, affidavits, objections, and submissions.



9. The gravamen of the complaints raised by the petitioners revolve around recruitment, appointment and other terms and conditions of employment within the county public service, county of Kisii. The question of first instance jurisdiction of this court is therefore implicated.
10. Article 234(2)(i) of the Constitution has clothed the Public Service Commission with the function and power to hear and determine appeals in respect of decisions made in respect to recruitment and appointments to county governments' public service.
11. To further the constitutional function of the Public Service Commission, section 77(2)(a), (e) and (g) of the County Governments Act require persons dissatisfied with the exercise of the powers of recruitment, appointment, qualifications or removal from office by a county public service board to appeal to the public service commission.
12. In the same vein, section 87(2) of the Public Service Commission Act defers the commencement of judicial proceedings in the Courts before the exhaustion of the appeal procedure outlined in part xv of the Act.
13. The Court of Appeal previously outlined the law on the exhaustion of alternatively anchored dispute resolution processes.
14. In Geoffrey Mutbinja & 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.
15. In Secretary, County Public Service Board & Ar v Hulbbhai 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.
16. These decisions are binding on this court.
17. The petitioners herein moved the court at the first instance without bothering to exhaust the appeal procedures as contemplated by the Constitution, the County Governments Act, and the Public Service Commission Act.
18. Since the jurisdiction of this court is a deferred jurisdiction, the court will decline jurisdiction.
19. The court strikes out the petition and accompanying motion with costs to the respondents.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 28TH DAY OF SEPTEMBER, 2022.



RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Petitioners K. Getanda Advocate

For Respondents Manyonge Wanyama & Associates, LLP

Court Assistant Chrispo Aura

