



REPUBLIC OF KENYA



**KENYA LAW**  
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**Onyango v County Government of Kisumu & 2 others (Petition  
E023 of 2022) [2022] KEELRC 12736 (KLR) (5 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12736 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**PETITION E023 OF 2022**  
**S RADIDO, J**  
**OCTOBER 5, 2022**  
**IN THE MATTER OF THE CONTRAVENTION OF**  
**ARTICLES 10, 23, 41(2),**  
**47, 176, 232, 235 AND 236**  
**OF THE CONSTITUTION OF**  
**KENYA**  
**AND**  
**IN THE MATTER OF THE PUBLIC SERVICE**  
**COMMISSION ACT NO. 10**  
**OF 2017**  
**AND**  
**IN THE MATTER OF THE PUBLIC OFFICERS**  
**ETHICS ACT NO. 4 OF 2003**  
**AND**  
**IN THE MATTER OF THE HUMAN RESOURCES**  
**POLICIES AND**  
**PROCEDURES MANUAL**  
**FOR THE PUBLIC SERVICE,**  
**2016**  
**AND**  
**IN THE MATTER OF THE DISCIPLINE MANUAL**  
**FOR THE PUBLIC SERVICE**  
**BETWEEN**



**BETWEEN**

**PENINA AKINYI ONYANGO ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF KISUMU ..... 1<sup>ST</sup> RESPONDENT**

**KISUMU COUNTY PUBLIC SERVICE BOARD ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY SECRETARY, KISUMU COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. Penina Akinyi Onyango (the Petitioner) lodged a Petition against the County Government of Kisumu, the County Public Service Board, Kisumu, and the County Secretary on 22 May 2022, alleging that her indefinite suspension from the office of Chief Officer, Education and ICT and contemplated disciplinary action were unlawful.
2. The Petitioner also challenged the constitutionality of section K.7(2) of the Human Resources Policies and Procedures Manual for the Public Service, 2016 and section 4.3(c) of the Discipline Manual for the Public Service, 2016.
3. The Court directed the Petitioner to serve the Petition and the accompanying Motion. On 26 May 2022, the Court directed the parties to file and exchange affidavits and submissions within agreed timelines.
4. Despite Ms Awuor appearing during the session, the Respondents did not file a formal notice to defend the Petition and Motion.
5. The Petitioner filed her submissions on 21 September 2022 (should have been filed and served before 22 July 2022), while the Respondents submissions on were not on record by agreed timeline.
6. The Court has considered the Petition, Motion, affidavits, and submissions and has come to the conclusion that the Petition should be disallowed for the following reasons.
7. One, the Petitioner seeks orders declaring sections of the Human Resource Policies and Procedures Manual for the Public Service, 2016, and the Discipline Manual for the Public Service, 2016, inconsistent with *the Constitution* and the *Public Service Commission Act*.
8. The provisions sought to be declared unconstitutional are in instruments developed and issued by the Public Service Commission of Kenya. The Commission has not been made a party to the proceedings.
9. Two, the instruments sought to be declared invalid by the Petitioner do not expressly apply to county public service board employees. The applicable instrument is the County Public Service Human Resource Manual, 2013.
10. Similarly, in the view of the Court, considering the possible polycentric nature of the orders prayed for, the Honourable Attorney General should also have been made a party.
11. Three, Article 234(2)(i) of *the Constitution* as read with section 77(1) and (2)(c) and (e) of the *County Governments Act* and sections 85,86 and 87(2) of the *Public Service Commission Act* have deferred the jurisdiction of this Court until and unless the appellate procedures set therein have been exhausted.



12. The Courts have now settled the law on approaching a Court before exhausting alternatively provided dispute resolution avenues.

13. The Court of Appeal stated in *Geoffrey Muthinja & Ar v Samuel Muguna Henry & 1756 Ors* (2015) eKLR, thus:

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.

14. In *Secretary, County Public Service Board & Ar v Hulbbhai Gedi Abdille* (2017) eKLR, the same Court 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.

15. These decisions are binding on this Court.

16. The Petitioner herein moved the Court at the first instance without bothering to exhaust the appeal procedures contemplated by *the Constitution*, the *County Governments Act*, and the *Public Service Commission Act*.

17. Since the jurisdiction of this Court is a deferred jurisdiction and not all appropriate and necessary parties are before it, the Court will decline jurisdiction.

### **Conclusion and Orders**

18. The Court regrettably has to strike out the Petition with no order on costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 5<sup>TH</sup> DAY OF OCTOBER 2022.**

**RADIDO STEPHEN, MCI Arb**

**JUDGE**

Appearances

For Petitioner Maxwell O. Ogonda & Associates Advocates

For Respondents did not formally come on record

Court Assistant Chrispo Aura

