



Tome & another v Bungoma County Assembly Service Board (CASB) & 9 others; Ethics and Anti-Corruption Commission (Interested Party) (Petition E007 of 2021) [2022] KEELRC 12864 (KLR) (6 October 2022) (Ruling)

Neutral citation: [2022] KEELRC 12864 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
PETITION E007 OF 2021**

JW KELL, J

OCTOBER 6, 2022

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
PETITION NUMBER E007 OF 2021**

**IN THE MATTER OF THE ADVERTISED 55 JOB VACANCIES IN THE
COUNTY ASSEMBLY OF BUNGOMA IN CONTRAVENTION OF
ARTICLES 2,10,73,201 AND 232 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE ENFORCEMENT OF THE
CONSTITUTION OF KENYA, 2010 UNDER ARTICLES 3 (10, 22 & 258**

AND

**IN THE MATTER OF SECTION 4 (1 & 2) OF THE CONSTITUTION
OF KENYA (PROTECTION OF THE RIGHTS AND FUNDAMENTAL
FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF SECTIONS 102 AND 107 OF
THE PUBLIC FINANCE MANAGEMENT ACT, 2012**

AND

**IN THE MATTER OF REGULATIONS 25,42,43 AND
119 OF THE PUBLIC FINANCE MANAGEMENT
(COUNTY GOVERNMENTS REGULATIONS) 2015**

AND

IN THE MATTER OF CONTRAVENTION OF THE FISCAL RESPONSIBILITY PRINCIPLES

BETWEEN



FRANCIS SIMIYU TOME 1ST PETITIONER
GODWIN BARASA SITATI 2ND PETITIONER

AND

BUNGOMA COUNTY ASSEMBLY SERVICE BOARD (CASB) 1ST
RESPONDENT

SECRETARY OF THE BUNGOMA CASB 2ND RESPONDENT
CHAIRPERSON OF THE BUNGOMA CASB 3RD RESPONDENT
BEN KIPKUT (CASB MEMBER) 4TH RESPONDENT
GEORGE MAKARI (CASB) 5TH RESPONDENT
RACHELLE KHISA (CASB MEMBER) 6TH RESPONDENT
ANTHONY MABELE (CASB MEMBER) 7TH RESPONDENT
NATIONAL TREASURY & PLANNING 8TH RESPONDENT
CONTROLLER OF BUDGET 9TH RESPONDENT
COMMISSION ON REVENUE ALLOCATION 10TH RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

RULING

(On the respondents' notice of preliminary objection dated June 24, 2022)

1. The Respondents filed a Notice of Preliminary Objection dated June 24, 2022 and filed in court on even date seeking to strike out the Petition herein on the following grounds:-
 - a. That the entire Petition runs counter to the provisions of Section 77(1) and (2) of the [County Governments Act](#) No 17 of 2012.
 - b. The entire Petition offends the provisions of Article 234(2)(1) of the [Constitution of Kenya](#).
 - c. The entire Petition runs counter to the provisions of Section 85 (a)(g) and Section 87(2) of the [Public Service Commission Act 2017](#).
 - d. The entire Petition offends the spirit of the provisions of Section 8(1) and (2) and Section 9 of the [Public Service Commission\(County Appeals Procedures\) Regulations](#).
 - e. That consequently therefore this honourable court lacks the jurisdiction to hear and determine the entire Petition.
2. The Preliminary Objection was canvassed by way of written submissions.
3. The Respondents' written submissions on the Preliminary Objection drawn by J O Makali & Company Advocates are dated July 12, 2022 and received in court on the July 13, 2022.



4. The Petitioners' written submissions on the Preliminary Objection drawn by Francis Simiyu Tome are dated July 18, 2022 and received in court on even date.

Determination

Issues for determination

5. The parties have addressed each of the issues under the notice of preliminary notice separately. The court takes the view that all the issues raised touch on the jurisdiction of the court and consequently the issues to be addressed is whether court lacks jurisdiction to hear and determine the Petition and whether the Notice of Preliminary Objection is merited.

Whether the court has jurisdiction to hear and determine the petition and whether the instant petition is premature

The respondent's case

6. The Respondent submits that Article 234(2)(i) of the Constitution clothes the Public Service Commission with the jurisdiction to hear and determine appeals in respect of County Governments Public Service of which is inclusive of the 1st Respondent. That the provision uses the word 'shall' hence in mandatory terms. That the petition is calculated at impeaching the recruitment process of the 1st Respondent.
7. That the gravamen of the petition herein is the decision of the 1st Respondent related to recruitment and remuneration of the employees of the 1st Respondent. That the Petition is filed in court without regard to the mandatory provisions of Article 234(2)(i) of the Constitution is a non- starter.
8. The Respondents submit that Article 234(2)(i) of the Constitution is to be read together with the provisions of Section 77 of the County Governments Act and Section 85(a)-(g) of the Public Service Commission Act which clothe the Public Service Commission with the jurisdiction to hear and determine appeals from decisions of the County Government Service Boards including the Bungoma County Assembly Service Board. That a person dissatisfied by decision of the County Assembly Public Service Board should first file appeal to the board itself under the laid down procedures and if dissatisfied appeal to the Public Service Commission under Section 77 of the County Governments Act and Section 85 of the Public Service Commission Act.
9. That the Petitioner has not satisfied the court that he first exhausted the appeal provisions both to the Bungoma County Assembly Service Board and the Public Service Commission.
10. To buttress the foregoing submissions the Respondents rely on the decision in Daniel N Mugendi v Kenyatta University and 3 others (2013)eKLR where the court stated: 'Citing the case of Alphonse Mwangemi Munga & others v African Safari Club Ltd (2008)eKLR, the learned judge was persuaded that, 'The constitution had to be read together with other laws made by parliament. It should not be construed as to be disruptive of other laws in administration of justice and accordingly parties should make use of normal procedures under various laws to pursue their remedies instead of all of them moving to the constitutional court and making constitutional issues of what is not.'
11. The Respondents further submit that in the latest Application the Petitioner seeks to have the list of all recruited staff submitted to court. That it is evident from prayers sought in the Petition that the petitioner challenges the recruitment process and employment of the respondents. That the correct forum for such challenge is the Public Service Commission.



12. That the jurisdiction of the court is ousted by Section 87 (2) of the [Public Service Commission Act](#) and the court ought to down its tools.
13. That failure to lodge appeal to the county assembly public service board and the public service commission is fatal to the Petition. To buttress this submission the Respondents rely on the decision in [Secretary County Public Service Board v Hulbai Gedi Abdille](#) (2017)ekLR where the Court of Appeal in allowing the appeal held that the most suitable and appropriate procedure for such disputes was as provided for under Section 77 of the [County Governments Act](#) and not vide Judicial Review. The Respondents submit that going by the [Hulbai Gedi Abdille](#) decision of Court of Appeal the court has no jurisdiction and ought to down its tools.
14. The Respondent further relies on the decision of the Court of Appeal in [Owners of Motor Vessel 'Lillian S' v Caltex Oil Kenya Limited](#) (1989) KLR1 to buttress the submission that without jurisdiction the court must down its tools. That the decision of the court is ousted by dint of section 85(2) of the [Public Service Commission Act](#).

The petitioners' submissions in opposition to the notice of preliminary objection by the respondents in summary.

15. The Petitioners oppose the Notice of Preliminary Objection and submit that:-
16. Based on the submissions by the respondents filed on the July 12, 2022 the prayers alleged to be in the amended petition are indeed under the original unamended petition.
17. That the Court on November 29, 2021 granted leave to the Petitioners to amend their petition which was done and served on the respondents on December 22, 2021. That it is apparent that the instant Preliminary Objection was in response to the original petition hence fatally and incurably defective.
18. The Petitioners submit that they amended their petition as set out in amended petition dated November 2, 2021.
19. That on merit, it is not true that the gravamen of the petition relates to decisions on recruitment and remuneration of employees hence first port of call in challenge to those decisions being Public Service Commission under Section 77 of the [County Governments Act](#) and Section 85 (a)-(g) of the [Public Service Commission Act 2017](#).
20. That far from that position the substantive claim of the amended claim does not in any way challenge the 1st Respondent decision to recruit and remunerate personnel rather it challenges the manifested fiscal irresponsibility demonstrated by the 1st Respondent to deploy public resources in a manner not authorised by the constitution and the law.
21. That the amended petition also raises the question of the 1st Respondent intention to recruit persons within its establishment in excess of the lawful ceilings set by the Commission of the Revenue Allocation which ceilings are applicable to all the 47 county assembly service boards in Kenya. That with exception of the Bungoma County Assembly Service Board, all the County Assembly Service Boards have complied with the set ceilings.
22. The Petitioners submit that the issue of fiscal indiscipline are not within the purview of the Public Service Commission as delimited under Section 85 of the [Public Service Commission Act](#) and Section 77 (2) of the [County Governments Act](#) can only be heard and determined by a competent court of law.
23. That a purposive and holistic reading of the provisions of section 85 of the [Public Service Commission Act](#) and Section 77 (2) of the [County Governments Act](#) shows that the Public Service Commission does



- not have the mandate to entertain appeals touching on fiscal indiscipline /irresponsibility within the county government public service boards. That this falls within the jurisdiction of a court of law.
24. The Petitioners submit that they moved the court in October 2021 on apprehension that the 1st Respondent had an established intention to deploy public funds contrary to the constitution and the law , no decision(recruitment) had been made by the 1st Respondent to warrant appeal to the Public Service Commission as envisaged under Section 77(1) of the County Governments Act. That it is trite law the citizens have a Constitutional right to move court to seek judicial redress against anticipated actions like one cited in the petition that are injurious to the public.
 25. That it is the Petitioners conviction that the legitimate path was to invoke the court jurisdiction to hear and determine the intertwined issues under the petition , that being the most effective manner of disposing the dispute bearing in mind the Public Service Commission cannot grant interim orders to preserve the substratum of the subject matter pending hearing and determination.
 26. That it was not the intention of the draftsmen of the Constitution that the court be faced with a mixture of causes of action with part of the claim being dispatched to a quasi judicial organ (PSC in this context) and other part to court.
 27. That the Public Service Commission was never intended to be a behemoth that will bestride the mandate of other independent bodies like the Commission on Revenue allocation who filed a replying affidavit in the instant petition and a report stating that the 1st Respondent must rationalise its staffing levels as per the set ceilings ad with in the give timelines.
 28. To buttress its submissions the petitioners rely on the decision of the Supreme Court in the matter of Interim Independent Electoral Commission(2011)eKLR where the court found that the commissions and independent offices are required to function free of direction or control by any person or authority and that meant that in carrying out their functions they are not to take orders or instructions from organs or persons outside their ambit.
 29. On whether the entire petition offends the provisions of Article 234 (2) of the Constitution, the petitioners submit that Section 77(2) of the County Governments Act is specific on kind of appeals that can be entertained by PSC and fiscal indiscipline is not one of them.
 30. The Petitioner submits on the Public Service Commissions (County Appeals Procedures)Regulations 2022 were gazetted on June 3, 2022 while the petition was filed in October 2021 hence not applicable and relies on the decision of the Supreme Court in Samuel Kamau Macharia & Anor v Kenya Commercial Bank Ltd & 2 others (2012)eKLR as cited in Golden Line International Limited v Blusea Shopping Mall limited & 3 Others(2016)eKLR where the court held that that all non-criminal legislation is prima facie prospective unless retrospective effect is by express words or by necessary implication it appears to be the intention of the legislature. The court holds that the foregoing is the law.
 31. The Petitioners submit that Section 77 of the County Governments Act does not mention the County Assembly Service Boards rather the County Public Service Board. That the same ought to be provided for under the Constitution, Public Service Commission Act and the County Governments Act and not subsidiary legislation (The Public Service Commission)(County appeals procedures)Regulations 2022)
 32. That contrary to the Public Service Commission County appeals procedures)Regulations 2022, regulations are meant to operationalise the parent Act and Section 77(1) of the County Governments Act does not provide for County Assembly Service Boards. That this submission is consistent with the



provisions of section 31(b) of the [Interpretation and General provisions Act](#) which stipulates that no subsidiary legislation shall be inconsistent with the provisions of the Act.

33. The Petitioners submit that the courts have held that Section 77 of the [County Governments Act](#) does not apply to County Assembly Service Boards and relies on the decision of Justice Rika in [John Mwivithi Mutie V Speaker Kiambu County Assembly & 2 Others](#) eKLR 2021 and decision of Justice Radido in the [Purity Mwonjoria Kamuruci V Nyandarua County Assembly Service Board](#) (2017)Eklr to that effect.

Determination

34. 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.
35. 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 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.
36. 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.
37. The Respondent relies on the following provisions of the law:-

Article 234(2)(i) of the [Constitution](#) to wit:-‘

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;”



38. On appeals the respondents rely 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;”

39. 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.”

40. The Respondent submits the first port of call for the Claimant aggrieved with the decision Respondent was the appeal County Assembly Public Service Board and if not satisfied to the Public Service Commission.

41. The respondent to buttress its position that there exists alternative remedy that ought to be exhausted first relies on Court of Appeal decision in [Secretary County Public Service Board v Hulbai Gedi Abdille](#) (2017)ekLR

42. On the validity of the Notice of Preliminary Objection the court is guided by decision of Honourable Justice Newbold who 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 JA 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."

43. The *Mukisa Biscuits* decision has been upheld by the superior courts as a proper authority on preliminary objection. The court upholds the authority too. The court finds that the Respondents having filed their response the facts are settled.

44. The Petitioner submitted that the submissions by the respondent having relied on the original Petition then the Preliminary Objection was in response to that petition, the petition having been amended then the Preliminary Objection was fatally defective. On this submission the courts position is that the submissions are not pleadings. The court is only bound to consider the proper pleadings being the



petition as amended, the responses and the Notice of Preliminary. The court considered the Notice of Preliminary as raising points of law and consistent with the *Mukisa Biscuits Authority (supra)*.

45. The Petitioners submit that their substantive claim is on fiscal indiscipline of the 1st respondent. It is true the Petition as amended included allegation of fiscal indiscipline in the intended recruitment process.
46. The 1st Respondent made a decision to advertise in daily nation newspapers dated September 2, 2021 for recruitment of various 55 vacancies in the Bungoma County Assembly staff establishment. It is this decision which is challenged by the Petitioners on various grounds among them for being unconstitutional and violation of the law, being against the budgetary expenditure for the financial year 2021/2022 hence non-compliant with fiscal responsibility principles, the vacancies being beyond the capped establishment by the 11th Respondent and most important seeks the recruitment process of the 40 vacancies to be commenced afresh and in strict compliance with the law.
47. Section 77 of the *County Governments Act* states:-

- “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;
- (a) recruitment, selection, appointment and qualifications attached to any office.”

As read together with section 85(a) of the *Public Service Commission* act to wit

“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;”

Section 87(2) of the *Public Service Commission Act* ousts the jurisdiction of the court in matter of recruitment of any person to County Government by providing as follows “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

48. 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- Hulbbai Gedi Abdille* (2017) eKLR (Makhandia, Ouko & M’Inoti 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."

49. The Petitioners submit that Section 77 of the [County Governments Act](#) does not apply to County Assembly Service Boards under the doctrine of separation of powers and relies on the decisions of my brother Justice Rika in [John Mwivithi Mutie V Speaker Kiambu County Assembly & 2 Others](#) eKLR 2021 and decision of Justice Radido the [Purity Mwonjoria Kamuruci V Nyandarua County Assembly Service Board](#) (2017)Eklr to that effect. The said decisions are persuasive.
50. The court's reading of Section 77(2) is that it applies to County Governments as defined under Articles 176(1) of the [Constitution](#) to mean County Government of each County consisting of the county assembly and the county executive. If that is the law then it would mean the Public Service Commission has mandate to entertain appeals from county assembly service boards. That would then mean the court has no jurisdiction in the first instance. But the Petitioners submit there was only intention to recruit and spent public money irregularly hence they are not affected by Section 77 of the [County Governments Act](#).
51. The Court on maturity of the instant petition and exhaustion of the alternative mechanism points out the response of the Controller of budget at paragraph 24 where the Controller of Budget avers that the Petitioner has not exhausted all avenues of seeking redress having not raised the same with her office in order to exercise her mandate under Article 252 of the [Constitution](#).
52. The Court is guided by the decision cited by the Petitioners in Supreme Court [in the matter of Interim Independent Electoral Commission](#)(2011)eKLR where the court found that the commissions and independent offices are required to function free of direction or control by any person or authority and that meant that in carrying out their functions they are free to operate without influence from persons outside their ambit. The court upholds the said decision and finds that the instant Petition of which the Petitioners submit the gravamen is fiscal indiscipline is an issue falling squarely under the office of Controller of Budget and the court would be meddling in her mandate by entertaining the petition.
53. Further the issues raised in the instant Petition also fall within the purview of the Bungoma County Assembly under Section 15(1) of the [County Governments Act](#) to wit:- "A person has a right to petition a county assembly to consider any matter within its authority, including enacting, amending or repealing any of its legislation.". The Petitioners did not invoke that forum which is best suited to the issues raised against the county assembly service board.The court is guided by the Supreme Court decision in [Julius Kariuki Mate & Another v Martin Wambora and another](#) 2017 eKLR the court while emphasizing supremacy of the [Constitution](#) and the adjudicatory role of the courts in determining matters emphasized adherence by all persons and state organs to the objects and principles of the [Constitution](#) and observed that in it in the interest of the people that there be avoidance of premature interference by the courts in the procedure of other state organs especially the legislative arm of government which is presumed to represent the will of the people unless proved otherwise. The Supreme Court decision is binding on this court and the decision is upheld to apply in the instant petition.
54. In Conclusion the court finds it has no first instance jurisdiction in view Article 226 of the [Constitution](#) giving mandate to oversee County budgets to the Controller of Budget as read together with Article 252 of the [Constitution](#) and in view of the provisions Section 15 of the [County Government Act](#)(*supra*). The court while respecting the holding of the its brothers (*supra*) is of the opinion that Section



77 County Governments Act is permissive and may extend to any public officer under the county government.

55. The Court finds the instant Petition premature for failure to lodge the complaint before the proper constitutional body with the mandate to oversight budget and expenditure of County Governments being the Controller of Budget and also failure to exhaust right of appeal to the County Assembly and upholds the Supreme Court decision in Julius Kariuki Mate & Another v Martin Wambora and another 2017 eKLR. The submission that the substratum of the amended petition was fiscal indiscipline of the 1st Respondent reinforces this finding.
56. The Petition as amended on November 2, 2021 is dismissed for being premature and for failure to exhaust alternative available remedies as stated above. The court has no jurisdiction as first port of call on issues in dispute as it would be tantamount to usurping the jurisdiction of an Independent Constitutional Office and the Bungoma County Assembly.
57. This being a public interest Petition in the spirit of upholding good governance, the court orders each party to bear own costs.
58. It is so ordered.

RULING DATED, DELIVERED AND SIGNED THIS 6TH DAY OF OCTOBER 2022 IN OPEN COURT AT BUNGOMA.

J.W. KELI,

JUDGE.

In The Presence Of:-

Court Assistant: Brenda Wesonga

For Petitioner: Mr. Tome

For Respondent : Mr Musumba

