



**Fwamba & 2 others v Bungoma County Assembly Service Board & 6 others
(Petition E006 of 2021) [2022] KEELRC 14693 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 14693 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
PETITION E006 OF 2021**

JW KELI, J

NOVEMBER 3, 2022

**IN THE MATTER OF INTENDED RECRUITMENT PLACEMENT OF 55 JOB VACANCIES
ADVERTISED 55 JOB VACANCIES IN THE COUNTY ASSEMBLY OF BUNGOMA.**

AND

**IN THE MATTER OF ENFORCEMENT AND/OR ALLEGED CONTRAVENTION
AND/OR THREATENED VIOLATION OF ARTICLES OF THE CONSTITUTION
INCLUDING ARTICLES 1,1 (2),3,10,19,20,21,23,27,41,174,201,207,220,227,228,232
AND ARTICLE 258 OF THE CONSTITUTION OF THE**

REPUBLIC OF KENYA

AND

**IN THE MATTER OF THE PROVISIONS OF THE COUNTY
GOVERNMENT ACT, THE PUBLIC FINANCE MANAGEMENT
(COUNTY GOVERNMENT) REGULATIONS 2015)**

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 PRINCIPLES
OF PUBLIC FINANCE AS WELL AS THE PRINCIPLE OF
FISCAL RESPONSIBILITY PRINCIPLES**

BETWEEN

IGNATIUS NYUKURI FWAMBA 1ST PETITIONER

MARK ILUKAU BARASA 2ND PETITIONER



JUMA JANE NASAMBU 3RD PETITIONER

AND

BUNGOMA COUNTY ASSEMBLY SERVICE BOARD 1ST RESPONDENT

SECRETARY, BUNGOMA COUNTY ASSEMBLY SERVICE BOARD 2ND
RESPONDENT

CHAIRPERSON BUNGOMA COUNTY ASSEMBLY SERVICE
BOARD 3RD RESPONDENT

BEN JOSHUA KIPKUT 4TH RESPONDENT

GEORGE WASIKE MAKARI 5TH RESPONDENT

RACHEAL RAEK NEKESA KHISA 6TH RESPONDENT

ANTHONY SIMIYU MABELE 7TH RESPONDENT

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

RULING

1. The Petitioner vide Petition dated October 12, 2021 challenged the recruitment of 55 persons vide advertisement dated September 2, 2021 by the 1st Respondent stating it was undertaken without adequate budgetary allocation of funds in violation of various provisions of the *Constitution of Kenya* and the provisions of section 107(1) and 108 of the *Public Finance Management Act* and regulations thereunder. The Petitioners sought permanent injunction to stop the recruitment process.
2. At the same time the Petitioners filed a Notice of Motion Application seeking conservatory orders which application was determined by this court on merit and ruling delivered on the December 15, 2021 dismissing the Application.
3. The Respondent on the June 24, 2022 filed in court the instant Notice of Preliminary Objection dated on even date raising the following points of law:-
 - 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.
4. The court directed that the Preliminary Objection be canvassed by way of written submissions. Only the Respondents filed their written submissions. On the July 28, 2022 the court gave the petitioners leave of 21 days to file their submissions having failed to comply with earlier order. The petitioners did not comply.



Determination

Whether the preliminary objection is merited

The Respondent's case

5. 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.
6. 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.
7. 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.
8. 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.
9. 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.'
10. 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.
11. 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.
12. 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.



13. 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*.

14. The Petitioners did not file their written submissions hence the objection is decided exparte.

Decision

15. 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.

16. 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.

17. 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. The Court finds the instant Preliminary Objection on ground of jurisdiction properly raised.

18. The Respondent relies on the following provisions of the law:-

Article 234(2)(i) of the *Constitution* to wit:- “ The Commission shall hear and determine appeals in respect of County Governments Public Service”. 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;”



19. 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;”

20. 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.”

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

22. The Respondent to buttress its position that there exists clear procedures on 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

23. 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 lack of budgetary allocation hence unconstitutional and in violation of the law on public expenditure.

24. 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

25. 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 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'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."

26. 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.
27. The Court on reading the instant Petition finds that it is similar on facts with petition in Bungoma ELRC E007 of 2021 *Francis Simiyu Tome and Another vs Bungoma County Assembly service Board and others* which challenged the very same recruitment advertisement of 2nd September 2021 on basis of budgetary allocation and was struck off for failure to exhaust alternative available remedies following a preliminary objection raised by the respondents. In that case the Controller of Budget was a respondent and filed a response. In Petition E007 of 2021(supra) the court held as follows: "on maturity of the instant petition and exhaustion of the alternative mechanism (sic) the court 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*".
28. The Court is guided by the decision of the Supreme Court 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 in which the main issue is challenge of budgetary allocation for the impugned recruitment is an issue falling squarely under the office of Controller of Budget and the court would be meddling on her mandate by entertaining the petition.



29. Further the issues raised in the instant Petition also fall within the purview of the Bungoma County Assembly and Section 15(1) of the County Governments Act to reads:- “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.”. one of the roles of the 1st Respondent is under the County Government Act Section 12(7)is stated as follows:-“(c) preparing annual estimates of expenditure of the county assembly service and submitting them to the County Assembly for approval, and exercising budgetary control over the service; “ The Petitioners did not invoke that forum of the County Assembly under Section 15 of the County Governments Act 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 where 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 on the objects and principles of the Constitution and observed that in it was 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 is binding on this court and the decision is upheld to apply in the instant petition.
30. In Conclusion the court finds it has no first instance jurisdiction in the subject matter of the petition being lack of budgetary allocations for the proposed recruitment exercise by the 1st Respondent in view of Article 226 of the Constitution giving mandate to oversee County Budgets to the Controller of Budgets as read together with Article 252 of the Constitution and in view of the provisions Section 15 of the County Governments Act(*supra*).
31. 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 the County Assembly and upholds the Supreme Court decision in Julius Kariuki Mate & Another v Martin Wambora and another 2017 eKLR.
32. The Court upholds its decision in Bungoma ELRC E007 of 2021 Francis Simiyu Tome and Another vs Bungoma County Assembly service Board and others where the court determined similar claim as the instant petition, and orders that the petition dated October 12, 2021 is struck off for being premature and for failure to exhaust alternative available remedies consistent with the decision of the Court of Appeal in Speaker of National Assembly V James Njenga Karume(1992)e KLR. 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 (Controller of Budget) and the Bungoma County Assembly. The Court upholds the Notice of Preliminary Objection dated June 24, 2022 on basis of lack of jurisdiction for failure to exhaust alternative suitable and available remedies under the law. The Petition dated October 12, 2021 is struck off.
33. This being a public interest petition in the spirit of upholding good governance, the court orders each party to bear own costs.
34. It is so ordered.

RULING DATED, SIGNED AND DELIVERED THIS 3RD NOVEMBER 2022 IN OPEN COURT AT BUNGOMA.

**J.W. KELI,
JUDGE.**

IN THE PRESENCE OF



Court Assistant:- Brenda Wesonga

For Claimant:- Absent

For Respondent:- Absent

