



**Kayugira v Vihiga County Public Service Board & another (Employment and Labour Relations Cause 95 of 2021) [2022] KEELRC 13093 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13093 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 95 OF 2021**

**JW KELI, J**

**NOVEMBER 3, 2022**

**(FORMERLY KISUMU ELRC CAUSE NO. 82 OF 2019)**

**BETWEEN**

**DAMARIS SINDANI KAYUGIRA ..... CLAIMANT**

**AND**

**VIHIGA COUNTY GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

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

**RULING**

1. The claimant by statement dated September 9, 2019 and filed on September 20, 2019 sought, against the respondent, the following reliefs:-
  - i. A declaration that the claimant's services were unprocedurally, unlawfully and unfairly terminated and the claimant is entitled to compensation for unfair termination.
  - ii. The sum of Kshs 4,055,216/- as pleaded in paragraph 13 herein above.
  - iii. In the alternative the claimant be reinstated to her previous position of Deputy Sub- County Administrator.
  - iv. An order compelling the respondents to issue the claimant with a certificate of service under section 51 of the *Employment Act, 2007*.
  - v. Costs of this suit and interest at court rates from the date of filing until payment in full.
  - vi. Any other relief the honourable court may deem just and fit to grants.
2. The respondent entered appearance and filed response dated July 7, 2020 which attracted reply from the claimant dated July 8, 2020.



3. On the June 6, 2022 the office of the County Attorney of Vihiga County filed notice of change of advocates and simultaneously file notice of preliminary objection of even date.
4. The notice of preliminary objection seeks to strike out the suit on the following grounds:-
  1. The claim falls within the province of the appellate jurisdiction of the Public Service Commission by the application of section 77 of the [County Government Act](#).
  2. The jurisdiction of this honourable court is further ousted by section 87(2) of the [Public Service Commission Act](#).
  3. The claim is incompetent for being filed in a court without the requisite pecuniary jurisdiction.
  4. The claim amounts to abuse of the process of the honourable court.
5. The court gave directions for the notice of preliminary objection to be canvassed by way of written submissions.
6. The respondents'/objector written submissions drawn by the County Solicitor of the respondents dated July 26, 2022 were received in court on even date.
7. The claimant's written submission on the notice of preliminary objection drawn by DC Chitwah & Company Advocates are dated September 19, 2022 and received in court on the September 21, 2022.
8. The claimant submits that in the memorandum of defence dated July 7, 2020 at paragraph 18 the respondent admitted jurisdiction of the court. That parties are bound by their pleadings.
9. The claimant submits that the issue as to whether the claimant ought to have taken the claim as appeal to the Public Service Commission is a question of fact and relies on landmark decision on preliminary objection in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd*(1996) EA 696 (law JA and Newbold JA) where the court held:- " So far as I am aware , a preliminary objection consists of a pure 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 off the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration." In the ruling of Newbold JA he observed as follows:- " A preliminary objection in the in nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is in the exercise of judicial discretion. The improper objection does nothing but unnecessarily increase costs and on occasion confuse issues. This improper practice should stop."
10. To buttress their submissions on the validity of the preliminary objection the claimant further relied on the decisions of superior courts in [David Nyekorach Matsanga & another v Phillip Waki & 3 others](#) and [Hassan Ali Jobo & another v Suleiman Said Shabal & 2 others](#) (SCK No 10 of 2013(2014) eKLR. The court finds that the holdings in the cited decisions of the superior court just reiterated the decision in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696. Thus it can be said with authority that the jurisprudence on preliminary objection validity is as stated in *Mukisa Biscuit Manufacturing Co Ltd* case.
11. The claimant submits that contemplation under section 85 of the [Public Service Commission Act](#) is totally alien to the claim by the claimant in this court. That the exclusive jurisdiction of the court finds basis under the section 162(2) of the [Constitution of Kenya](#) and section 12 of the [Employment and Labour Relations Act](#) as relates to employment and labour relations disputes. That it is a fallacy to be



insisted that the court can only entertain the claimants' claim after she has exhausted the appellate avenues provided under section 85 of the [Public Service Commission Act](#).

## Decision

### The issue for determination is whether the court has jurisdiction to hear and determine the claim.

12. There is no dispute as to the employment of the claimant by the respondents and that the claim is on her terms of engagement and termination of services.
13. The respondent challenges the jurisdiction of the court on basis of the law that disputes from decisions of 1<sup>st</sup> respondent must first be appealed to the Public Service Commission under section 77 of the [County Government Act](#) and section 87(5) of the [Public Service Commission Act](#).
14. The court finds that jurisdiction is a proper point of law as stated in *Mukisa Biscuit Manufacturing Co Ltd* case (*supra*) and upheld by all superior courts in Kenya. Jurisdiction is a proper point of law hence validly raised as a preliminary objection. The issue as to whether the claimant ought to have taken the claim as appeal to the Public Service Commission is a question of law and not fact as submitted by the claimant.
15. The court while in agreement with the submission that parties are bound by their pleadings, finds pleadings by parties do not grant the court jurisdiction. The court is guided by the Supreme Court decision in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR where it held that jurisdiction flows from either the [Constitution](#) or legislation or both. The Supreme 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. In that case the court upheld the decision in *Owners of the Motor vessel "Lilian S"-vs- Caltex Oil (Kenya) Ltd* (1989) eKLR the decision of Nyarangi JA on jurisdiction being everything and that without it the court must down its tools.

### The relevant law

- a. Article 234(2) (a) (c) of the [Constitution Kenya](#).
  - "234 Functions and powers of the Public Service Commission.  
The functions and powers of the Commission are as set out in this article,  
The Commission shall:-
    - i. Hear and determine appeals in respect of county governments public service"
- c. Section 77 of the [County Government's Act, 2012](#) provides-
  - "77. Appeals to the Public Service Commission
    - (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 against any county public officer may appeal to the Public Service Commission against the decision".



- d. Sections 85(c) and 87(2) of the [Public Service Commission Act 2017](#) –

Part XV- Hearing and Determination of Appeals in Respect of County Government Public Service

85. 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

-

c. Disciplinary control

“ A person shall not file any legal proceedings in any court of law in respect  
87 to matters within the jurisdiction of the Commission to hear and determine  
(1) appeals for County Government Public Service unless the procedure provided  
... for:- under this part has been exhausted.”

16. The respondents in support of their preliminary objection relied on several authorities of various superior courts which upheld the doctrine of exhaustion of existing alternative remedies and all of which upheld the decision of the Court of Appeal case of [Secretary County Public Service Board and another -vs- Hulbbhai Gedi Abdille](#) (2017) eKLR (Makhandia, Ouko & M’Inoti JJA) where the court allowed the appeal on basis that the respondent had failed to utilize the process under section 77 of the [County Government Act](#).
17. 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’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.”
18. The foregoing Court of Appeal decision is binding on this court. The court in proceeding to hear the claim which falls under section 77 of the [County Government Act](#) under Public Service Commission would be an act of defiance of the Court of Appeal and would be falling in error if it permitted the claim. The court finds that a decision was made by the respondent not to renew the claimants’ contract of employment. The decision falls under section 77 of the [County Government Act](#) hence the first appeal against the decision ought to have been to the Public Service Commission as held by the Court of Appeal in the case of [Secretary County Public Service Board and Another -vs- Hulbbhai Gedi Abdille](#) (*supra*). The court finds and determines it has no jurisdiction at first instance in the instant dispute and proceeds to down its tools. The notice of preliminary objection dated June 6, 2022 is allowed and the claim dated September 9, 2019 struck off.



19. To temper justice with mercy the court orders each party to bear own costs.

20. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 3<sup>RD</sup> DAY OF NOVEMBER 2022.**

**J. W KELI,**

**JUDGE.**

**In the presence of :-**

**Court Assistant : Brenda Wesonga**

**Petitioners:- Absent**

**Respondents:- Absent**

