



**Otieno & another v Secretary, Migori County Public Service Board & 5 others
(Petition E066 of 2021) [2022] KEELRC 13052 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13052 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E066 OF 2021
CN BAARI, J
NOVEMBER 3, 2022**

BETWEEN

PETER OTIENO 1ST PETITIONER

STEPHEN OKELLO 2ND PETITIONER

AND

**SECRETARY, MIGORI COUNTY PUBLIC SERVICE BOARD 1ST
RESPONDENT**

MIGORI COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

SECRETARY COUNTY GOVERNMENT OF MIGORI 3RD RESPONDENT

COUNTY GOVERNMENT OF MIGORI 4TH RESPONDENT

PUBLIC SERVICE COMMISSION 5TH RESPONDENT

ATTORNEY GENERAL 6TH RESPONDENT

RULING

1. Before court is the 1st, 2nd, 3rd and 4th Respondents' Preliminary Objection seeking that the Petitioners' petition be struck out or dismissed on the following grounds:
 - i. That the court lacks jurisdiction to hear and determine the petition
 - ii. That the petition offends the doctrine of exhaustion as it violates the express provisions of Section 77 of the County Government Act, 2012 and Sections 85 and 87(2) of the Public Service Commission Act, 2017.
 - iii. That the petition is fatally defective, vexatious, frivolous, incompetent, misconceived, misplaced and an abuse of the process of this Honourable Court.



- Parties canvassed the Preliminary Objection by way of written submissions. The Petitioners and the 1st, 2nd, 3rd and 4th Respondents filed their submissions. The 5th and 6th Respondents did not file submissions.

The 1st-4th Respondents' Submissions.

- It is submitted for the 1st -4th Respondents that Section 77 of the *County Government Act*, 2012 and Sections 85 and 87 (2) of the *Public Service Commission Act*, have created a specific statutory body by the name of Public Service Commission whose mandate includes hearing appeals in respect of any decision relating to the engagement of persons in a county government.
- It is their submission that the stated statutes require persons dissatisfied with or affected by any decision made by a County Public Service Board to approach the Public Service Commission for redress of the dispute before moving to court. It is their submission that this court lacks jurisdiction to entertain this petition. They had reliance in *Owners of Motor Vessel Lilian 'S' v Caltex Oil (k) limited (1989) KLR 1* to buttress their position.
- It is the Respondents' submission that a court of law can only exercise jurisdiction conferred on it either by the *Constitution*, the law or both but cannot confer itself or exceed the jurisdiction conferred on it. They sought to rely in Nairobi Petition No 3 of 2016- *Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 others (2019) eKLR* to support this position.
- The Respondents further submit that the jurisdiction of the Public Service Commission to hear and determine matters that fall within her jurisdiction should not be ousted.
- It is submitted for the Respondents that the Honourable court's jurisdiction has been wrongly and improperly invoked rendering the petition herein premature and offends the doctrine of exhaustion.
- It is further submitted that the power of the Public Service Commission to hear and determine appeals from county governments emanates from Article 234 (2) of the *Constitution* and for the petitioners to have filed this petition without seeking redress from the Public Service Commission offends the doctrine of exhaustion. They relied in the holding by Justice Radido in Kisumu Petition No E016 of 2020-*Evans Muswahili Ladtema v Vibiga Public Service Board*.

The Petitioners' Submissions

- It is submitted for the Petitioners that a point of Preliminary Objection must be based on some reply setting out clearly what the Respondents are complaining of, which has not been done. They relied in *Stephen Onyango Achola & Another v Edward Hongo Sule & another (2004) eKLR*.
- The Petitioners submit that Parliament has amended various statutes to extend the jurisdiction of this court, and further submit that this court has power to hear matters touching on the fundamental rights of citizens. They sought to rely on the holding in *United States International University (USIU) v Attorney General & 2 Others (2012) eKLR* to buttress this position.
- It is further submitted that the Petitioner is not seeking employment from the Respondent county, and neither were they applicants in the impugned process, but ordinary citizens challenging the unconstitutional issues happening at the county of Migori. They sought to rely on the holding of Justice Ongaya in *Abdikadir Suleiman v County Government of Isiolo & another (2015) eKLR* to support this position.
- It is the Petitioner's submission that he has cited various constitutional violations which cannot be adjudicated upon by the Public Service Commission.



Determination

13. I have considered the Preliminary Objection and the rival submissions. The issue for determination is whether Section 77 of the [County Government Act](#) and Section 87(2) of the [Public Service Commission Act](#), 2017, oust this Court’s jurisdiction in respect of the instant petition.
14. Section 77 of the [County Government 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; remuneration and terms and conditions of service; (emphasis mine)
 - (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](#);
 - (e) retirement and other removal from service;
 - (f) pension benefits, gratuity and any other terminal benefits; or
 - (g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.

On the other hand, Section 87 (2) of the [Public Service Commission Act](#) provides thus: -

“(2) 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 service unless the procedure provided under this Part has been exhausted.”

15. The petition herein concerns recruitment of persons to various position in the County Public Service of Migori by the Migori County Public Service Board.
16. The Petitioners in his petition challenges the recruitment process which is alleged to be fraudulent and not having adhered to the provisions of the [Constitution](#) on various grounds, including regional balance and failure to consider marginalized groups, amongst other complaints.
17. Section 77 (2)(a) of the [County Government Act](#), provides that the Public Service Commission shall entertain appeals on any decision relating to employment of a person (emphasis mine) in a county government including a decision in respect of—
- “(a) recruitment, selection, appointment and qualifications attached to any office; remuneration and terms and conditions of service; “
18. The foregoing provision leaves no doubt that a disputes emanating from the county government public service in relation to recruitment, selection and appointment, should in the first instance, be referred to the Public Service Commission by way of appeal.



19. In *Geoffrey Muthinji & Another v Samuel Henry & 7 Others (2015) eKLR*, the court held that it is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the court is invoked, and that, courts ought to be a fora of last resort, and not the first port of call the moment a storm brews.
20. Non-adherence to the provisions of Section 77 of the *County Government Act* and Section 85 and 87(2) of the *Public Service Commission Act*, ousts this court's jurisdiction to entertain the dispute.
21. In *Lukale Moses Sande v the County Government of Kakamega & 3 Others* Cause No 23 of 2020 the court opined thus:

“The Claimant did not exhaust the appeal procedures in respect to his removal, purported removal and or terms and conditions of service as contemplated by the *Constitution*, the *County Government Act* and the *Public Service Commission Act*, before moving this court, and the court therefore declines jurisdiction.”
22. Further, in *Republic v National Environment Authority Ex Parte Sound Equipment Ltd [2011] eKLR*, the Court of Appeal held that a party should not be allowed to bypass the statutory appellate process provided under the *County Governments Act* and the *Public Service Commission Act*, save in exceptional circumstances.
23. Further, in the often-quoted case of *Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Limited [1989] eKLR*, the Court had this to say on jurisdiction: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
24. The Petitioner's contention that he is not an applicant in the recruitment process, but that he is litigating in the public interest, does not in my view change this position. Section 77 states that ‘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’
25. My interpretation of this provisions is that a person litigating in the public interest, is not precluded from the requirement to exhaust the statutory provisions before bringing a matter to court.
26. I find and hold that the petition herein offends the doctrine of exhaustion, and the court declines jurisdiction.
27. The Petitioners' petition dated December 28, 2021, is struck out with no orders as to costs.
28. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 3RD DAY OF NOVEMBER, 2022.

CHRISTINE N BAARI

JUDGE



Appearance: _

Mr Misiga h/b for Ms Nyakwana for the Applicant

Ms Owino h/b for Mr Otieno for the 1st – 4th Respondents

Mr Ogosso h/b for Ms Wangechi for the 5th Respondent

N/A for the 6th Respondent

Ms Christine Omollo-C/A

