



**Ekuwam v Clerk Turkana County Assembly & another (Cause 43 of 2020) [2022] KEELRC 13080 (KLR) (1 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13080 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE 43 OF 2020  
NJ ABUODHA, J  
NOVEMBER 1, 2022**

**BETWEEN**

**ALEX METHODIUS EKUWAM ..... CLAIMANT**

**AND**

**CLERK TURKANA COUNTY ASSEMBLY ..... 1<sup>ST</sup> RESPONDENT**

**TURKANA COUNTY ASSEMBLY SERVICE BOARD ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. In the amended memorandum of claim filed in court on February 14, 2022, the claimant seeks the following prayers:
  - a. Kshs 4,903,363 made up of Kshs 1,531,440 being damages for wrongful withholding of salaries, Unpaid salaries of Kshs 3,063,230 and unpaid leave for the year 2015, 2017 and 2020 being Kshs 308,693.
  - b. Costs of these proceedings
  - c. Any other relief that this honourable court may deem fit and just to grant.
2. The respondents in response filed a statement of response to the amended memorandum of claim on the April 5, 2022 and simultaneously the notice of preliminary objection which is the subject of this ruling.
3. The notice of preliminary objection dated March 29, 2022 raises the following ground of objection:-
  - i. The honourable court lacks jurisdiction to hear and determine the present claim in the first instance, as the jurisdiction of this honourable court has been prematurely invoked on account of section 77 of the [County Governments Act](#) where the claimant has failed to



follow the mandatory procedure provided for under the [County Governments Act, 2012](#), before approaching the court.

4. When this matter came up for directions on May 16, 2022, the court directed the parties to canvass the said preliminary objection by way of written submissions. Pursuant to those directions, the respondents filed their submissions dated June 10, 2022 while the claimant filed his dated June 3, 2022.
5. The respondents submitted that the court lacked jurisdiction to entertain the instant suit on the basis that the claimant had failed to follow the mandatory procedure provided for under section 77 of the [County Government Act, 2012](#) had been complied with before approaching the court. It was stated that article 234 of the [Constitution](#) provides for powers of the Public Service Commission which includes *inter alia*, to hear and determine appeals in respect of County Governments Public Service. It was further submitted that the logical interpretation to section 77 of the [County Government Act](#) as buttressed by section 85 and 87(2) of the [Public Service Act, 2017](#), is that a person challenging the decision of the County Assembly Service Board is required to appeal to the Public Service Commission. The respondent relied on the authority of [Hexron Mwambia Karong'a v Tharaka Nithi County Government & another](#) [2019] eKLR where the Court of Appeal observed a party cannot bypass the provision of section 77 and come to court directly seeking reprieve for matters that were for the Public Service Commission to handle. It was further submitted section 77 of the [County Government Act](#) prescribes the recourse to follow and it does not create an option by which one may elect whether or not to lodge a claim with the Public Service Commission. To buttress this position, counsel submitted the case of [Martin Kabubii Mwangi v County Governmet of Laikipia](#) [2019] eKLR where the court observed,

“The exhaustion principle enunciated in precedents such as the case of Secretary, County Public Service & another v Hulhai Gedi Adille does not permit an election as to the parts of the statute that one should rely on. Put another way, it removes discretion on the part of a litigant from choosing whether to follow the provision or not. In this case, the suit was filed before the exhaustion of the remedy under the law, namely the provisions of section 77 of the County Governments Act. The claimant ought to have appealed against his removal to the Public Service Commission before moving to court.”

6. According to the respondents, the claimant had not demonstrated any lack of suitability of the statutory appeal process provided in the [County Governments Act](#) or any exceptional circumstances that would allow him to bypass the process provided for by statute.
7. The court was thus urged to uphold the preliminary objection and dismiss the claimant's case for failure to exhaust the appellate process established by section 77 of the [County Governments Act](#) as read with sections 85 and 87(2) of the [Public Service Commission Act](#).
8. On his part, the claimant submitted firstly that the objective of this court as stipulated in the [Employment and Labour Relations Court Act](#) of 2011 is to hear and determine disputes relating to employment, labour relations and connected purposes. It was also submitted that section 12 of the [Employment and Labour Relations Court Act](#) confers exclusive original and appellate jurisdiction to this court to hear and determine all disputes referred to in accordance with article 162(2) of the [Constitution](#). It was further submitted that the claimant relied on the above provisions in bringing the instant suit which rightfully claims for his employment and terminal dues from the respondents.
9. It was further submitted that the claimant in his memorandum of claim questions the legality of the actions of the respondents who are the senior members of the board, and that the matter can only be handled and resolved fairly by the court and not the Commission. It was averred that section 77(1) of



the *County Governments* is not couched in mandatory terms and that the Act speaks of the word ‘may’. He argued that the use of the word “may” in section 77(1) suggests that the claimant had an option to appeal to the Commission or take such other legitimate action such as filing the present suit.

10. The claimant relied on the cases of *Abdikadir Suleiman v County Government of Isiolo* [2015] eKLR and *Thuranira Salesio Mutuma v County Public Service Board & 2 others* (2019) eKLR to buttress this position.
11. The court was urged to dismiss the notice of preliminary objection dated March 20, 2022 with costs.
12. I have considered the notice of preliminary objection dated March 20, 2022 and the rival submissions. From the said preliminary objection, the respondents have argued that this court lacks jurisdiction to entertain the claimant’s cause by virtue of section 77 of the *County Governments Act, 2012*.
13. Section 77 of the *County Governments Act* provides:-
  - "77 (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;
    - (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.
  - (3) An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of the Commission, the circumstances warrant it.
  - (4) The Commission shall not entertain an appeal more than once in respect to the same decision"
14. A reading of the above provision of the law, reveals evidently that an appeal from the decision of County Public Service Board lies in the Public Service Commission.
15. This court in the case of *Junet Mohamed Ibrahim & another v County Government of Mandera & 3 others* [2019] eKLR, while dealing with a similar matter observed:

“This section is the point of contention in this matter before me and I cannot construe it differently. Section 9(2) of the Fair Administrative Action Act provides that the court shall not review an administrative action or decision unless the mechanism including internal mechanism for appeal or review and all remedies available under any other written law are



first exhausted. The court however has power in exceptional circumstances to exempt a person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

The petitioner was informed of the intention to surcharge him for salaries drawn while absent from work without authority. He was required to respond to the letter communicating the decision within 7 days of receipt. He did not do so. The court does not see any exceptional circumstances demonstrated by the petitioner to warrant exemption from clear provisions of section 77 of the County Government Act.

The court therefore upholds the objection and hereby orders the suit herein stayed pending the exhaustion of the internal appeal process provided for under section 77 of the County Government Act.”

16. The court has analysed the present case at length and is not convinced that exceptional circumstances have been given to warrant the court to handle the matter before the exhaustion of the internal appeal process.
17. In the end, the preliminary objection is upheld with the consequence that the matter herein will be stayed pending the exhaustion of the internal appeal process provided for under section 77 of the *County Government Act*. Costs shall abide the outcome of the main case.
18. It is so ordered

**DATED AND DELIVERED AT ELDORET THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2022.**

**ABUODHA NELSON JORUM**

**JUDGE ELRC**

