



**Mberia & 3 others v County Secretary, County Government of Meru & 2 others
(Petition 1 of 2022) [2022] KEELRC 13567 (KLR) (15 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13567 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
PETITION 1 OF 2022
ON MAKAU, J
DECEMBER 15, 2022**

BETWEEN

**JOSEPH KITHURE MBERIA 1ST PETITIONER
PAUL MWAKI ARIMI 2ND PETITIONER
DR. JOHN NTOITI 3RD PETITIONER
KENNETH KIMATHI MBAE 4TH PETITIONER**

AND

**COUNTY SECRETARY, COUNTY GOVERNMENT OF MERU 1ST
RESPONDENT
MERU COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT
THE GOVERNOR, COUNTY GOVERNMENT OF MERU 3RD RESPONDENT**

RULING

1. This ruling relates to the Respondents Notice of Preliminary Objection dated October 18, 2022 which seeks for striking out of the petition and the Notice of Motion dated October 4, 2022 on four grounds. However, the grounds were consolidated into two during the hearing namely;
 - a. The Petitioner has not exhausted the appeal mechanisms provided by Section 77 of the *County Governments Act* (CGA) read with Section 85 of the Public Service Act before filing the suit.
 - b. The Petition is defective under Section 12 and 20 of the *Employment and Labour Relations courts Act* read with Article 162 (2) and 165 (b) of the *Constitution*.
2. The objection was argued orally on November 22, 2022 by Mr. Mwirigi learned Counsel for the Respondents and Mr. Maranya Advocate opposed it on behalf of the Petitioners.



3. Mr. Mwirigi argued that the Petition and the Motion are prematurely before the court because under Section 77(2) of the County Government Act the Petitioners should first have appealed to the Public Service Commission (the PSC). To emphasize that submission reliance was placed on the Court of Appeal decision in the case of Secretary County Public Service Board & Another V Hulbahai Gedi Abdile (2017) eKLR where the court held that where there is an alternative procedure for remedy provided by the law, the same ought to be exhausted before filing suit.
4. As regards the second ground, Mr. Mwirigi submitted that the Petition does not reveal any constitutional issue but purely employment disputes. He contended that the Hulbahai Abdile case above involved similar facts as in the instant petition and the court held that there was no constitutional issue involved but normal employment dispute
5. Mr. Mwirigi further submitted that the issue involved in the petition is not dismissal but compulsory leave which is an employment and not a constitutional issue. For emphasis he relied on the case of Bernard Mwaura Mbutia V Nyabururu Water & Sanitation Co. Ltd and Another [2019] eKLR where the court held that compulsory leave is an interim measure to allow for investigations and the court will rarely interfere with the same.
6. Further Mr. Mwirigi relied on the case of Ezron Kihumba Kamotho V Teachers Service Commission [2019] eKLR where a petition and an application were dismissed and the Petitioner was directed to file normal suit because the issue involved was purely employment.
7. The counsel urged the court to allow the objection adding that there is no breach or urgency since the Petitioners are still in their employment and are drawing full benefits.
8. Mr. Maranya Advocate opposed the preliminary objection vehemently. He submitted that the Petition was filed under Article 165 (5) of the Constitution to protect the Petitioner's rights from violation. He contended that the Petitioners have been sent on compulsory leave for indefinite period and other people appointed to replace them. The said decision was made one week after a new government was sworn in.
9. He argued that the impugned decision was made without according them a hearing, the reason for the decision was not communicated to them and the decision was made by a person who lacked the legal authority hence *ultra vires*. It was submitted that their employer is a body corporate, separate from the respondents and therefore the Petitioners were not sent away by their employer but third parties.
10. The counsel denied that the matter before the court is a mere employment dispute and maintained that fundamental rights have been violated and as such they seeking protection under Article 25, 27, 28, 35, 41, 47, 50 and 236 of the Constitution. Consequently, it was contended that only this court has the jurisdiction to remedy a breach of constitutional rights for employees. He observed that Tribunals only deal with merit and not procedural law which is the pervue of the court of law.
11. As regards the exhaustion doctrine, the counsel argued that Section 9 of the Fair Administrative Action Act (FAAA) provides for the exemptions to the exhaustion doctrine in matters where the court considers to be in the interest of justice. For emphasis he cited Republic v Independent Electoral and Boundaries Commission (IEBC) exparte National Super Alliance (NASA) Kenya & 6 Others [2017]eKLR, Republic V National Environment Management Authority Exparte Sound Equipment Limited []eKLR and Fleur Investment Ltd V Commissioner of Domestic Taxes & Another [2018]eKLR, where the courts held that a court of law would be in order to intervene even where the litigant who approaches it has not exhausted the preliminary process where arbitrariness, malice, capriciousness and disrespect of the rules of natural justice are manifest.



12. The counsel contended that the respondents actions herein are borne out of malice, abuse of discretion and disrespect of the constitution, statute and rules of natural justice. It was submitted that the suspension was triggered by ill- will retaliation, political persuasion and victimization of employees who worked for the previous government. Reliance was placed on the court of Appeal decision in [*Chief Justice of Kenya V Bryan Mandila Khaemba*](#) [2021]eKLR where it was held that the doctrine of exhaustion notwithstanding, courts still retain residual jurisdiction to intervene in exceptional circumstances despite existence of alternative remedies where the action complained of is marred with illegalities and procedural irregularities.
13. Further reliance was placed on [*James Orre V Office of Governor, county Government of Marsabit and Another*](#) [2021] eKLR where the Court held that a suit seeking to test constitutionality and legality of the termination of employment is outside the limits of Section 77 of the [*County Governments Act*](#). It was reiterated that appeals to the Public Service Commission applies the same substantive law and facts as applied by the primary authority in the decision appeal from. The appeals only deal with the merits or substance and not the procedural or legal propriety of the case, which are matters for the courts of law to address.
14. According to the Petitioners Section 77 of the [*county government Act*](#) does not apply to this case because the impugned actions are malicious, *ultra vires* and tainted with illegality including violation of constitutional rights, national values and principles of public service which can only be addressed by this court and not the Public Service Commission under Section 77 of the [*County Government Act*](#).
15. In a brief rejoinder, Mr. Mwirigi submitted that the petitioners fall under the ambit of the County Public Service and under Section 44 of the [*County Government Act*](#), the County Secretary is the Head of the County Public Service and therefore he had the authority to issue the petitioners with letters for compulsory leave. Accordingly, it was argued that the petitioners ought to have filed an appeal to the public service commission under Section 77 of the [*County Government Act*](#).
16. The foregoing notwithstanding the court was notified that the compulsory leave letters have since been recalled and the petitioners are back to work following the granting of conservatory order by the County.
17. Finally it was reiterated that the matter before the court involves an employment dispute and as such the court should follow the decision of [*Elizabeth Mburu V Kenya Breweries Limited*](#) [2019]eKLR where a petition was struck out because the dispute involved was employment dispute and not constitutional matter. The court went ahead to observe that it would be absurd to constitutionalize every employment matter.

Analysis and Determination

18. The issues for determination from the submissions above are:
 - a. Whether the Petition meets the competence threshold of a constitutional petition
 - b. Whether the petition is premature and offends the doctrine of exhaustion vis-à-vis section 77 of the [*County Government Act*](#).



Competence Threshold

19. The threshold of a competent constitutional case was stated by the High court in the case of *Anarita Karimi Njeru V Republic* [1979] eKLR where the court held that:
- “We would however again stress that if a person is seeking redress from the high court on a matter which involves a reference to the constitution it is important (if to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provision said to be infringed, and the manner in which they are alleged to be infringed.”
20. The said threshold was upheld by the Court of Appeal in *Mumo Matemu V Trusted Society of Human Rights Alliance & 5 Others* [2013]eKLR where the court stated that:-
- (41) We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims.
- (43) The petition before the High court referred to Article 1,2,3,4,10,19,20 and 73 of the constitution in the title. However, the petition provides no title or particulars as to the allegations and the manner of the infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organ ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the constitution, again without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect to the spirit of the constitution and the rule of law, again without any particulars.”
21. Applying the foregoing precedents to the facts of this case and basic procedural requirements set out under the *Constitution of Kenya (protection of Rights and Fundamental freedoms) practice and procedures* (The Mutunga Rules), I am satisfied that the instant petition meets the competence threshold. Part D of the petition details the provision of the constitution that have been violated, how they were violated and the complaint by the petitioners against the respondents. The said pleading gives some degree of precision about the matter before the court and what the court is being asked to do.

Exhaustion Doctrine

22. Section 77(1) of the *County Government Act* provides 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 offices may appeal to the Public service commission against the decision”
23. Section 87(2) of the *Public service commission Act* then bar access to court of law for anyone with a dispute that falls within the jurisdiction of the Public Service Commission until the pre-court procedure is exhausted. The aforementioned provision states that:-
- “ 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.”



24. The foregoing bar is in line with doctrine of exhaustion provided under section 9(2) of the *FAA Act* which provides that:-

“The High Court or subordinate court under sub section (1) shall not review an administrative action or decision under this Act unless the mechanisms including for appeal or review and all remedies available under any other written law are first exhausted.”

25. However, there are exemptions to the exhaustion doctrine. Section 9 (4) provides that:

“Notwithstanding subsection (3), the High court or subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhausting any remedy if the court considers such exemption to be in the interest of justice.”

26. In the case of *Fleur Investment Limited V Commissioner of Domestic Taxes and Another* [2018] eKLR the Court of Appeal held that:-

“Whereas courts of law are enjoined to defer to specialized tribunals and other alternative dispute resolution statutory bodies created by parliament to resolve certain specific disputes, the court cannot being a bastion of justice sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of Natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.”

27. In this case the petitioners have shown that the petition herein is not challenging the merits of the decision to send them to compulsory leave but the legality of the decision. They have shown that they are also challenging the decision for being arbitrary, malicious and being made in disrespect of the Rules of natural justice. Looking at the facts of the case, an appeal to the Public Service Commission would not avail to the petitioners the relevant remedy of Judicial review in respect of the alleged procedural impropriety and constitutional violations. The reliefs sought include order of certiorari to quash the impugned decision, which order can only be obtained from a Court of Law.

28. For the foregoing reasons I find that the facts of this case are different from that in the Hulbhai Gedi Abdille case cited by respondent.

In the end, the court finds no merits on the Notice of Preliminary Objection and proceeds to dismiss it with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 15TH DAY OF DECEMBER, 2022.

ONESMUS N MAKAU

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.



ONESMUS N. MAKAU
JUDGE

