



**Tome v Bungoma County Assembly Service Board (CASB) & 2 others (Cause E011 of 2021) [2022] KEELRC 13366 (KLR) (1 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13366 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CAUSE E011 OF 2021  
JW KELI, J  
DECEMBER 1, 2022**

**BETWEEN**

**FRANCIS SIMIYU TOME ..... CLAIMANT**

**AND**

**BUNGOMA COUNTY ASSEMBLY SERVICE BOARD (CASB) .... 1<sup>ST</sup>  
RESPONDENT**

**SPEAKER/CHAIRMAN OF CASB ..... 2<sup>ND</sup> RESPONDENT**

**CLERK/SECRETARY OF BUNGOMA CASB ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**(On the Respondent's Notice of Preliminary Objection by the Respondents dated June 27, 2022)**

1. The claimant *vide* statement of claim dated May 10, 2022 following his summary dismissal as the Principal Clerk Assistant of the Bungoma County Assembly brought the instant suit against respondents seeking various reliefs including a declaration that the summary dismissal was unfair, unprocedural and illegal, seeking for reinstatement, permanent injunction against recruitment in replacement and order against demotion, notice pay, unpaid housing allowances, service pay, severance pay, gratuity pay, compensation for wrongful dismissal, punitive damages, exemplary damages, damages for violation of claimants rights certificate of service, anticipatory benefits, costs and interests.
2. The claimant in addition filed under certificate of urgency notice of motion dated May 10, 2022 supported by his affidavit of even date seeking for interim order of restraining the respondents from advertising, shortlisting, interviewing, recruiting and in any other way filling the position of Principal Clerk Assistant( committee services).



3. The respondent entered appearance *vide* the law firm of J.O Makali & Company advocates on the July 5, 2022 and simultaneously lodged notice of preliminary objection dated June 27, 2022 raising points of law to wit:-
  - a. The entire petition runs counter to the provisions of section 77(1) and (2) of the County Government Act No 17 of 2013.
  - b. The entire petition offends the provisions of articles 234(2) 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 the court lacks jurisdiction to hear and determine the entire petition.
4. The respondents filed response to the claim dated October 13, 2022 and received in court on the October 17, 2022.
5. The claimant filed further affidavit dated August 29, 2022 and a further affidavit dated November 2, 2022.
6. The court directed that the preliminary objection be canvassed first by way of written submissions. The parties complied.

## **Determination**

### **Issues for determination.**

- a. Both parties in their written submissions addressed the issues raised under the notice of preliminary objection which the court summarises to be :whether the court lacks jurisdiction to hear and determine the suit

### **The Respondent's Case**

7. The respondents' submissions are dated October 7, 2022. The respondents submit that the claim runs counter to the provision of section 77(1) and (2) of the County Government Assembly Act. 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;
  - (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.”
8. The respondent submits that the petition(sic. it is a claim) offends the provisions of article 234(2) of the Constitution of Kenya 2010 to wit : ‘Functions and powers of the Public Service Commission article 234(1) the functions and powers of the commission are set out in this article.
- (2) the commission shall-
    - a. Subject to this Constitution and legislation-.
    - b. Hear and determine appeals in respect of County Governments Public Service; and
    - c. Perform any other functions and exercise any other powers conferred by national legislation.”
9. The respondent submits that the petition(sic) (instant suit is a claim) runs counter to the provisions of section 85 a-g and section 87(2) of the Public Service Commission Act 2017.
10. Section 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;
11. 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.”
12. That the entire petition (sic) offends the spirit of the provisions of section 8(1) and (2) and section 9 of the Public Service Commission (County Appeals Procedures) Regulations.
13. The respondent to buttress its submissions on the lack of jurisdiction and the suit offending doctrine of exhaustion relied on the decision of the Court of Appeal in Secretary, County Public Service Board & another v Hulbbai Gedi Abdille [2017] eKLR where the Court of Appeal held:-“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 a 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.”

14. The respondents submit that for lack of jurisdiction the court should down it tools and to buttress this submission relies on the decision of the Court of Appeal in *Owners of Motor Vessel 'Lillian S' v Caltex Oil Kenya Ltd(1989)e KLR* where the Court of Appeal held that jurisdiction is everything and where the court had no jurisdiction there is no basis of continuation of proceedings pending other evidence. That a court must down tools once it holds the opinion it is without jurisdiction.
15. The respondents submit that by dint of section 87(2) (*Public Service Commission Act* ) the court's jurisdiction was ousted.

### **The Claimant's Submissions.**

16. The claimant submits that he was not heard before the summary dismissal which he submits was unfounded. that upon the dismissal he filed appeal to the 1<sup>st</sup> respondent(Fsta1) and on failing to receive response did a reminder (Fsta2). That further he sent a demand notice to the respondent dated April 20, 2021.
17. The claimant further submits that he also filed appeal with the Public Service Commission which was not acknowledged. In the circumstances the claimant submits he has complied with the law. The claimant urges the court to be guided by the provisions of article 159 of the *Constitution* that justice shall not be delayed and for the court to administer justice without undue regard to procedural technicalities. The claimant cited several other decisions of the court which the court looked into.

### **Decision**

18. The court holds that 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.
19. The court is guided by the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR where in 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.
20. 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 based on points of law on ground of jurisdiction properly raised.
21. The respondent relies on the following provisions of the law:-



Article 234(2)(i) of the Constitution to wit:- ‘Functions and powers of the Public Service Commission article 234(1) the functions and powers of the commission are set out in this article.

- (2) the commission shall-
  - a. Subject to this Constitution and legislation-.
  - b. Hear and determine appeals in respect of County Governments Public Service; and
  - c. Perform any other functions and exercise any other powers conferred by national legislation.”

22. 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.”

24. Related to the forgoing laws cited by the respondent are the following provisions of the law under the Public Service Commission Act:- section 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.”

24. 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.”

25. The respondent submits the first port of call for the claimant aggrieved with the decision respondent was the appeal County Assembly Service Board then if unsuccessful to the Public Service Commission.



The respondents hinged their submissions on the decision of the Court of Appeal in *Secretary County Public Service Board and another v Hulbbhai Gedi Abdille* (2017) eKLR (Makhandia, Ouko & M’Inoti JJA) where the Court of Appeal held: “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 a 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.” The court finds that the Court of Appeal in *Secretary County Public Service Board and another v Hulbbhai Gedi Abdille* (2017) Eklr having dealt with claim by employee of the County Public Service Board, then the said decision is not relevant to the jurisdiction of the court in the instant suit.

26. Article 234 (2) of the *Constitution* states:- “The commission shall-
  - a. Subject to this Constitution and legislation-
  - b. Hear and determine appeals in respect of County Governments Public Service; and
  - c. Perform any other functions and exercise any other powers conferred by national legislation”.(emphasis given.)
27. Section 77 (1) of the *County Government Act* reads:- ‘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”(emphasis given)
28. 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.”( emphasis given)
29. Applying the Supreme Court decision 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 then the court finds and determines that neither the *Constitution* or the legislation being the *County Governments Act* and the *Public Service Commission Act* gave the Public Service Commission jurisdiction to handle employment claims emanating from employees of the County Assembly Service Boards.
30. The Court holds that the Public Service Commission jurisdiction is limited to county governments and that to deal with employees of the County Assembly Service Boards would be undermining the doctrine of separation of powers. There is need to draw parallel with the national government(executive), Judiciary and the National Assembly. PSC only deals with employees of the national government (the executive) respecting the doctrine of separation of powers. Under article 6 of the *Constitution* of Kenya has two level governments, the National and County. The doctrine of separation of powers applies with equal measure to both levels of government.
32. The court perused the County Government Act and found that unlike the County Public Service Boards, there is no clear redress mechanism provided for appeals from decisions of the County Assembly Service Boards on employees claims as envisaged under the decision of the Court of Appeal



in Speaker of the *National Assembly v James Njenga Karume* [1992] Eklr where the court held: ‘In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the *Civil Procedure Rules* cannot oust clear constitutional and statutory provisions.’”

33. The court found that the claimant filed appeal with the assembly board and even sent a reminder but there was no response. The court finds and holds that it has original jurisdiction to adjudicate over claims by employees who allege their services are terminated unfairly or for other grievance by employees against the County Assembly Service Board as no clear procedure for the redress of such grievance prescribed by the *Constitution* or an Act of Parliament exists as held in the *Speaker of the National Assembly v James Njenga Karume* [1992] Eklr. The right of appeal under section 15 of the *County Government Act* as held in Bungoma ELRC E007 of 2021 *Francis Simiyu Tome and another v Bungoma County Assembly service Board and others* would not qualify as a clear redress procedure for claims on decisions against employees. The court upholds its own decision in ELRC cause No E003 of 2021 *Martin Adans Wamukota Situma v The Bungoma County Assembly of Service Board (CASB)* to the extent that the Public Service Commission has no jurisdiction over decision by the County Assembly Service Boards.

### **Conclusion And Disposition**

34. The court holds that it has original jurisdiction to hear and determine claims by employees who allege their services were terminated unfairly or for constitutional violations against the County Assembly Service Boards’ decisions. The jurisdiction of Public Service Commission is limited to decisions of the County Public Service Boards. The notice of preliminary objection dated June 27, 2022 is dismissed for lack of merit with costs to the claimant in the cause.
35. The parties to take hearing directions in the petition to be heard together with the notice of motion.
36. It is so ordered.

**RULING DATED, DELIVERED AND SIGNED THIS 1<sup>ST</sup> DECEMBER 2022 IN OPEN COURT AT BUNGOMA**

**J.W. KELI,**

**JUDGE.**

IN THE PRESENCE OF:-

**Court Assistant : Brenda Wesonga**

**For Claimant: Tome**

**For Respondent: Masengenji holding brief for Murunga**

