



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**JUDICIAL REVIEW NO. 3 OF 2020**

**IN THE MATTER OF AN APPLICATION BY JOSEPH ARUNG OKWESO FOR  
ORDERS OF JUDICIAL REVIEW IN THE NATURE OF CERTIORARI & MANDAMUS**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENTS ACT**

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT**

**REPUBLIC.....APPLICANT**

**VERSUS**

**KISUMU COUNTY SECRETARY.....RESPONDENT**

**COUNTY PUBLIC SERVICE BOARD.....INTERESTED PARTY**

**EX-PARTE JOSEPH ARUNG OKWESO**

**JUDGMENT**

1. For determination are 2 Motions by Joseph Arung Okweso (the *ex-parte* applicant) against the County Secretary, County of Kisumu.

2. The first Motion is dated 14 January 2020, and the *ex-parte* applicant seeks orders:

- (i) An order of judicial review in the nature of certiorari to remove into the Employment and Labour Relations Court and quash the decision of the Respondent contained in the letter dated 19<sup>th</sup> August 2020 that terminated the services of the *ex-parte* applicant.
- (ii) An order of judicial review in the nature of a mandamus compelling the Interested Party to reinstate the *ex-parte* applicant to his former position as the Chief Officer of Health & Environment at the County Government of Kisumu with no loss of benefits.
- (iii) Costs of this application be provided for.

3. The second Motion is dated 4 February 2021, and therein the *ex-parte* applicant seeks orders:

- (i) ...
- (ii) A temporary injunction do issue directed at the Respondent, its employees, workers, agents and/or whomsoever jointly and severally restraining them from recruiting, proceeding with recruitment, filling the vacancy of the Chief Officer in charge of Health & Environment at the County Government of Kisumu pending the hearing and determination of this application.

(iii) A temporary injunction do issue directed at the Respondent, its employees, workers, agents and/or whomsoever jointly and severally restraining them from recruiting, proceeding with recruitment, filling the vacancy of the Chief Officer in charge of Health & Environment at the County Government of Kisumu pending the hearing and determination of the *ex-parte* applicant's Notice of Motion application dated 14<sup>th</sup> January 2021.

(iv) The costs of this application be provided for.

4. The Court directed the Respondent to respond to both Motions on 9 February 2021.

5. The Respondent filed a Replying Affidavit on 19 February 2021.

6. Pursuant to further Court orders, the *ex-parte* applicant filed a supplementary affidavit and his submissions on 21 February 2021.

7. The Respondent filed his submissions on 22 March 2021.

### **Background**

8. The *ex-parte* applicant was appointed as the Chief Officer, Environment and Health Services, through a letter dated 9 December 2019. The appointment was subject to 6-months' probation.

9. On 9 June 2020, the Respondent wrote to the *ex-parte* applicant requesting him to provide by 27 May 2020 documents relating to his exit from his previous employment, clearance from the previous employer and a copy of the last pay certificate so that his details could be entered/updated into the Integrated Personnel and Payroll Database system.

10. The *ex-parte* applicant did not provide the documents.

11. The Respondent sent another request to the *ex-parte* applicant on 9 June 2020 to provide the documents so that his salary could be processed. This was to avoid audit queries.

12. Again, the *ex-parte* applicant did not provide the documents.

13. On 19 August 2020, the Respondent notified the *ex-parte* applicant that the County Public Service Board had approved a request for the termination of his appointment.

14. The *ex-parte* applicant then moved the Court and secured leave to commence judicial review proceedings against the Respondent, leading to the filing of the first Motion.

15. The Court has considered the Motions, affidavits and submissions.

### **Evaluation**

16. The *ex-parte* applicant was subject to disciplinary control by the County Public Service Board. The letter of termination informed him that the Board had approved the termination of his appointment.

17. The powers and functions of the Board are set out primarily in the County Governments Act.

18. The Act also outlines the procedures to be followed where the Board or a person acting in purported exercise of disciplinary powers reposed in the Board takes disciplinary action.

19. In this regard, section 77 of the County Governments Act, No. 17 of 2012 provides that:

*(1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in the exercise or purported exercise of disciplinary control against any public officer may appeal to the public service commission.*

*(3) An Appeal to the public service commission 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.*

20. Interlinked with the aforesaid provision of the County Governments Act is section 87(2) of the Public Service Act, No. 10 of 2017, which is in the following terms:

*A person shall not file any legal proceedings in any court of law with respect to matters within the jurisdiction of the Public Service Commission to hear and determine appeals from county government public service unless the procedure provided for under this part has been exhausted.*

21. The Court of Appeal had occasion to consider the implication of section 77 of the County Governments Act in *Secretary, County Public Service Board and Ar vs Hulbhan Gedi Abdille (2017) eKLR* where it stated 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 the only 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.*

22. From the statutory provisions and binding authority from the Court of Appeal, the Court is of the view and finds that the *ex-parte* applicant should have exhausted the appellate mechanism outlined in the statute before moving the Court. He did not.

23. The effect of not exhausting statutorily anchored alternative dispute resolution mechanisms was discussed by this Court differently constituted in *Martin Kabubii Mwangi v County Government of Laikipia* (2019) eKLR.

24. The Court rendered itself thus:

The exhaustion principle enunciated in precedents such as the case of *Secretary, County Public Service & Ar v Hulbhai Gedi Abdille* (*supra*) does not permit an election as to the parts of a 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 the Court. The suit did not fall in the category of suits that can be entertained by the Court. As he did not appeal as provided for in law, the suit is a non-starter and is accordingly struck out with no order as to costs.

25. This Court has considered the facts presented by the parties, the above-cited statutory provisions and case law and come to the view that it must decline jurisdiction at this stage in time for the reasons above stated.

26. The Notice of Motion dated 14 January 2021 cannot therefore stand. It is struck out.

27. The orders sought in the Motion dated 14 February 2021 cannot issue simply because the mother Motion is not properly before the Court.

28. This latter Motion is also dismissed with costs.

**Delivered through Microsoft teams, dated and signed in Kisumu on this 2<sup>nd</sup> day of June 2021.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

For *ex-parte* applicant                      Bruce Odeny & Co. Advocates

For Respondent                              Office of the County Attorney

Court Assistant                              Chrispo Aura