



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. E004 OF 2020

IN THE MATTER OF

ARTICLES 2(1), 10(2)(c), 22(1) & (3), 27, 41, 47(1), 50(1), 75(1)

(c), 236, 258 AND 259 OF THE CONSTITUTION

AND

IN THE MATTER OF

VIOLATION AND/OR INFRINGEMENT OF

FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF

THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

AND

IN THE MATTER OF

THE PUBLIC SERVICE COMMISSION ACT, 2012

AND

IN THE MATTER OF

THE PUBLIC SERVICE RULES AND REGULATIONS

AND

IN THE MATTER OF

THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF

THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF

**THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

JOY ATIENO OWUOCHA.....1st PETITIONER

WYCLIFF MOCHACHE ORARE.....2nd PETITIONER

ABNER OCHIENG OPIYO..... 3rd PETITIONER

v

COUNTY GOVERNMENT OF HOMA BAY..... 1st RESPONDENT

COUNTY PUBLIC SERVICE BOARD, HOMA BAY.....2nd RESPONDENT

JUDGMENT

1. The 3 Petitioners sued the County Government of Homa Bay and the County Public Service Board, Homa Bay (the Respondents) on 27 October 2020, alleging unfair termination of employment, breach of contract (failure to pay wages) and violation of their rights to fair labour practices and fair administrative action.

2. The reliefs sought by the Petitioners were:

(i) A declaration be made and issued that the Petitioners are entitled to protection under the provisions of the Constitution, 2010 and the Fair Administrative Actions Act, 2015.

(ii) An order directing the Respondents to settle all salary arrears of the Petitioners forthwith and at once and thereafter to promptly pay any such salaries on due dates.

(iii) A declaration that the Petitioners are lawful and bona fide employees of the Respondents.

(iv) A permanent injunction prohibiting and/or restraining the Respondents jointly and severally either by themselves, servants, agents and/or employees from disciplinary actions, disciplining, suspending, preventing, barring, restricting and/or interfering with the Petitioners performance, discharge and/or execution of their duties in the positions aforementioned above herein whatsoever and howsoever subject only to the observance of the provisions of the Constitution of Kenya, 2010, the Fair Administrative Actions Act, 2015, the County Governments Act, 2012, the Employment Act and any other relevant law.

(v) A permanent injunction prohibiting and/or restraining the Respondents either by themselves, servants, agents and/or employees from suspending, interdicting the Petitioners in their respective positions abovesited above herein without regard to the due process of the law.

(vi) A declaration that stoppage of payment of the Petitioners salaries by the Respondents on unstated grounds of Staff Audit or any other unknown reasons is unlawful and a judicial review to

that effect do issue to bring the decision to this Court for quashing.

(vii) A declaration to issue that the removal and dismissal of the Petitioners from their respective positions stated in the Petition herein vide newspapers on or about 11th day of April 2018 are unconstitutional, unlawful and amounts to violations of the aforesaid provisions of the Constitution and status enumerated in the Petition herein.

(viii) An order of certiorari to issue to bring into this Honourable Court for purposes of being quashed the decision of the County Secretary/Head of Public Service or any officer of the 1st Respondent removing and dismissing the Petitioners from their respective positions stated in the Petition herein.

(ix) An order reinstating the Petitioners in their respective positions of employment stated in the Petition herein.

(x) A permanent injunction prohibiting and restraining the Respondents either by themselves, agents, servants, and/or employees from appointing any other persons to act and/or replace the Petitioners in their said respective positions without regard to the law.

(xi) Compensation.

(xii) The Respondents be condemned to pay damages for illegal stoppage of payment of salaries.

(xiii) The Honourable Court be pleased to issue orders and writs as the Court may deem fit and expedient.

3. Filed with the Petition was a Motion, and on 30 October 2020, the Court certified it urgent and directed that it be served.

4. When the Motion came up for *inter-partes* hearing on 18 November 2020, the Court dismissed it because the Petitioners and Respondents were absent.

5. Later in the day, the advocate for the Petitioners appeared in Court, and the Court directed him to serve the Respondents with a mention notice with a return date of 23 November 2020.

6. None of the parties attended the Court on 23 November 2020, and the Court directed that a Notice to Show-Cause issues with mention set for 9 December 2020.

7. The Petitioners were not represented on this latter date, and the Court set a further mention for 17 December 2020.

8. The Petition was further mentioned on 17 December 2020, 11 February 2021, 8 March 2021 and 24 April 2021, when the Court directed the Petitioners to file and serve a further affidavit and submissions on or before 28 May 2021.

9. The Respondents were directed to file and serve their submissions before 28 June 2021 (the Respondents had caused replying affidavits to be filed on 10 February 2021 and 10 March 2021).

10. The Petitioners submissions were not on record by the agreed timeline (Respondents submissions were also not on record).

11. The Court has considered the Petition and affidavits on record and come to the conclusion that the Petition lacks merit for the following reasons.

12. One, the Petitioners did not exhaust the appeal procedures contemplated by Article 234(2)(i) of the Constitution as read with section 77 of the County Governments Act and sections 85, 86 and 87 of the

Public Service Commission Act.

13. The Court of Appeal had occasion to consider the implication of section 77 of the County Governments Act and exhaustion doctrine 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.

14. Two, by failing to file submissions as directed by the Court, the Petitioners failed to prosecute the Petition (considering that Petitions are ordinarily prosecuted through the record and submissions).

15. Lastly, the Petitioners never responded to the averments by the Respondents that there were no records of their employment, including payroll particulars.

Conclusion and Orders

16. Flowing from the above, the Petition is dismissed with costs to the Respondents.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 8TH DAY OF OCTOBER 2021.

RADIDO STEPHEN,

MCIARB JUDGE

Appearances

For Petitioners	Omonde Kisera & Co. Advocates
For Respondents	Otieno, Yogo, Ojuro & Co. Advocates
Court Assistant	Chrispo Aura