



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

JUDICIAL REVIEW APPLICATION NO. 1 OF 2021

(Originally Nairobi ELRC Judicial Review Application No. E009 of 2021)

IN THE MATTER OF AN APPLICATION BY GEOFFREY SORE MOMANYI TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND DECLARATION

AND

IN THE MATTER OF ARTICLES 10, 47, 162(2)(a) AND (3) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT, CHAPTER 234B OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

BETWEEN

GEOFFREY SORE MONYANI.....APPLICANT

VERSUS

GOVERNOR, VIHIGA COUNTY.....RESPONDENT

AND

COUNTY PUBLIC SERVICE BOARD, VIHIGA.....INTERESTED PARTY

RULING

1. The County Public Service Board, Vihiga appointed Geoffrey Sore Monyani (the applicant), as a Legal Advisor in the office of the Governor, Vihiga, for a 5-year term on or around 21 August 2017.
2. On or about 28 April 2021, the Governor wrote to the applicant to notify him of his dismissal due to prolonged absence without permission (a similar letter was also issued on 3 May 2021).
3. The applicant was aggrieved, and he filed a Chamber Summons before the Court sitting in Nairobi on 5 May 2021, seeking leave to apply for the judicial review orders of certiorari and a declaration that the Governor had breached his right to fair administrative action.
4. When the Summons was placed before the Duty Court in Nairobi, it directed that the application be transferred and be placed before the Court sitting in Kisumu.
5. The application was mentioned on 11 May 2021, when the Court directed the Respondent and Interested Party to file responses ahead of further directions on 3 June 2021.
6. On 3 June 2021, the Court directed the parties to file and exchange submissions within set timelines on the applicability of 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 to the proceedings.

7. The County Secretary of the Respondent filed a replying affidavit on 17 June 2021.
8. The applicant's submissions which should have been filed by 3 July 2021, were not on record by the said date). The Respondent's submissions on the jurisdictional question were also not on record by 3 August 2021 as directed.
9. On 1 July 2021, the Interested Party filed an application seeking more time to file submissions, and the submissions were filed on 4 August 2021.
10. Nevertheless, the Court will address the jurisdictional question.
11. Article 234(2)(ii) of the Constitution mandates the Public Service Commission of Kenya to hear and determine appeals in respect of county governments' public service.
12. In terms of enabling legislation, section 77(1) and (2)(c) of the County Governments Act requires persons dissatisfied with the exercise of disciplinary powers by County Public Service Boards to appeal to the Public Service Commission.
13. In the same vein, section 87(2) of the Public Service Commission Act restricts the institution of judicial proceedings in the Courts before the exhaustion of the appeal procedures outlined in Part XV of the Act.
14. The Court of Appeal has addressed its mind severally to the exhaustion of alternatively anchored dispute resolution processes.
15. In *Geoffrey Muthinja & Ar v Samuel Muguna Henry & 1756 Ors* (2015) eKLR, the Court held:

It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews... as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of Courts.

16. In *Secretary, County Public Service Board & Ar v Hulbhai Gedi Abdille* (2017) eKLR, the Court of Appeal said of the application of section 77 of the County Governments Act:

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..... Her contention that she disregarded the appeal because it could not afford her an opportunity to question the procedure followed by the appellant is, in our view, without basis because **Section 77** has placed no fetter to the jurisdiction of the Public Service Commission.

17. These decisions are binding on this Court.
18. The applicant did not exhaust the appeal procedures as contemplated by the Constitution, the County Governments Act and the Public Service Commission Act before seeking leave to commence judicial review proceedings.
19. The Court, therefore, declines to grant leave to the applicant to commence judicial review proceedings.
20. The Summons is dismissed with costs to the Interested Party, who was the only one who filed submissions.
21. The effect of this Ruling is that the application by the Interested Party filed in Court on 1 July 2021, has become moot.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 24TH DAY OF NOVEMBER 2021.

RADIDO STEPHEN, MCIARB

JUDGE

APPEARANCES

FOR APPLICANT MIDENGA & CO. ADVOCATES

FOR RESPONDENT ESTHER ANDISI, PRINCIPAL LEGAL OFFICER, OFFICE OF THE COUNTY ATTORNEY

FOR INTERESTED PARTY MIGOS OGAMBA & WAUDO ADVOCATES

