



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT BUNGOMA**

**CAUSE NO E003 OF 2021**

**DR. DOMINIC CHUNGANI MUTESHI.....PETITIONER**

**VERSUS**

**THE COUNTY GOVERNMENT OF KAKAMEGA.....1<sup>ST</sup> RESPONDENT**

**THE KAKAMEGA COUNTY PUBLIC SERVICE BOARD.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This Ruling is on the Notice of preliminary objection raised by the Respondents dated 4<sup>th</sup> October 2021. The Notice of Preliminary objection is on two grounds namely:-

a. That the court lacks jurisdiction to entertain the matter and that the entire petition should be struck out the court's record with costs on the reasons :-

That the petitioner ought to have exhausted available internal employee disciplinary mechanisms provided for in:-

b. Article 234(2)(a)(i) of the Constitution of Kenya on the functions and powers of the Public Service Commission inter alia being to 'hear and determine appeals in respect of county government public service.'

c. Article 235(1)(c) on staffing of county governments, Article 235(1) A county Government is responsible within a framework of uniform norms and standards prescribed by an Act of parliament for:- (c) exercising disciplinary control over and removing persons holding or acting in those offices.

d. Section 77(1) of the County Governments Act 2012 on appeals to the Public Service Commission.

e. Section 85(c) and 87 (2) of the Public Service Commission Act 2017.

f. Clause 4s K.1 and K.10 of the Human Resource Policies and Procedures Manual for the Public Service, 2016 on disciplinary Control and appeals.

g. Clause P.11 of the Kakamega County Human Resources and Procedures Manual, 2016 providing for appeals to the Public Service Commission.

2. On the 12<sup>th</sup> October, 2021 the court directed that the preliminary objection dated 4<sup>th</sup> October, 2021 be canvassed by way of written submissions.

3. The Respondent's /Objector submissions are dated 18<sup>th</sup> October, 2021 and those of the Petitioner/Respondent 28<sup>th</sup> October, 2021.

4. The Preliminary objection challenges jurisdiction of this court to hear and determine the Petition on the basis that the Applicant/Petitioner has not exhausted Internal Employee disciplinary mechanisms under section 77 of the County Governments Act and that the suit is premature, misplaced and blatant abuse of court process rendering it incurable and fatally defective.

5. On the 21<sup>st</sup> September 2021 the court, following the filing of application by Petitioner under certificate, ordered the Petitioner to attend

the disciplinary proceedings as directed by his employer in the letter dated 3<sup>rd</sup> September, 2021 which was pursuant to the suspension letter issued to the Petitioner dated 25<sup>th</sup> August, 2021. The Respondents submit that the Petitioner did not comply with the court directions.

6. The Petition arises from the contents of the letter by Respondents to show cause as outlined in paragraph 8 of the petition. The Respondents submit that the court has no jurisdiction as there is a defined appeal system on internal disciplinary mechanism which has not been exhausted by the Petitioner including the fact that the Petitioner is still in employment and failed to turn up for disciplinary hearings as directed by court.

7. The Respondent submits that the Petition is premature and relies on the provisions of Article 235(i) (c) of the Constitution being that the County Government has powers within the legal framework prescribed by parliament to exercise disciplinary control and removing person holding or acting in house offices. The Respondent further relies on Section 59 of the County Government Act 2012 which creates the County Government Public Service Board with function to exercise disciplinary control over and remove, persons holding or acting in those offices as provided for in that Act. The Respondent also relies on the Human Resource Policies and Procedure manual for the Public Service 2016 and Kakamega County Human Resources Policies and Procedures Manual 2016 to exercise disciplinary control over officers and that the disciplinary process is handled expeditiously with observance of the rules of mutual justice. The Respondent submits that the suspension/interdiction letters have been issued. The Petitioner has not appeared before the Board as preliminary investigations have not been concluded. Under that Kakamega County Manual the suspension shall not exceed 3 months unless there are extraneous circumstances which are communicated to the officers on suspension. The Petitioner has brought claim before the expiry of 3 months and that is premature.

8. The Respondents further submit that after investigations, hearing is conducted and if employee is dissatisfied by decision of the Board they can appeal to the Public Service Commission within 90 days of date of letter of desertion. The Respondent to buttress their submissions rely on the Provisions of Article 234 (2) of Constitution on functions of the Public Service Commission to hear and determine appeals in respect of County Government Public Service. The Respondent submits that Article 234 (2) (a) of the Constitution is considered in mandatory terms.

9. The Respondents further relies on the provisions of Section 77 of the County Government Act 2012 on appeals to the Public Service Commission by any person dissatisfied or aggrieved 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 against the decision.

10. The Respondent further relies on section 87 (2) of the Public Service Commission Act 2017 which prohibits a person against filing legal proceedings in court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from the County Government Public Service unless that procedure is exhausted.

11. The Respondent to buttress their preliminary objection relies on the decision in *R v Lawrence Omhaha Ag County Chief Officer, public Service County Government of Kakamega and 4 others exparte Kenya County Government workers annual (2021) (eKLR and Susan Wanjiru Mwai to 69 others - vs- County Government of Kirinyaga and 2 others (2020) eKLR* where in both cases the court found the proceedings to be premature and dismissed the suits for lack of jurisdiction for disregard of the dispute resolution mechanisms under section 77 of the County Governments Act.

12. The Petitioner submits that under Article 162 (2) (a) of the Constitution the court is a special court for purposes of determining employment and labour disputes and have jurisdiction to deal with constitutional matters. This, the Petitioner submits, in so far as it relates to employment and labour relations where the court has jurisdiction to hear and determine this petition.

13. The Petitioner submits that the petition is for court to determine whether the Respondents have violated or threatened to the Petitioner's rights under Article 28, 41, 47 to 50 of the Constitution.

14. The Petitioner to buttress its case in opposition to the preliminary objection relies on the decision in *Kaisow Billow Issack - vs Ministry of Interior and Coordination of National Government and 3 others 92021 ) eKRL* which upheld this court's jurisdiction on constitution petition under the Constitution and in *Evans Ladtema Muswahili -vs vihiga County Public Serive Board & 20 others., Marley Ezekiel Ayiego ( interested party) (2021) eKLR* where Justice Musyoka of the High court found that it was doubtful that the existence of alternative dispute resolution mechanisms under doctrine of exhaustion of remedies applies to constitutional petitions.

15. The Petitioner further addresses the court on the granting of the injunction and relies on the case of *Guelia – vs- Cassman Brown & Company Limited (1973) EA 358 on the constitution* for grant of interlocutory injunction and states the Notice of Motion application meets the threshold set out in that classic authority on interlocutory injunctions. The Petitioner submits that the balance of convenience lies in granting the orders sought as failure to do so will cause him irreparable harm and prejudice. That he stands to lose his career and that the orders sought in interim are necessary to support the Claim.

## DETERMINATION

16. The court has carefully considered the submissions by both parties. The Petitioner invokes the jurisdiction of the court to handle all constitutional matters touching on Employment and Labour Relations under Article 162(2)(a) of the Constitution and states that the doctrine of exhaustion of alternative remedies does not oust the jurisdiction of the court to deal with the constitutional petition. On other hand, the Respondent states that court has no jurisdiction to handle the petition for lack of exhaustion of remedies under section 77 of the County Governments Act.

17. This court and the High Court have in various cases interpreted the provisions of section 77 of the County Governments Act and came to different decisions including the decision of Musyoka J in HC *Evans Ladtema Muswahili v Vihiga County Public Service Board & 20 Others ; Marley Ezekiel Ayiego (interested party)2021 eKLR* where the honourable Judge doubted that the doctrine of exhaustion of

remedies applies to constitutional petitions a decision cited by the Petitioner in the submissions.

18. The Court of Appeal has now settled the question of interpretation of Section 77 of the County Governments Act and the question of exhaustion of that process before the court intervention. In the case of **Secretary County Public Service Board and Another v Hulbhai Gedi Abdille (2017) eKLR**, The Court of Appeal (*Makhandia, Ouko & M'Inoti*, JJA) allowed the appeal on the basis that the Respondent's had failed to utilize the process provided by section 77 of the County Governments Act 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 only the forum through which the Respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one specifically tailored by 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 of appeal in that case upheld the doctrine of exhaustion of remedies as follows: Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime. In the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR**, The Court of Appeal emphasized:- *"...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 observed without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions..."*

To address the question as to whether the doctrine of exhaustion of remedies applies in a constitutional petition the Court of Appeal in the same decision of **Secretary County Public Service Board**(supra) held as follows:-

*'Still on the same note, and even if this had been a constitutional petition as the learned judge assumed, this Court in the case of Daniel N. Mugendi v Kenyatta University & 3 Others [2013] eKLR, stated:- "...Citing the case of Alphonse Mwangemi Munga & Others vs. African Safari Club Ltd [2008] eKLR, the learned judge was persuaded that the Constitution had to be read together with other laws made by Parliament. It should not be so construed as to be disruptive of other laws in the administration of justice and that accordingly parties should make use of the normal procedures under the various laws to pursue their remedies instead of them moving to the constitutional court and making constitutional issues of what is not. With all the foregoing, the learned judge concluded that the claim placed before her by the appellant was based on employment-a matter that should have instead been taken to the Industrial Court which had constitutional and statutory jurisdiction over such matters and not the High Court in the form of a constitutional reference." On the basis of the foregoing, the constitutional petition could not have seen the light of the day as well.'*

19. The decision of the Court of Appeal **Secretary County Public Service Board and Another v Hulbhai Gedi Abdille (2017) eKLR** (supra) is binding on this court. The petitioner ought to have subjected himself to the mechanism under Section 77 of the County Governments Act in the first instance. The process is underpinned under Article 235(1)(c) of the Constitution. I find the decision in *HC Evans Ladtema Muswahili v Vihiga County Public Service Board & 20 Others ; Marley Ezekiel Ayiego (interested party)2021 eKLR* not persuasive having considered the Court of Appeal decision above.

20. Further, the Supreme Court of Kenya has introduced the doctrine of judicial restraint on matters of separation of powers in *Julius Kariuki Mate & Another and Martin Nyaga Wambora and another 2017 eKLR* cited and applied by my brother Judge Mathews N. Nduma in *Kisumu ELR Constitution Petition No. 31 of 2020 Evans Muswahali Ladtema v The County Assembly of Vihiga County*, Where the Supreme Court cautioned against courts rushing to issue conservatory orders that hinder other arms of government from exercising their constitutional and statutory roles. This court agrees with the holding of Justice Nduma in paragraph 26 *Evans Muswahali Ladtema (supra)* and I cite, *'26. the Supreme court while emphasizing the supremacy of the constitution and the adjudicatory role in determining matters emphasized adherence to all persons and state organs to the objects and principles of the Constitution, found that it is in interest of the people for which all state organs are enjoined to serve that there be avoidance of premature interference by the courts in the procedure of other state organs....' (Emphasis given)*

21. The Petitioner has not exhausted the available mechanisms under section 77 of the County Governments Act which mechanisms are anchored under the Constitution Article 235(1)(C). The Petitioner is still an employee of the Respondents hence at no danger of limitation of action. The submission by the Petitioner that this being a constitutional petition cannot be defeated by the doctrine of exhaustion of remedies fails considering the judicial restraint doctrine by the Supreme Court explained above and the binding Court of Appeal decision in **Secretary county Public Service Board & The Secretary Wajir County v Hulbhai Gedi Abdille (2017)eKLR** (supra).

22. Consequently, the court upholds the Preliminary Objection by the Respondents dated 4<sup>th</sup> October 2021 and strikes out the Petition dated 6<sup>th</sup> September 2021 for being premature on basis of the failure by the Petitioner to exhaust the statutory mechanisms under section 77 of the County Governments Act, 2012 in the first instance. No order as to costs.

**DATED, DELIVERED AND SIGNED AT BUNGOMA THIS 2<sup>ND</sup> DAY OF DECEMBER 2021.**

**J W KELI**

**JUDGE.**

**IN THE PRESENCE OF :**

**Court Assistant – Brenda Wesonga**

**For Petitioner – Singanga**

**For Respondents – Wabuko**