



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

PETITION NO. 2 OF 2020

(Formerly Nairobi ELRC Petition No. 197 of 2019)

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 21, 22, 23 (3) 27, 28, 32,
33, 37, 41, 47, 48, 162 (2)(b), 176, 258 & 259 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER THE ALLEGED CONTRAVENTION OF ARTICLES 27, 29,
41, 47 & 48 OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF SECTIONS 3, 5, 17, 18, 26, 44, 46, 47 OF THE EMPLOYMENT ACT NO. 11 OF 2007

AND

IN THE MATTER OF SECTION 78, 81 OF THE LABOUR RELATIONS ACT NO. 14 OF 2007

AND

IN THE MATTER OF SECTIONS 4, 7, 8, 9, 10 & 11 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

**IN THE MATTER OF SECTION 3, 12, 19, 20 & 27 OF THE EMPLOYMENT AND
LABOUR RELATIONS COURT ACT NO. 20 OF 2011**

AND

IN THE MATTER OF SECTION 14 OF THE OCCUPATIONAL SAFETY AND HEALTH ACT, 2007

AND

IN THE MATTER OF THE DISMISSAL OF 300 NURSES OF KIRINYAGA COUNTY

AND

**IN THE MATTER OF DISCRIMINATIVE REINSTATEMENT OF 184 NURSES OF
THE 300 DISMISSED BY KIRINYAGA COUNTY GOVERNMENT**

BETWEEN

KENYA NATIONAL UNION OF NURSES.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF KIRINYAGA.....1ST RESPONDENT

CABINET SECRETARY MINISTRY OF HEALTH.....2ND RESPONDENT

CABINET SECRETARY MINISTRY OF LABOUR

AND SOCIAL PROTECTION.....3RD RESPONDENT

THE COUNTY PUBLIC SERVICE BOARD

KIRINYAGA COUNTY.....4TH RESPONDENT

CHIEF OFFICER FINANCE

KIRINYAGA COUNTY GOVERNMENT.....5TH RESPONDENT

CHIEF OFFICER HEALTH

KIRINYAGA COUNTY GOVERNMENT.....6TH RESPONDENT

PUBLIC SERVICE COMMISSION.....7TH RESPONDENT

RULING

1. Before me for determination are two preliminary objections raised. The first is the preliminary objection raised by the 5th and 6th Respondent which is to the effect that:-

i. THAT this Honourable court has no jurisdiction to entertain this Petition as (by the Petitioners own admission) an appeal, brought under the provisions of section 77 of the County Government Act, is currently pending before the Public Service Board.

ii. THAT the jurisdiction of this Honourable Court once an appeal is lodged before the Public Service Board is not an original jurisdiction but an appellate jurisdiction against the decision of the Public Service Board.

iii. THAT the Re-Amended Petition is premature as the 7th Respondent is yet to render its decision on the Appeal filed by the Petitioners.

iv. THAT the Petitioners have failed to demonstrate that the 7th Respondent has failed and or ignored to determine the appeal filed by the Petitioners before it.

v. THAT the filing of parallel proceedings before this Honourable Court and the Public Service Commission amounts to forum shopping, an abuse of the court process.

vi. THAT as the Appeal by the Petitioner is still pending before the 7th Respondent, the hearing and determination of this Petition will prejudice the hearing and determination by the Commission.

vii. THAT this Petition offends the jurisprudence of the Court of Appeal in **Secretary, County Public Service Board & Another v Hulbhai Gedi Abdille [2017] eKLR**

2. The 4th Respondent also raised a preliminary objection to the effect that the Petitioner's Petition dated 8th June 2020 is fatally defective, premature and misconceived as it violates Article 234(2)(i) of the Constitution of Kenya 2010 and Section 77(1) of the County Governments Act, 2012 as the Petitioner herein having been dissatisfied with the decision made by the County Public Service Board did not appeal to the Public Service Commission against that decision.

3. The two objections were canvassed vide written submission. The parties duly filed their respective submissions on 14th July 2020 for the 5th and 6th Respondents, on 17th July 2020 for the 4th Respondent and on 20th July 2020 for the Petitioner. In their submissions, the 5th and 6th Respondent submitted that the Court has no jurisdiction to entertain this Petition as (by the Petitioner's own admission) an appeal, brought under the provisions of section 77 of the County Government Act, is currently pending before the Public Service Board. The 5th and 6th Respondents submitted that it was trite law that a determination as to jurisdiction ought to be determined at the first instance as held in the *locus classicus* on preliminary objections being the case of **Owners of Marine Vessel Lilian 'S' v Caltex Oil (K) Ltd [1989] KLR 1** where it was held that jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs its tool in respect of

the matter before it the moment it holds the opinion that it is without jurisdiction. The 5th and 6th Respondents submit that by their own admission the Petitioner lodged an appeal against the decision of the County Public Service Board in terms of Section 77 of the County Governments Act 2012. The 5th and 6th Respondents submit that the jurisdiction of this Honourable Court once an appeal is lodged before the Public Service Board is not an original jurisdiction but an appellate jurisdiction against the decision of the Public Service Board. The 5th and 6th Respondents submit that where a statutory remedy is provided the Court must exercise restraint and first give an opportunity to the relevant bodies or state organs to deal with the dispute as provided for in the relevant statute. The 5th and 6th Respondents cited the case of **Hezron Mwambia Karong'a v Tharaka Nithi County Government & Another [2019] eKLR** where the Court held

The Claimant it would seem was obliged to approach the Public Service Commission if dissatisfied with the decision of the Respondents. The Claimant cannot argue, in the face of the clear provisions of section 77 of the County Government Act, that he could bypass the legislative provision above and come to this Court directly seeking reprieve for matters that were for the Public Service Commission to handle. As held in the case of Republic v Secretary County Public Service Board ex parte Hulbai Gedi Abdille (supra) the law does not envision a situation where the litigants chose what part of a statute to follow. The foregoing is proof the suit is unmerited.

The 5th and 6th Respondents submitted that the situation in this Petition is even worse as the Petitioner is already before the said Commission awaiting the hearing and determination of their appeals. The 5th and 6th Respondents submitted that the Re-Amended Petition is premature as the 7th Respondent (PSC) is yet to render its decision on the Appeal filed by the Petitioner. The 5th and 6th Respondents cited a series of cases on the same footing as the case of **Hezron Mwambia Karong'a v Tharaka Nithi County Government & Another (supra)** and **Republic v Secretary County Public Service Board ex parte Hulbai Gedi Abdille (supra)** where courts have held similarly. The 5th and 6th Respondents argued that the statutory remedy has acquired a statutory underpinning by the enactment of the Fair Administrative Actions Act, No. 4 of 2015, an act of Parliament enacted pursuant to Article 47 of the Constitution. The 5th and 6th Respondents called in aid Sections 9(2), (3) and (4) thereof for their full effect. The 5th and 6th Respondents submitted that Article 159(2)(c) of the Constitution encourages alternative dispute resolution and as such PSC ought to hear the matter.

4. The 4th Respondent on its part submitted that the Petitioner's Petition is fatally defective, premature and misconceived as it violates Article 234(2)(i) of the Constitution of Kenya 2010 and Section 77(1) of the County Governments Act, 2012 as the Petitioner herein having been dissatisfied with the decision made by the County Public Service Board did not appeal to the Public Service Commission against that decision before instituting the suit herein. The 4th Respondent submitted that the issues for determination by this Honourable Court are:-

(a) Whether the Petitioner having been dissatisfied with the decision made by the County Public Service Board appealed to the Public Service Commission against that decision in the first instance before instituting the suit herein; and

(b) Whether this Honourable court should strike out this suit *ab initio*.

As to whether the Petitioner having been dissatisfied with the decision made by the County Public Service Board appealed to the Public Service Commission against that decision before instituting the suit herein. The 4th Respondent submitted its Preliminary Objection is founded on Articles 233 and 234(2) & (1)(i) of the Constitution of Kenya 2010 which respectively establish the Public Service Commission (PSC) and empowers it to hear and determine appeals in respect of County Governments' public service. The 4th Respondent submitted that its Preliminary Objection is further founded on Section 77 (1) of the County Governments Act, 2012 which provides that any person dissatisfied or affected by the decision of the CPSB should direct their grievance to the PSC by way of an appeal. Additionally, the 4th Respondent postulated that Rule 7 of the Public Service Commission (County Government Public Services Appeals Procedures) Regulations, 2016 is express that a person dissatisfied with the decision of the County Government Public Service in its discharge of a human resource function may appeal to the PSC against that decision while Rule 8 (c) of the said regulations empowers the PSC to hear and determine an appeal from a Public officer in a County Government Public Service regarding any decision relating to the engagement of the person in the County government, including the appeal in respect of disciplinary control like imposition of any punishment including dismissal. The 4th Respondent submitted that the above provisions, and specifically, the provisions of section 77 of the County Governments Act evince an intention to have all appeals arising out of decisions by County Service Boards dealt with by the Public Service Commission, hence its grant to the Commission of the mandate in mandatory terms. The 4th Respondent cited the case of the **Speaker of the National Assembly v Karume [2008] KLR** where it was held that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. The 4th Respondent also relied on the case of **James Akelerio Alias Muguu & Another v Moses Kasaine Lenolkilal & 3 others [2014] eKLR** where the Court while dismissing the Petition held that

"The Petitioners appear not to have voiced any objections at any of the aforementioned stages as against the nominated candidates to the Board or to the County Assembly.

[26] Nevertheless, all was not lost as the provisions of Section 77(2) of the County Governments Act allows any person dissatisfied or affected by any decision relating to employment of persons including a decision in respect of recruitment, selection, appointment to any office made by the County Public Service Board to appeal to the Public Service Commission against such decision

....Petitioners in their application and submissions have not demonstrated to this court that they had appealed against the decision of the Board to the Public Service Commission...

5. The 4th Respondent further cited the decision of Mumbi Ngugi J. (as she then was) in the case of **James Tinai Murete & others v County Government of Kajiado & Another; Nailantei Supeyo & 19 others [Interested Parties] [2015] eKLR** where the Court took the view that the petitioners in that case, dissatisfied with the decision of the respondents with regard to recruitment to various positions within the county were obliged to approach the Public Service Commission if dissatisfied with the decision of the respondents. The 4th Respondent cited a

series of decisions which pointed to the same reasoning on the existence of an alternative dispute resolution mechanism and urged the striking out of the Petition for being unmerited and for being an abuse of the Court process. The 4th Respondent submitted the failure to appeal to the PSC at the first instance was fatal.

6. The Petitioner in its submissions argued that the two objections as filed herein raise almost similar issues and the Petitioner addressed them by addressing its submissions on the questions it posed. The Petitioner posed the question Whether the firms of Wanyonyi & Muhia Advocates and Waweru Gatonye & Co. Associates are properly on record for the 4th, 6th and 7th Respondents? As regards the Preliminary Objection dated 9th July, 2020, the issue for determination solely is, whether the Petitioner appealed the decision of the County Public Service Board (the 4th Respondent herein) to the Public Service Commission? Whether the Petition is prematurely filed? As for the Preliminary objection dated 10th July, 2020, the issue(s) for determination is whether section 77 of the County Governments Act, 2012 ousts or restricts the jurisdiction of the court in the circumstances of the present Petition? Whether the Preliminary objections dated 9th and 10th July, 2020 are properly suited and not afterthoughts? That was the basic surmise of the Petitioners in respect to the submissions produced elsewhere above in this Ruling. On the question as to whether the firms of Wanyonyi & Muhia Advocates and Waweru Gatonye & Co. Associates are properly on record for the 4th, 6th and 7th Respondents, the Petitioner submitted that borrowing from the Civil Procedure Rules, Under Order 9 Rule 9 of the Civil Procedure Rules, 2010 (CPR) it is required that,

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

7. The Petitioner submitted that in ordinary practice, once a matter has been filed against a party or parties, the party or parties then have the option of appointing advocates of their choice to represent them. Such advocates or firms are required to file a notice of appointment indicating clearly the party they are representing and their address of service. The Petitioner submitted that in the instant case, the firm of Waweru Gatonye & Co. Advocates has been acting for the County Government of Kirinyaga and the County Public Service Board (the 4th Respondent herein). The Petitioner submitted that from the record, the said firm has taken over the conduct of the matter for and on behalf of the 6th and 7th Respondent. The Petitioner submitted that there is no notice of change and/or appointment of advocate from both ends. The Petitioner cited the case of **Iway Africa Limited v Infonet Africa Limited & Another [2019] eKLR** where Makau J. citing the case of **Sunrise Properties Ltd v Fifty Investments Limited & Another [2007] eKLR** upheld a preliminary objection that was raised against pleadings that had been lodged by a new advocate who had not filed a Notice of Appointment of Advocates. The Petitioner submitted that that court held that applications filed and action taken before the lodgment of such a Notice of Appointment of Advocates were invalid and proceeded to expunge them from the record. The Petitioner’s submitted that the requirement to file necessary notices of change and/appointment for purposes of record and service of the said upon the opposing counsels should not be taken casually as has been witnessed herein and any such pleadings filed by the said 2 firms are not properly on record and should be struck out.

8. On the question as to whether the Petitioner appealed the decision of the County Public Service Board (the 4th Respondent herein) to the Public Service Commission, the Petitioner submitted that the nurses represented by the Petitioner herein were employed by the 4th Respondent on behalf of Kirinyaga County Government and who unfortunately were dismissed on 8th July, 2019 unheard and that whereas some of the dismissed nurses were returned to work without going through any such disciplinary processes, the rest whose interests are being pursued in the Petition herein have never been returned to work. The Petitioner submitted that according to Section 77 of The County Governments Act 2012, the nurses were supposed as an option, to appeal the decision of the 4th Respondent to the 7th Respondent herein. The Petitioner submitted that on 25th October 2019 it forwarded the appeals of the nurses to the 7th Respondent for consideration and the 7th Respondent acknowledged receipt but never acted on them. The Petitioner submitted that this means that the appeals were formally referred. The Petitioner submitted that the 7th Respondent is required to within 14 days to call for the record of the proceedings before the 4th Respondent. The Petitioner submitted that this was done but in violation of the regulations. The Petitioner submitted that the 7th Respondent on 13th December 2019 wrote to the 4th Respondent calling for comments, documents and committee proceedings within 14 days. The Petitioner submitted that in accordance with the **Human Resource Manual Guidelines and Procedure Regulations** Section K2. 2(i) the 7th Respondent is to hear appeals from person in Job Group T and below where the nurses belong. Further, it was submitted, Regulation K.3. paragraph 4 requires that those appeals should be concluded within six (6) months and which period was if at all going by the day the appeals were filed expired on 25th April, 2020. The Petitioner submitted that the 7th Respondent in clear disregard to procedure and their own laid down regulations did not hear the appeal of the nurses as filed on 25th October 2019 but advertised for recruitment of nurses on 7th May 2020. The Petitioner submitted that this only means, they were not interested at all in entertaining the appeals. The Petitioner submitted that the actions complained of above as well as the administrative mandate of the 4th and 7th Respondent and failure to accord the nurses a fair hearing necessitated the filing of the Petition. The Petitioner submitted that the Petition is not an appeal and should not be confused by the Respondents as such.

9. As to the question whether the Petition is pre-maturely filed, the Petitioner submitted that the Petition seeks the determination of the Petitioners rights which have been violated denied, infringed and threatened such as the right to fair administrative actions, the right to be heard and afforded a fair hearing and the right to access justice under Articles 47(1), 50(1) and 48. The Petitioner submitted that these rights guaranteed to the Petitioner cannot be dismissed on grounds alleged by the 4th Respondent in the preliminary objection dated 9th July 2020. The Petitioner submitted that these rights violated by the Respondents can only be addressed and determined by Court and not cannot be barred by the law. The Petitioner cited Article 22 (1) of the Constitution which provides that *“Every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”* The Petitioner submitted that Article 22 has no time limit to institute a suit when such a right has been violated. The Petitioner urged the court to be guided by the principles set out in the case of **Basheshar Noth v The Commissioner of Income Tax, Delhi and Rajasthan (1959) Supp. 1. S.C.R. 528** where it was held that the right given to citizens is itself a fundamental right and cannot be

circumscribed or curtailed except as provided by the constitution. The Petitioner argued that any person thus has ordinarily the right to invoke Article 22(1) for appropriate relief if their fundamental rights are illegally or unconstitutionally violated. The Petitioner submitted since it alleges that these rights were violated by the Respondents it has a right on behalf on the nurses to commence this suit in order to ventilate the said violations. It was further submitted that, any decision arising out of a procedure that is flawed, irregular and contrary to the law must be addressed under the ambit of the Bill of Rights. The Petitioner submitted that nine (9) months down the line, the PSC has not concluded the hearing of the Appeals referred by the Petitioner's members. The Petitioner urged the Court not to determine the preliminary objections without giving heed to the chain of events showing the violation of the Petitioner's rights. It submitted that in seeking the determination of the nurses' rights it cannot be said that the Petitioner has abused the court process. The Petitioner further submitted that this Court should not direct its mind toward the adjudication of the previous proceedings but should ask itself whether the Petitioner's members were accorded a fair trial and the Judgment was pronounced on the nurses' rights that are now a subject of this Petition. It cited the case of **Joel Ndung'u Bedan v Principal Secretary Ministry of Interior & Coordination of National Government & Another [2020] eKLR** where Onesmus Makau J. held that:

In this case the petitioner contended that he appealed to the PSC after the dismissal but for over 5 months he heard no word from the PSC. He therefore felt compelled to seek the court's intervention. I agree with him that failure to have any communication from PSC for over 5 months from the date of filing his appeal justified his decision to access the court of law for justice.

Article 47 of the Constitution requires that administrative action must be done expeditiously. That provision extends to the hearing and determination of appeals to the PSC. The respondents cannot insist that the petitioner exhausts internal mechanisms in which they have put a bottleneck. Consequently, I return that the claimant has demonstrated a good cause to warrant accessing this court before his appeal at the PSC is fully determined.

In view of the observation and findings, herein above, that the dismissal of the petitioner was devoid of substantive and procedural fairness, I make declaration that the decision by the 1st Respondent on 17.4.2019 to dismiss the petitioner amounted to unfair and wrongful termination.

10. As regards the Preliminary objection dated 10th July 2020, the Petitioner submitted that the issue(s) for determination is whether Section 77 of the County Governments Act, 2012 ousts or restricts the jurisdiction of the court in the circumstances of the present Petition? The Petitioner submitted that turning on the impugned Section that forms the crux of the preliminary objections herein, Section 77 of the County Governments Act, 2012 sub-section (1) as regards appeals to the Public Service Commission provide as follows:

*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.*

The Petitioner's submitted that based on this provision in as much as the Act provides for an appeal channel that a decision of the County Public Service Board (as in the case involving the 4th Respondent herein) can be pursued with the Public Service Commission (the 7th Respondent herein), the said proviso is not couched in mandatory terms and the exercise of such option to pursue the resultant decision of the 4th Respondent is not in vain and but legitimately founded on the cause of violation of rights as alleged in the Petition. The Petitioner submitted that this Court enjoys jurisdiction under Section 12 of the Employment and Labour Relations Court Act to handle any such matters employment and labour relations including the question of violations of human rights and can order such remedies as per Article 23 of the Constitution of Kenya, 2010. The Petitioner submitted that this Court enjoys the jurisdiction to hear and determine employment and labour relations matters alongside claims of fundamental rights (and enforcement of constitutional and statutory provisions) ancillary and incidental to those matters. The Petitioner cited the case of **Karisa Chengo & 2 Others v Republic [2015] eKLR** where the Court of Appeal stated:

By being of equal status, the High Court therefore does not have the jurisdiction to superintend, supervise, direct, guide, shepherd, and or review the mistakes, real or perceived, of the ELRC and ELC administratively or judiciously as was the case in the past. The converse equally applies. At the end of the day however, ELRC and ELC are not the High Court and vice versa. However, it needs to be emphasized that status is not the same thing as jurisdiction. The constitution though does not define 'status'. The intentions of the framers of the constitution in that regard are obvious given the choice of the words they used; that the three courts (High Court, ELRC and ELC) are of the same juridical hierarchy and therefore are of equal footing and standing. To us it simply means that the ELRC and ELC exercise the same powers as the High Court in performance of its judicial function, in its specialized jurisdiction but they are not the High Court.

The Petitioner submitted that it places emphasis on the deliberate use of the word "may" and submitted that the Petitioner herein had an option to appeal to the Commission on the merits of the decision of 4th Respondent or take such other legitimate action such as filing the Petition. The Petitioner submitted that the indecision of the 7th Respondent in not concluding the appeals within the required time and the question of the rights of the nurses are matters that can only be handled and resolved by this Court and not the Commission as misconceived in the preliminary objections. The Petitioner relied on the case of **Abdikadir Suleiman v County Government of Isiolo & Another [2015] eKLR** where Ongaya J. when faced with a similar matter held:

Article 234(2) (i) of the Constitution provides that the Public Service Commission is vested with the function and power to hear and determine appeals in respect of county governments' public service. Article 262 defines "public service" to mean the collectivity of all individuals, other than state officers, performing a function within a state organ. Accordingly, and firstly, the court holds that the power of the Commission to hear and determine appeals in respect of county governments' public service constitutionally applies only to public officers, and not state officers, in the service of the county governments or any other state organ. Secondly, the court holds that Section 77 of the County Governments Act, 2012 amplifies and brings into operation Article 234(2) (i) of the Constitution.

This court's holding is that while making its primary decisions or decisions on appeals, the Commission like any other state organ or person under Article 10 of the Constitution must care and ask itself whether the decision is lawful or legitimate in view of

relevant constitutional and statutory provisions but the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions rests with the court as vested with the appropriate jurisdiction under Article 162 (2) (a) as read with Article 165(5) and (6) of the Constitution; Article 22(1), and Section 12 of the Employment and Labour Relations Act, 2011.

The court is alert that under Article 159(2) (b) justice shall not be delayed and under Article 159 (2) (e) the court is guided that in exercise of judicial authority, the purpose and principles of the Constitution shall be protected and promoted. Under Article 159 (1) judicial authority is vested in the judiciary and it is the opinion of the court that issues of legality of actions or omissions is the immediate and proper primary or original province and jurisdiction of the court and is not the penultimate or initially ceded jurisdiction of persons, public bodies and authorities outside the judiciary. In the opinion of the court, it would amount to delayed justice to tell the claimant thus, “ The court knows your alleged case is that an illegality has taken place; you challenge the alleged illegality; on merits of the challenged decision you ought to appeal to the Commission; the Commission has no jurisdiction to consider issues of illegality as you have alleged in your case but it might consider it and may rule in your favour; and therefore, though this court has the primary jurisdiction to consider the issue of illegality as you have alleged, you ought to have gone to the Commission in the first instance just to see if the Commission might have considered the issue of illegality before you moved this court and your case is dismissed accordingly for failure to give the Commission chance to exercise the speculative and hopeful jurisdiction on that issue of alleged illegality.”

In the instant case, looking at the alleged claims of illegality, unconstitutionality, breach of constitutional rights and the remedies as prayed for, it is difficult to find that the cited alternative procedure and remedy under section 77 of the Act was available to the Petitioner. Even if it is said that it was a case of mixed jurisdiction of the Commission and the court, it is the court’s opinion that the legitimate path was to invoke the court’s jurisdiction to hear and determine the intertwined issues, that being the most efficient and effective manner of disposing the dispute.

In reliance on the above decision the Petitioner submitted that the court should find that Section 77 of the County Government Act, 2012 does not oust the jurisdiction of this court for want of exhaustion of the procedure and remedies envisaged under the section and as such, that limb of the preliminary objection should fail.

11. As to whether the Preliminary objections dated 9th and 10th July 2020 are properly suited and not afterthoughts, the Petitioner submitted that it filed this Petition on 23rd October 2019 and followed it with amendments on 24th February 2020 and a re-amendment on 8th June 2020. The Petitioner submitted that throughout these actions the Respondents have always submitted to the jurisdiction of this Court without question and to raise the preliminary objections at this late stage when the matter is about to be set down for hearing is suspicious and only meant delay the final determination of the said. The Petitioner cited the case of **Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited (1969) E.A** as cited by Onyango J. in **Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers (KUDHEIHA Workers) v Registered Trusted of East African Ramgarhia Board t/a Guru Nanak Ramgrhia Sikh Hospital [2020] eKLR** that the essence of preliminary objections is:-

“A point of law which has been pleaded, or which arises in the course of pleadings and which, if argued as a preliminary point, may dispose of the suit.”

That Sir Charles Newbold elaborated that –

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. The Court considers that this improper practice should stop.”

The Petitioner further relied on the decision of Kubo J. in **James Kamangu Ndimu v Margaret Wanjiru Ndimu & Another [2007] eKLR** as cited in **Joseph Kipkemboi Tanui v Chief of Defence Forces & 2 Others [2019] eKLR** where it was held:

“More fundamentally, I am of the persuasion that the issue of jurisdiction is a pure point of law which can be raised at any time and that it is better raised at the earliest possible opportunity.”

The Petitioner submitted that these preliminary objections are improperly suited, are afterthoughts and that these preliminary objections are misconceived and only aimed at misleading the Court and delaying the hearing of the Petition dated 8th June 2020. The Petitioner prayed that the two preliminary objections are just for dismissal with costs for being meritless.

12. The issue of representation is not a matter of concern as it was the Petitioner who split the case into what it is now. Initially, the Petitioner had sued the County Government of Kirinyaga and the Minister for Health and that of Labour and Social Protection. The suit against the County Government of Kirinyaga is what spawned the 4th, 5th and 6th Respondents who were represented at the onset by M/s Waweru Gatonye & Co. Advocates. M/s Wanyonyi & Muhia Advocates took on representation for the 4th Respondent filed a notice of change of advocates taking over conduct of the suit from the advocates who represented her initially, namely M/s Waweru Gatonye & Co. Advocates. The line of argument advanced by the Petitioner on representation is thus unmerited and is accordingly dismissed.

13. In regard to the objections proper, in a nutshell the 4th, 5th and 6th Respondents are of the view that this Court lacks jurisdiction on account of there being another forum before which the Petitioner should pursue the matters in issue as provided for under Section 77 of the County Governments Act and Section 9 of the Fair Administrative Actions Act. The Court agrees that where a statute provides a dispute resolution mechanism that forum should be approached first and upon determination the requisite appeals or review can be sought from the Superior Court. I will add that the exhaustion doctrine frowns upon the action of a party who does not approach the matters as provided for in statute and in a sense seems to forum shop. It is not denied that there is already a pending appeal before the PSC. This is not an appeal

against the decision made in that pending appeal and as there is already a parallel dispute resolution before a competent body which this Court can hear an appeal from, I strike out the Petition herein and order the Petitioner to pay costs of the objections to the 4th and 5th-6th Respondents.

It is so ordered.

Dated and delivered at Nyeri this 24th day of September 2020

Nzioki wa Makau

JUDGE