



Republic v Mandera County Government; Mohamed (Exparte Applicant); Hassan & 3 others (Interested Parties) (Judicial Review E001 of 2023) [2024] KEHC 1180 (KLR) (31 January 2024) (Ruling)

Neutral citation: [2024] KEHC 1180 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
JUDICIAL REVIEW E001 OF 2023
JN ONYIEGO, J
JANUARY 31, 2024**

IN THE MATTER OF AN APPLICATION BY BASHIR ADAN MOHAMED FOR ORDERS OF PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF SECTION 80 OF THE PUBLIC SERVICE COMMISSION ACT 2017

AND

IN THE MATTER OF ARTICLES 27 AND 232 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT 2015

AND

IN THE MATTER OF THE MANDATORY RETIREMENT AGE FOR PUBLIC EMPLOYEES AND/OR CIVIL SERVANTS

BETWEEN

REPUBLIC APPLICANT

AND

MANDERA COUNTY GOVERNMENT RESPONDENT

AND

BASHA ADAN MOHAMED EXPARTE APPLICANT

AND

DIRIYE HAJI HASSAN INTERESTED PARTY

MOHAMED ABDILLE GABOW INTERESTED PARTY



IBRAHIM MOHAMUD ABDI INTERESTED PARTY
PUBLIC SERVICE COMMISSION INTERESTED PARTY

RULING

1. The ex parte applicant through the firm of Mutua Mboya & Nzissi Advocates moved this court via Chamber Summons dated 17.04.2023 seeking for the following reliefs:
 - i. Spent.
 - ii. Ex parte applicant be granted leave to apply for Judicial Review order of certiorari to remove into this Honourable Court and quash the decision to extend the mandatory retirement age of the Assistant Community Development Officer, Principal Land Surveyor and Principal Land Administrator beyond sixty years of age.
 - iii. The ex parte applicant be granted leave to apply for Judicial Review of mandamus to compel the respondent to advertise and recruit suitable persons for the positions of Assistant Community Development Officer, Principal Land Surveyor and Principal Land Administrator.
 - iv. The ex parte applicant be granted leave to apply for Judicial Review of Prohibition to prohibit the respondent from re-appointing the Assistant Community Development Officer, Principal Land Surveyor and Principal Land Administrators employees in public service.
 - v. That leave so granted to operate as a stay of the extension of mandatory retirement age of the respondent's Assistant Community Development Officer, Principal Land Surveyor and Principal Land Administrator beyond sixty years.
 - vi. That costs of this application be awarded to the applicant.
2. Upon considering the application, the Honourable Court on 05.06.2023 issued ex parte orders granting prayer 2,3 and 4 of the ex parte applicant's application dated 17.04.2023 and further directed that, the applicant file a substantive notice of motion within 14 days and that upon service, the respondents to file their response within fourteen days.
3. The applicant thus filed a notice of motion dated 06.06.2023 together with a statutory statement of even date seeking orders as follows:
 - i. An order of prohibition do issue at the respondent prohibiting the respondent herein from re-appointing and/or re-employing the 1st and 2nd interested parties herein.
 - ii. An order of certiorari do issue to remove into this court and quash the decision by the respondent to re-appoint and /or re-employ the interested parties herein.
 - iii. Such other order or relief as this Honourable Court may deem just and expedient to grant.
 - iv. The costs of this application be awarded to the ex parte applicant.
4. It was stated that section 80(1) of the *Public Service Commission Act* 2017 provides that a public officer shall retire from service with effect from the date of attaining the mandatory retirement age. That considering that the 1st, 2nd and 3rd interested parties had attained the said age, the respondent blatantly proceeded to recruit and /or extend the services of the said interested parties.



5. It was the applicant's case that selective extension of the mandatory retirement age of some public officers, was discriminatory hence an act in breach of article 27 of *the constitution*. This Honourable Court was therefore urged to not only uphold but also enforce the law as provided to ensure that the respondent does not contravene government policies and guidelines in reference to the retirement age.
6. In response, the respondents through the firm of Sheikh & Shariff Advocates filed a notice of preliminary objection dated 14.11.2023 citing the following grounds:
 - i. That this Honourable Court lacks jurisdiction to hear and determine this application in view of the doctrine of exhaustion, the ex parte applicant having not exhausted administrative and legal avenues available to him under section 77 of the *County Governments Act*, 2012 and Sections 85,86,87,88 and 89 of the *Public Service Commission Act*, 2017.
 - ii. That for the foregoing reasons, the application is incompetent and legally untenable and ought to be struck out with costs.
7. With the concurrence of both parties, the Court directed that the respondent's notice of preliminary objection be heard first by way of written submissions.
8. The respondent in their written submissions dated 22.11.2023 submitted that jurisdiction must flow from either *the constitution* or legislation and without it a court ought to down its tools. In that regard reliance was placed in the case of Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR, where the Supreme Court held that:

(68) "A court's jurisdiction flows from either *the constitution* or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the law..."
9. That by unilaterally extending the interested parties' employment beyond the Mandatory age of retirement vide a letter dated 16.06.2023, the respondent acted unconstitutionally and contrary to the functions and powers of the County Public Service Board set out under section 59 of the County Government Act.
10. It was urged that the decision being challenged herein being a decision of the County Public Service Board, the applicant was required to exhaust the statutory resolution mechanism before invoking the jurisdiction of this court and therefore, the application herein was incompetent and ripe for striking out.
11. This Court was referred to Section 77 of the *County Governments Act* which makes provision how appeals to the Public Service Commission are effected as a form of internal dispute resolution mechanism. The respondent placed reliance on the cases of Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] eKLR and The Court of Appeal decision in the case of The Clerk, Nakuru County Assembly, The Speaker, Nakuru County Assembly & 3 Others v Odongo & 7 Others (Civil Appeal E136 & 137 of 2022 (Consolidated) [2023] KECA 427 (KLR) (14 April 2023) where it was held that it is imperative that where a dispute resolution mechanism exists outside courts, the same ought to be exhausted before the jurisdiction of the court is invoked. It was prayed thus this Court should uphold the preliminary objection for it is clear that the applicant did not exhaust all the dispute resolution mechanism as provided.
12. On his part, the ex parte applicant submitted that the doctrine of exhaustion does not apply to the suit herein as the appeal and review mechanism set out under section 85 to 89 of the *Public Service Commission Act* 2017 are not mandatory. That a party may elect to subject themselves to the said process or seek redress from a court of competent jurisdiction.



13. It was argued that sections 85 to 89 of the *Public Service Commission Act*, 2017 are only instructive and they do not oust this Court's original jurisdiction. It was submitted that failing to appeal or apply for review under the commission as provided for under sections 86(1) and 88(1) ought not render the proceedings to which it relates illegal, null and void. Reliance was placed on the Court of Appeal decision in the cases of Chief Justice and President of the Supreme Court of Kenya & Another v Bryan Mandilla Khaemba [2021] eKLR where it was held that the doctrine of exhaustion notwithstanding, courts still retain residual jurisdiction to intervene in exceptional circumstances despite existence of alternative remedies where the action complained of is marred by illegality and procedural irregularities;
14. Further reliance was placed in the case of Fleur Investments Limited v Commissioner of Domestic Taxes & Another [2018] eKLR where it was held that: 'whereas the courts of law are enjoined to defer to specialized tribunals and other alternative dispute resolution statutory bodies created by parliament to resolve certain specific disputes, a court cannot, being a bastion of justice, sit back and watch such institutions ride roughshod on the rights of the citizens who seek refuge under *the constitution* and other legislations for protection'.
15. The applicant contended that the preliminary objection was misplaced as it assumed that the 1st, 2nd and 3rd interested parties were employees of the respondent which was not the case. That the County Service Board is not authorized by law to consider re-employment or re-appointment of county employees. That section 57 of the County Government is self-explanatory as the interested parties herein are not employees of the respondent. This Court was therefore urged to dismiss the preliminary objection herein with costs.

Determination

16. I have carefully read and considered the preliminary objection herein and the submissions thereof. The issue that germinates for determination is whether this Honourable Court is endowed with the jurisdiction to hear and determine the suit herein.
17. It is trite that a preliminary objection should be raised only on a pure point of law which if determined favourably should be able to dispose the matter with finality. In the case of I.N. & 5 others v Board of Management St G. School Nairobi & another (2017) eKLR the court defined a preliminary objection as follows; -

“Definition of a preliminary objection

7. I find it necessary to define what constitutes a preliminary objection on a point of law. A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.
8. It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence. Understanding the nature and scope of preliminary objections is very important for practicing lawyers. Knowing how to raise a properly formulated preliminary objection, and when to raise it, can



save a lot of time and costs. [Also See Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd [1969] EA 969]”.

18. In the words of Sir Charles Newbold P. at page 701, B:-

“...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 preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.”

19. To discern what constitutes a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

20. Therefore, I will embark to determine whether indeed section 77 of the County Government Act provides for a mechanism for the parties to solve their problems as and when they arise in the first instance and whether this court has jurisdiction to determine the suit herein in the obtaining circumstances.

21. Section 57 of the County Government Act provides that:

There is established a County Public Service Board in each County, which shall be-

- a. A body corporate with perpetual succession and a seal; and
- b. Capable of suing and being sued in its corporate name.

22. Section 59 of the County Government Act does specify the functions and powers of a County Public Service as hereunder:

Functions and powers of a County Public Service Board

- (1) The functions of the County Public Service Board shall be, on behalf of the county government, to—
 - (a) establish and abolish offices in the county public service;
 - (b) appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments;
 - (c) exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under this Part;
 - (d) prepare regular reports for submission to the county assembly on the execution of the functions of the Board;
 - (e) promote in the county public service the values and principles referred to in Articles 10 and 232;
 - (f) evaluate and report to the county assembly on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the county public service;
 - (g) facilitate the development of coherent, integrated human resource planning and budgeting for personnel emoluments in counties;



- (h) advise the county government on human resource management and development;
- (i) advise county government on implementation and monitoring of the national performance management system in counties;

23. Section 77 of the [County Governments Act](#), discusses appeals to the Public Service Commission as follows;

- (1) 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.
- (2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of—
 - (a) recruitment, selection, appointment and qualifications attached to any office;
 - (b) remuneration and terms and conditions of service;
 - (c) disciplinary control;
 - (d) national values and principles of governance, under Article 10, and values and principles of public service under Article 232 of [the Constitution](#);
 - (e) retirement and other removal from service;
 - (f) pension benefits, gratuity and any other terminal benefits; or
 - (g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard. (3) An appeal under subsection (1) 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.
- (4) The Commission shall not entertain an appeal more than once in respect to the same decision.
- (5) Any person dissatisfied or affected by a decision made by the Commission on appeal in a decision made in a disciplinary case may apply for review and the Commission may admit the application if—
 - (a) the Commission is satisfied that there appear in the application new and material facts which might have affected its earlier decision, and if adequate reasons for the non-disclosure of such facts at an earlier date are given; or
 - (b) there is an error apparent on record of either decision.
- (6) An application for review under subsection (5) shall be in writing and made within the time prescribed by the Commission in regulations governing disciplinary proceedings, but the commission may entertain an application for review later if, in the opinion of the Commission, the circumstances warrant it.

24. Section 85 of the [public service commission Act](#) provides that;



The Commission shall, in order to discharge its mandate under Article 234(2)(i) of *the Constitution*, hear and determine appeals in respect of any decision relating to engagement of any person in a County Government, including a decision in respect of—

- (a) recruitment, selection, appointment and qualifications attached to any office;
- (b) remuneration and terms and conditions of service;
- (c) disciplinary control;
- (d) national values and principles of governance, under Article 10 and values and principles of public service under Article 232 of *the Constitution*;
- (e) retirement and other forms of removal from the public service;
- (f) pension benefits, gratuity and any other terminal benefits; or
- (g) any other decision the Commission considers to fall within its constitutional competence to hear and determine an appeal in that regard.

25. Section 86 goes further to provide that;

(1) Any person who is dissatisfied or affected by a decision made by any authority or person in respect of a County Government public service may appeal to the Commission against the decision.

(2) An appeal under subsection (1) shall be in writing and made within ninety days from the date of the decision:

Provided that the Commission may consider an appeal out of time if, in the opinion of the Commission, the circumstances warrant it.

(3) The Commission shall make regulations to guide the hearing and determination of appeals from the county public service boards.

(4) After considering an appeal under this section the Commission may—

- (a) uphold the decision;
- (b) set the decision aside;
- (c) vary the decision as it considers to be just; or
- (d) give such directions as it may consider appropriate with respect to the decision

26. Section 87 thus provide as follows;

(1) The Commission may in hearing and determining appeals from the County Governments' public service, co-opt relevant experts depending on the nature of the appeal.

(2) A person shall not file any legal proceedings in any Court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from county government public service unless the procedure provided for under this Part has been exhausted.

27. According to the provisions reproduced above, it is trite that some of the functions of the Board on behalf of the County Government include but not limited to establishing and abolishing offices in the county public service; appointing persons to hold or act in the offices of the county public service and to confirm appointments. It therefore follows that the body bestowed with the mandate to resolve



disputes on employment matters arising from decisions of the public service board is the public service commission and that the internal dispute resolution mechanism provided thereof must be exhausted.

28. In the holding of a 5-Judge Bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR the court expressed itself on the position of internal dispute mechanism as follows: -

52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine 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 the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution* and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:

42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:

Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

43. While this case was decided before *the Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution.

29. The applicant argued that the interested parties' employment had ceased and what is being prevented is re-employment and that the application herein is pegged on the re-hiring of the said interested parties. Taking into account that the cause herein is anchored on irregular extension of employment services, the right body charged with the responsibility to hear any appeal challenging that act is the Public Service commission pursuant to section 77(2) of the County Government Act and Sections 85, 86 and 87 of the *public service commission Act*. According to these provisions, the commission has exclusive mandate to hear the appeal against extension of retirement age. Unless the dispute raises a constitutional question, this court cannot arrogate itself jurisdiction where there is none.

30. I do not agree with Mr. Mutua that the procedure provided for under Section 85,86 and 87 does not apply in the circumstances of this case. The procedure for challenging the decision of the County service board is by appealing to the public service commission which excludes courts of law from entertaining such disputes.

31. At this point, it is quite clear, that no attempts were made by the applicant to resolve the matter before the relevant body. Since this matter concerns the running of the internal affairs of the respondent, the best approach in my view would have been to present the displeasure, a resultant of the respondents' actions to the rightful body created for such internal dispute resolution. Although in exceptional circumstances a court may assume jurisdiction to avert an outright injustice, in this case, no such exception was cited to warrant bypassing an organ bestowed with jurisdiction by statute.



32. In any event, although not raised, even if this matter were under exceptional circumstances to be heard by a court of law which is not, the right court would have been the Employment and Labour Relations Court pursuant to Article 162 of *the Constitution* and not the high court.
33. For avoidance of doubt, *the constitution* under Article 162 of *the constitution* provides;
- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the Courts referred to in clause (2).
 - (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - (a) a) employment and labour relations; and
 - (b) b) the environment and the use and occupation of, and title to, land.
 - (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
34. Article 162 cited above leaves me with no doubt that Parliament was very clear that disputes arising from the exercise of matters of employment are to be appealed and/or filed at the Employment Court and not this Court.
35. In general, a Court is bound to entertain proceedings that fall within its jurisdiction. Put differently, a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. The South African Constitutional Court [See In the matter between Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others Case CCT 64/08 [2009] ZACC 26] had this to say: -
- “Jurisdiction is determined on the basis of the pleadings... and not the substantive merits of the case... In the event of the Court’s jurisdiction being challenged at the outset (in limine), the applicant’s pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court’s competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant’s claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by...{another court}, the High Court would lack jurisdiction...”
36. Courts are bound by the mandate of the Legislature and once it has expressed its intention in words which have a clear significance and meaning without offending *the constitution*, the Court is precluded from speculating. If the provision is unambiguous and the legislative intent is clear, the other rules of construction of statutes need not be called into aid.
37. Courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words employed by the Legislature. [See Republic v National Employment Authority & 3 Others Ex –parte Middle East Consultancy Services Limited [2018] eKLR].



38. In a nut shell, I am persuaded by the respondent's submissions that this court does not have jurisdiction to entertain the suit herein hence bound to down its tools. The upshot of it all is that the preliminary objection is upheld and the suit herein struck out with no order as to costs.

DATED, SIGNED AND DELIVERED THIS DAY OF 31ST DAY OF JANUARY 2024.

J. N. ONYIEGO

JUDGE

