



**Omolo v County Government of Kisumu & 4 others (Civil Appeal
E242 of 2021) [2022] KECA 1366 (KLR) (2 December 2022) (Judgment)**

Neutral citation: [2022] KECA 1366 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL E242 OF 2021
PO KIAGE, M NGUGI & F TUIYOTT, JJA
DECEMBER 2, 2022**

BETWEEN

AMOS WILLIAM OMOLO APPELLANT

AND

COUNTY GOVERNMENT OF KISUMU 1ST RESPONDENT

GOVERNOR, KISUMU COUNTY 2ND RESPONDENT

COUNTY SECRETARY, KISUMU COUNTY 3RD RESPONDENT

CHAIRMAN, COUNTY PUBLIC SERVICE BOARD 4TH RESPONDENT

COUNTY ASSEMBLY OF KISUMU 5TH RESPONDENT

*(Appeal from the Judgment and Decree of the Employment and Labour Relations Court at
Kisumu (Radido, J.) Dated 2nd December, 2021 in Kisumu ELRC Petition No. 42 of 2017)*

JUDGMENT

Judgment Of Tuiyott J.A

1. The crux of this matter is whether Amos William Omolo (the appellant) exhausted the dispute resolution avenue provided under Section 77 of the County Governments Act (the Act) before turning to the Employment and Labour Relations Court (ELRC) for relief.
2. The jurisprudence that has taken root on the implication of a party's failure to exhaust that avenue was stated by this Court in County Public Service Board and Another v Hulbhan Gedi Abdille [2017] eKLR:

“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.”

3. A synopsis of the dispute giving rise to this appeal can be stated. In a letter dated 1st February, 2017, the appellant was appointed as County Attorney for the County Government of Kisumu (the 1st respondent or the County Government) by the Kisumu County Public Service Board (the Board). Not long thereafter, the relationship between the appellant and the County Government hit turbulence. In a letter dated 11th October, 2017, the County Secretary of the County Government (the 2nd respondent or the County Secretary) sent the appellant on compulsory leave to facilitate investigations into his conduct regarding two sets of litigation filed against the County Government and the legality of the office of the County Attorney and recruitment. On 30th October, 2017 the County Secretary wrote to the appellant informing him of the intention of the office to take disciplinary action against him but before doing so requiring him, within twenty-one (21) days, to show cause why the intended action should not be taken. The appellant was to answer to two allegations:
 - i. Acting ultra vires in E&LRC Petition No. 39 of 2016 *Doris Ombara v County Government of Kisumu* by summoning and issuing directions to the City Manager against the scope of your powers.
 - ii. Improper and careless attendance to duty in Kisumu HCMC No. 104 – 195 of 2015 *Ken Pundo & Co. Advocates v County Government of Kisumu & 3 others* leading to County Government incurring unnecessary debts in terms of interests on the decretal sum and legal fees.
4. To be noted is that unlike the letter that sent the appellant on compulsory leave, the NTSC letter did not raise any question about the legality of the office of the County Attorney and the recruitment of the appellant to that office. The importance of this distinction will play out shortly.
5. The appellant responded to the notice to show cause through an email of 1st November, 2017. Although he gave his answers to the allegations, he warned that the allegations touched on matters that were the subject of ongoing litigation and the discussion would be sub judice that litigation. A day after, the appellant filed a constitutional petition against the County Government of Kisumu (the 1st respondent), Government, Kisumu County, (the 2nd respondent), County Secretary, Kisumu County (the 3rd respondent) and Chairman, County Public Service Board (the 4th respondent) being Nairobi ELRC Petition No. 96 of 2017 in which he raised various issues and sought the following prayers: -
 - a. A declaration that within the intendment of Article 41 of the *Constitution*, the 1st 2nd and 3rd Respondents cannot impose compulsory leave on the Petitioner.
 - b. A declaration that within the intendment of Article 47 (2) of the *Constitution*, the Respondents cannot take administrative actions without giving valid reasons for the same.
 - c. An Order of Judicial Review in the nature of Certiorari do issue to bring into the Honourable Court for purposes of quashing the 3rd Respondents' letter dated 11th of October, 2017 sending the Petitioner on compulsory leave, for being invalid, illegal and unconstitutional.
 - d. An Order of Judicial Review in the nature of Certiorari do issue to bring into the Honourable Court for purposes of quashing the 3rd Respondent's Show cause letter dated 30th of October, 2017 for being invalid, illegal and unconstitutional.



- e. An Order of Judicial Review in the nature of Certiorari do issue to bring into the Honourable Court for purposes of quashing any other letter, memorandum and/or communication imposing sanctions upon the Petitioner for decisions and/or action taken by the Petitioner in the Course of his employment and in performance of his duties as the County Attorney for the County Government of Kisumu.
 - f. An Order of Judicial Review in the nature of Mandamus does issue compelling the respondents to recall and reinstate the Petitioner to his position as the County Attorney and chief legal officer.
 - g. An Order of Compensation for general and exemplary damages to compensate the petitioner for the harassment, financial constraints, intimidations, defamation and mental torture he has suffered resulting from the unfair and unconstitutional imposition of compulsory leave.
 - h. A permanent injunction against the Respondents stopping them and their officials from proceedings with the intended unfair termination, dismissal and/or suspension of the Petitioner from his employment.
 - i. The costs of the Petition be borne by the Respondents.
6. On 3rd November, 2017, the ELRC at Nairobi granted an ex parte order suspending the effect of the letter sending the appellant on compulsory leave pending inter partes hearing. The file was transferred to Kisumu and an inter partes hearing conducted on 16th November, 2017. The Court declined to extend the ex parte orders and eventually dismissed the motion on 12th April, 2018.
7. In dismissing the motion Maureen Onyango, J observed: -
- “I find that the applicant has not proved any exceptional circumstances to warrant interference by the court at this investigative stage of the disciplinary process. The Applicant has not demonstrated any violation of his rights by the Respondents as all that has been done is to ask him to show cause why disciplinary action should not be taken against him. This being a preserve of the employer it would be interference by the court in the administrative functions of the employer to stop the process and shield the Applicant from investigation even before he responds to the notice to show cause.”
8. Notwithstanding his inability to stop the disciplinary process, the appellant’s entreaties to the ELRC did not end. He was back through a notice of motion dated 9th October, 2019. On 17th October, 2019, Nduma, J granted an ex parte order in his favour for a temporary injunction compelling the respondents to reinstate forthwith his salary and benefits and inter partes hearing was set for 22nd January, 2020. Before that date would be further developments. In a letter dated 18th December, 2019, the Service Board wrote a letter inviting the appellant for disciplinary hearing on 9th January, 2020 at 10.00am. The Service Board justified this action on the ruling of Maureen Onyango, J that had permitted it to proceed with disciplinary proceedings. Through a letter dated 30th December, 2019, written by his advocate Kibet Adoli & Magina Advocates, the appellant stated that he would not engage in what he termed as ‘subjudicial conduct’. The appellant, unsurprisingly, did not appear before the Board on 9th January, 2020 and in a letter of 14th February, 2020 addressed to the County Secretary, the Board advised the County Government to terminate the contract of employment for gross misconduct.
9. On 19th May, 2021, the ELRC granted leave to the appellant to amend his petition to reflect the changed circumstances. Another substantial addition in the amended petition filed on 26th May 2021



was an order seeking to declare the Kisumu County Office of the County Attorney Act, 2018 (the County Attorney Act) unconstitutional.

10. Upon considering the record and submissions filed by the parties, Radido, J dismissed the petition in a judgment delivered on 2nd December, 2021. The learned trial Judge considered the matter under three main headings. The learned trial Judge found that the appellant had not exhausted the procedure found in Section 77 of the County Government Act. The learned trial Judge found that the appellant's assertion that his right to fair labour practices, administrative action or hearing had been infringed was without merit as the appellant had failed to cooperate with the employer in the disciplinary process. The learned trial Judge also held that:

“28. In the view of the Court, the recommendation letter dated 27th August 2018 does not satisfy or show that the Petitioner had been requested to address the allegations which led to the termination of employment or that he had been cleared of the allegations.”

11. This is the decision that aggrieved the appellant who is now before us on a first appeal in which he asks us to address his grievances in the context of the following issues;

- (i) Whether the appellant had exhausted alternative dispute resolution avenues before approaching the court.
- (ii) Whether the County Public Service Board has the jurisdiction to hear and determine constitutional issues.
- (iii) Whether the appellant was given reasons for his termination.
- (iv) Whether the Kisumu Office of the County Attorney's Act, 2018 is unconstitutional.

12. As a first appeal court, our duty is to reevaluate the evidence before the trial court with a view to drawing our own conclusions. On this occasion we stand in the same place as the trial court as the trial proceeded on the basis of affidavit evidence.

13. Section 77 of the Act reads;

77. Appeals to the Public Service Commission

- (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.

14. The effect and implication of that statutory provision was set out at the beginning of this decision and none of the parties contests it. The position of the appellant, however, is that an examination of the facts of this dispute reveals that he exhausted the alternative dispute resolution avenue before approaching the ELRC. Reference is made to the affidavit of Eng. Nahashon W. Oyuga (Oyuga), sworn on 14th January, 2021. He was the Chairman of the Service Board at the time the appellant was invited to appear before that board. We are asked to consider the full extent of the dispositions in that affidavit and so I feel duty bound to reproduce it in extenso:

1. That I am aware of the facts in issue in his Petition as I was the Chairman of the Kisumu County Public Service Board at the time the Petition was filed and hence competent to swear this Affidavit.
2. That the Petitioner herein Mr. Amos William Omolo was appointed as the county Attorney for the County Government of Kisumu through a very competitive and transparent process on the 11th of February, 2015 on permanent and pensionable terms. (Annexed and marked NWOO -1 are documents demonstrating the step by step process of the Petitioner's recruitment and appointment)
3. That I am aware that the Petitioner was put on compulsory leave on the 11th of October, 2017 by the then acting County Secretary Dr. C. Olang'o Onudi based on alleged investigation of
 - a. The Petitioner's conduct in E& LRC Pet. No. 39 of 2016 *Doris Chandi Ombara vs County Government of Kisumu & 3 Others*
 - b. The Petitioner's conduct in HCMC No. 104-195 of 2015 *Ken Pundo & Co. Advocates Vs County Government of Kisumu & 3 others.*



c. Legality of the Petitioner's office and recruitment.

- 4 That it was clear from the onset that there was no ground at all for the removal of the Petitioner from the office of the County Attorney or taking of any form of disciplinary action against of the Petitioner. The grounds in paragraph 3 above were flimsy and unsubstantiated.
- 5 That as the County Attorney, the Petitioner could only instruct external advocates to handle the County Government's cases. The Petitioner could not therefore be held liable for the actions of the external Advocates. As the county Attorney, the Petitioner did not have any conduct in the cases filed against the County Government.
6. That furthermore, the County Government ignored the Petitioner's advice by making payments against the Petitioner's advice towards HCMC No. 104-195 of 2015 Ken Pundo & Co. Advocates Vs County Government of Kisumu & 3 others. In fact the payments were made after the Petitioner had placed on compulsory leave.
7. That there was no wrong doing on the part of the Petitioner in as far as the cases filed against the County Government were concerned. The Petitioner was not mandated to ensure a favourable outcome for the county Government. The best he could do was to ensure the County Government was well advised and represented, that is what he did.
8. That on the legality of the Petitioner's office and recruitment, the County public service board is authorized under section 60 of the County Governments Act to establish and abolish offices in the County Public service. The Office of the County Attorney was legally and procedurally established and the Petitioner's recruitment and appointment was open and transparent and was never challenged in Court or anywhere.
9. That after interrogating the grounds upon which the 2nd and 3rd Respondent sort to remove the Petitioner from the office we found that there was no basis to warrant the removal, suspension or compulsory leave.
10. That infact on the 27th of August, 2018 I wrote a letter of recommendation for the Petitioner in which I discussed his competence including his role in development of the County Attorney's Act by the Senate and recommended him for higher responsibilities (Annexed and marked N.W.O.O-2 is a copy if the said letter of recommendation)
- 11 That having found him fir to continue holding the office of the County Attorney and also qualified for higher responsibilities or promotions, the Board had expressed itself with finality on the Petitioner.
- 12 That the new members of the Kisumu County Public Service board thus lacked the capacity to conduct a disciplinary hearing or make any recommendation for dismissal of the Petitioner as alluded to in the Petitioner's termination letter dated 15th February, 2020 (Annexed and marked NWOO-3 is a copy of the letter)
- 13 That therefore the actions that led to the termination of the Petitioner's employment were unlawful and illegal.
- 14 That I swear this affidavit in support of the Petitioner's petition and to further vouch for the Petitioner's unwavering competence as the County Attorney of the County Government of Kisumu. The termination of the Petitioner's employment was unprocedural and unfair.
- 15 That what I have deponed to herein is true to the best of my knowledge and belief.



15. In that affidavit, Oyuga makes reference to a letter of recommendation he wrote on 27th August, 2018. In that letter Oyuga alludes to the competence of the appellant, including his role in the development of the County Attorneys Act by the Senate, and recommends him for higher responsibilities.
16. The appellant asserts that he was victorious before the Service Board and the County Government, who would have been aggrieved by the decision of the Board, was the one to invoke the procedure availed by Section 77 of the Act.
17. The respondents retort that the affidavit and letter was written by Oyuga after he had left office. We were further reminded that the letter framing the charges requiring the petitioner to appear before the disciplinary panel of the board did not include the legality of how the petitioner was recruited.
18. The strained relationship between the appellant and the respondents is traced to the letter of 11th October, 2017 from the 3rd respondent directing the appellant to proceed on compulsory leave to enable investigations to be conducted in regard to his conduct in ELRC Petition No. 39 of 2016 *Dorcas Chandi Ombora v County Government of Kisumu* and HCMC No. 104-195 OF 2015 *Ken Pundo & Co. Advocates v County Government of Kisumu* and what was framed “legality of your office and recruitment.” In the letter to show cause dated 30th October, 2017, the appellant is asked to answer to his conduct in the litigation. The matter around the legality of his office was apparently dropped. The appellant responds to this correspondence through an email of 1st November, 2017 in which he demands the withdrawal of the letters failing which he would institute legal proceedings against the respondents. Indeed, he commenced those proceedings and obtained orders stalling the process but just up to when Maureen Onyango, J refused to extend those ex parte orders. Eventually, the Service Board wrote a letter dated 18th December, 2019 inviting the petitioner for a disciplinary hearing on 9th January, 2020. It is common ground that he did not attend the hearing and a recommendation for termination of his service was written by the Board on 14th February, 2020. I do not hear the appellant dispute the invitation to attend the disciplinary hearing. Indeed, his advocates, Kibet, Adoli & Magina reacted to that letter of invitation through a letter dated 30th December, 2019.
19. The closing paragraphs of that letter are singularly important. The appellant’s advocates stated:

“We would also wish to bring to your attention the ongoing negotiations between the Governor, County Secretary and our Client aimed at amicably settling the ongoing case mentioned above. Your letter goes against the spirit of the negotiations which are at an advanced stage and indeed we submitted our settlement proposal dated 10th December, 2019 as directed by the Governor.

We hereby ask that you withdraw your letter dated 18th December, 2019 to pave way for the negotiations or in the alternative ventilate the issues raised therein in the ongoing Petition where they have been extensively argued.”
20. The appellant’s advocates do not allude to a resolution of the dispute in their client’s favour before the Service Board. The letter makes no mention of a disciplinary process, presumably undertaken before the date of the letter, in which the appellant had been exonerated by the Board. To the contrary, the appellant in this letter plainly admits that the dispute is unresolved and alive. For whatever worth the affidavit of Mr. Oguya was made, it does not detract from the fact that the appellant did prove that a disciplinary process in which he was absolved had been undertaken and concluded. Oguya’s affidavit is loudly silent on the date or dates of the supposed meeting or process. Further the contents of Oguya’s letter of 27th August, 2018 belies the true intention of the letter. It does not state that the appellant had



been heard on the specific allegations set out in the notice to show cause letter of 30th October 2017. The intention of Oyuga’s letter is unequivocally spoken in its opening paragraph;

“This reference/recommendation by the Board is provided based on a request from Mr. Amos William Omolo, the County Attorney for Kisumu County, that he be provided with a general recommendation letter to serve as reference while seeking for higher level responsibilities in other organizations/companies.”

21. Although the learned trial Judge only made reference to the letter of 27th August, 2018, as just demonstrated, the affidavit of Oguya sworn on 4th January, 2021, would not add traction to the appellant’s case. Simply he had not exhausted the mechanism set out in Section 77 of the Act and was prematurely before the Court on the grievance regarding the disciplinary action commenced against him. In the same vein, any complaint that his right to fair labour practice, administrative action or fair hearing had been breached should have been the subject of an appeal under the provisions of Section 77 and not one to be hastily brought before ELRC.
22. What I must now consider is whether, notwithstanding the provisions of Section 77 of the Act, the appellant could still properly question the constitutionality of the County Attorneys Act before the ELRC. I start by observing that the argument made by learned counsel Mr. Yogo appearing for the respondents that a constitutional petition could not seek orders of certiorari and mandamus is flawed. Article 23 (3) of the *Constitution* spells out, but without closing the list, the reliefs that can be sought in proceedings brought pursuant to Article 22. The sub-article reads:

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

 - (a) a declaration of rights;
 - (b) an injunction;
 - (c) a conservatory order;
 - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
 - (e) an order for compensation; and
 - (f) an order of judicial review.
23. Time and time again our courts have affirmed the right of a party bringing a constitutional petition to seek judicial review reliefs on the platform provided by Articles 22 and 23 (see *Child Welfare Society of Kenya v Republic & 2 others Ex-parte Child in Family Focus Kenya* [2017] eKLR).
24. I have no difficulty in finding that the appellant could mount a constitutional challenge against certain provisions of the *County Attorney Act* before the ELRC. The trouble with the approach by the appellant was to conflate that challenge with the disciplinary process which required exhaustion before another forum by dint of Section 77 of the *Act*. This led to an unhappy situation where the ELRC would have jurisdiction over the constitutional challenge but lack first instance jurisdiction to determine matters that could only come to it after the exhaustion of the process contemplated by Section 77. A question would arise whether the ELRC would have jurisdiction over the petition simply because it included a facet which it could properly entertain in its first instance jurisdiction. A similar



question was before this Court in *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others* [2020] eKLR in which my brother Asike Makhandia, JA stated:

“A Court cannot arrogate itself an original jurisdiction simply because claims and prayers in a petition are multifaceted. The concept of multifaceted claim is not a legally recognized mode for conferment of jurisdiction to any court or statutory body”

25. This view notwithstanding, the court in the matter at hand determined the petition on merit. Yet, as correctly submitted by counsel for the appellant, the trial court did not address the constitutional challenge to section 29 of the *County Attorneys Act*, one of the issues raised in the petition. Even if it is assumed that the entire petition was properly before the ELRC for determination, still I think that the appellant would not succeed on the constitutional question.

26. In the petition the appellant pleaded;

“58. To the extent that the 5th Respondent enacted the Kisumu County office of the County Attorney Act, 2018 whose intent is to defend the purpose of this suit. Provisions of Article 50 of the *Constitution* were violated.”

27. In submissions before the trial court, the appellant elaborates on the grievance.

He contends that during the pendency of the proceedings before the ELRC, the impugned statute was enacted which in Section 29, a transitional provision, provided that the Governor, here the 2nd Respondent, would within 90 days of the coming into force of the Act appoint the County Attorney in accordance with the provisions of the Act. Further, that the person lawfully exercising the powers and functions of the County Attorney or its equivalent immediately before the Act would, unless appointed under the Act, cease exercising such powers or functions on the appointment of the County Attorney under the Act. The appellant made the argument that Section 29 of the impugned Act constructively terminated his employment.

28. It is, however, common ground that the Service Board recommended the termination of the services of the appellant on account of his unanswered conduct in respect to the two sets of litigation. The provisions of the impugned Act were not invoked in any way. Simply, the provisions of the new statute were not deployed against the appellant. The effect is that there is no live controversy regarding the constitutionality of the provisions of the impugned Act because termination of the services of the appellant was not pegged on the provisions of the statute. The matter could not properly be before the ELRC for want of ripeness. The doctrine of ripeness, which is very much part of our jurisprudence discourages a court from deciding an issue which is still in the realm of hypothesis and has not crystalized into a justiciable controversy. (See the Supreme Court decisions in *Attorney-General & 2 others –v- Ndiu & 79 others; Prof Rosalind Dixon & 7 others* (Amici Curiae) [2022] KESC 8 (KLR) and *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others* Pet. 14A, 14B & 14C of 2014 of [2014] eKLR).

Courts should not use scarce resources, not least judicial time, in determining academic or moot questions.

29. Whichever way I look at this appeal, I cannot find merit in it and I would propose that it be dismissed in its entirety with costs.



Judgment Of Kiage, JA

30. I have had the advantage of reading in draft the judgment of Tuiyott, JA. I entirely agree with his reasoning and conclusions, and have nothing useful to add.

31. As Mumbi Ngugi, JA is also in agreement, the final orders in the appeal are as proposed by Tuiyott, JA.

Judgment Of Mumbi Ngugi JA

32. I have read in draft the judgment of Tuiyott JA with which I agree fully and have nothing to add.

DATED AND DELIVERED AT KISUMU THIS 2ND DAY OF DECEMBER, 2022

F. TUIYOTT

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

SIGNED

DEPUTY REGISTRAR

