



**Nyaoga v Kisii County Assembly Service Board & another (Petition
E035 of 2024) [2024] KEELRC 2385 (KLR) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2385 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E035 OF 2024
CN BAARI, J
SEPTEMBER 30, 2024**

BETWEEN

JAMES OMARIBA NYAOGA APPLICANT

AND

KISII COUNTY ASSEMBLY SERVICE BOARD 1ST RESPONDENT

KISII COUNTY ASSEMBLY 2ND RESPONDENT

RULING

1. Before Court is the Applicant/Petitioner's motion application dated 10th September, 2024, brought pursuant to Articles 22 and 23(3)(c) of *the Constitution*, Section 9(4) of the Fair Administrative Actions Act, Section 12(1)(a) & (3) (i) & (iii) of the *Employment and Labour Relations Court Act* and Rules 10, 45, 47 & 54 of the Employment and Labour Relations Court (Procedure) Rules, 2024. The Applicant/Petitioner seeks orders

That: -

- i. Spent.
- ii. Pending the hearing and final determination of the petition, a conservatory order in the nature of stay be issued in favour of the Petitioner restraining the Kisii County Assembly Service Board and Kisii County Assembly, from implementing the resolution of the County Assembly of Kisii dated 29/8/2024, revoking the appointment of the Petitioner as the Clerk of the County Assembly of Kisii.
- iii. That the court be pleased to issue conservatory orders restraining the Respondents from removing the Applicant from the pay roll, advertising, shortlisting, recruiting or appointing any other person as a substantive holder of the Office of Clerk or replacing the Applicant as the Clerk, County Assembly of Kisii.



- iv. A conservatory order be issued staying the decision of the Respondents, including the coming into effect of the 2nd Respondent's resolution dated 29th August, 2024 and the Gazette Notice N. 110078 Vol. CXXVI – N0. 136 of similar date issued and signed by the Speaker of the County Assembly of Kisii revoking the appointment of the Petitioner as Clerk of the County Assembly of Kisii pending determination of the petition.
 - v. That court be pleased to exempt the Applicant from the obligation to exhaust any other statutory remedy in the interest of justice, given that the prayers sought in the petition and motion cannot be granted in another statutory forum except superior courts.
 - vi. Such further and other orders, including an order reinstating the status quo ante 29th August, 2024, as shall preserve the substratum of the petition, be issued to stop the patent illegality and unlawfulness.
 - vii. Costs be provided for.
2. The application is supported by grounds on the face and the affidavit of James Omariba Nyaoga, the Applicant/Petitioner herein. The crux of the motion is that the Applicant having been on suspension since August, 2022, had his appointment as Clerk of the County Assembly of Kisii revoked on 29th August, 2024 and the revocation published in the Kenya Gazette on 2nd September, 2024.
 3. The Applicant avers that if replaced, the prayers sought herein shall be overtaken by events.
 4. The Applicant/Petitioner states that the Board of the 1st Respondent did not comply with the provisions of Section 23(i)(a)(b) and (c) of the *County Assembly Services Act*, before it purported to hear him on 25th April, 2024 and to remove the Applicant from office hence the decision is unconstitutional, illegal null and void.
 5. It is his case that at the time the Board of the 1st Respondent purported to have met and suspended him from duty, it had no quorum and that the Secretary to the Board and the Speaker then, had no power to suspend the Applicant.
 6. The Applicant avers that the Kisii County Human Resources Manual was passed before the county government Act was promulgated, which Act provides the procedure for removal of Clerk of County Assembly. He avers that court should disregard the reliance on the HR manual to remove the Applicant.
 7. It is argued that there is no recommendation for revocation of appointment of Clerk of County Assembly, and that there is no evidence that the Petitioner was supplied with the report of the Ad hoc Committee on revocation as required under the Standing Orders.
 8. It is further urged that the report of the 1st Respondent and charges informing the Applicant/Petitioner's removal were not supplied to him within 3 days prior to the removal.
 9. It is argued that there is no evidence that the Petitioner/Applicant was invited to participate, and that he participated before a vote was taken for his removal.
 10. The Applicant/Petitioner argues that Public Service Commission is not the appropriate forum since his petition is for enforcement of fundamental rights, and should be exempted from the obligation to exhaust available remedies. Reliance was had to the holding of the Supreme Court in *Nicolus v. Attorney General & 7 Others* to buttress this assertion.
 11. It is his prayer that conservatory orders be issued as the Respondents will not suffer any prejudice.



12. The Respondents opposed the motion vide their response dated 18th September, 2024 and the submissions filed therewith. The Respondents argue that the court does not have jurisdiction to hear and determine this motion and petition premised on the Petitioner not having exhausted the dispute resolution mechanism availed to him by statutes.
13. The Respondents states further that the court lacks jurisdiction to undertake a merit review of the removal of Clerk. They placed reliance in the case of Mike Mbuvi Sonko for the holding that the role of the court is not to do a merit review owing to the doctrine of separation of powers.
14. It is their assertion that there are no exceptional circumstances to warrant bypassing the existing dispute resolution process. They aver that the Petitioner/Applicant has concealed the fact that he had lodged an appeal before the PSC and is now proceeding as if he had not filed one.
15. The Respondents further states that Hon. Justice Radido rendered a judgment on this matter where he held that the Petitioner's case did not invoke circumstances to warrant exemption from the obligation to exhausts, and for which this court is being invited to sit on appeal.
16. They aver that the Applicant/Petitioner has not made out a prima facie case to warrant grant of conservatory orders. They state that the Applicant challenged the commencement of the disciplinary process against him and which process was sanctioned by the Court of Appeal, a fact the Petitioner has attempted to conceal.
17. The Respondents aver that the Applicant/Petitioner dragged them to court with countless litigation which frustrated a constitutional process. They aver that county assembly is required to act within 10 days and that it is only a sub-committee that considers the issue of removal and that the role of the whole house is simply to consider the recommendation.
18. The Respondent states that from advice by counsel, the Petitioner/Applicant has not met the threshold for the grant of conservatory orders.
19. Parties canvassed the motion by way of written submissions, and which have been duly considered.

Analysis and Determination

20. I have considered the Motion, the grounds and affidavit in support, the reply by the Respondents and the rival submissions, both oral and written. Two issues present for determination:
 - i. Whether the Court has jurisdiction to hear and determine this matter
 - ii. Whether the Applicant/Petitioner is entitled to the reliefs sought.

Whether the Court has jurisdiction to hear and determine this matter

21. The Respondents' argument is that the court does not have jurisdiction to hear and determine this motion and petition, on the premise that the Petitioner has not exhausted the alternative dispute resolution mechanisms availed to him under Article 234(2)(i) of *the Constitution* read with Section 77 of the County Government Act and Sections 85 and 87 of the *Public Service Commission Act, 2017*.
22. On his part, the Applicant/Petitioner argues that Public Service Commission is not the appropriate forum since his petition is for enforcement of Fundamental Rights and Freedoms, and should be exempted from the obligation to exhaust available remedies. In countering the prayer for exemption, the Respondents submitted that the Applicant/Petitioner has not demonstrated any exceptional circumstances to warrant exemption from the exhaustion doctrine.



23. The doctrine of exhaustion aims at promoting an efficient justice system by requiring that parties exhaust all available administrative remedies before seeking redress in a court of law.

24. In the case of Republic v National Environment Management Authority ex parte Sound Equipment Ltd (2011) eKLR, the Court had this to say on exhaustion of alternative remedies: -

“... Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it ...”

25. Section 9(4) of the Fair Administrative Actions Act provides that the High Court or subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such remedy not to be in the interest of justice.

26. The Supreme addressed exemption from the obligation to exhaust in Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) [2023] KESC 113 (KLR), in the following words:

“.....the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances.

This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court.”

27. The issues the Applicant/Petitioner raises revolve around the manner in which the disciplinary process was conducted. It is his position that he was not invited to participate in the disciplinary process leading to his removal from office.

28. In my considered view, there is nothing unique in the Applicant/Petitioner’s removal process and dismissal, that warrants exemption from the statutory obligation to exhaust. Indeed, the Court of Appeal in *Nyaoga v Chairman Kisii County Assembly & 3 others (Civil Appeal E034 of 2023)* [2023] KECA 1540 (KLR) (8 December 2023) while dealing with similar issues between the same parties herein, held thus:

“.....In addition, the appellant has also not led any evidence to show the existence of exceptional circumstances to warrant the direct invocation of court’s jurisdiction without exhausting all remedies available first. We hold the view that the appellant ought to convince this Court that the internal remedy would be ineffective, unavailable and inadequate.



32. It is also on record that the 3rd respondent, did in line with the court's order, review the charges contained in the show cause letter and suspension; and affirmed the same with variation on suspension terms, and the appellant was invited to respond to said new charges.
33. From this, it is clear to us that the appellant has not exhausted the available remedies as the original charges have been varied and the appellant has been invited to respond to said charges. Indeed, we echo what was pointed out by the trial court that section 9 of the said regulations provides that the commission may hear appeals against any decision regarding the engagement of any person in a county government including inter alia, disciplinary control such as dismissal and imposition of any other administrative punishment. These regulations have a settling effect on the question as to whether the appellate processes set out in Section 77 of the County Government Act is applicable to both staff employed by the County Public Service Board and the County Assembly Service Board. We do not detect any error in application of the law, or in application of legal principles on the part of the trial Judge. We thus find that the trial Judge was not at fault in finding that the court lacked jurisdiction for want of the appellant exhausting all available remedies before directly invoking the court's jurisdiction.
34. We also agree with the respondents that a Human Resource Manual is recognized properly by the court as well as under the *Employment Act* as an instrument of choice in use of disciplinary matters. It in no way ousts the jurisdiction of the court, rather, it simply postpones that jurisdiction, awaiting exploration of all other avenues of redress."
29. The foregoing decision of the Court of Appeal, has addressed all the issues that the Applicant/Petitioner raised in the instant motion, but most importantly, the issue under review on the doctrine of exhaustion.
30. In the final analysis, I find and hold that this court lacks jurisdiction to hear and determine the Applicant/Petitioner's motion and petition in the first instance.
31. The other issues subject of the motion obviously fall by the way side.
32. The motion herein and the petition is thus struck out with costs to the Respondents.
33. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 30TH DAY OF SEPTEMBER, 2024.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Odera present for the Petitioner/Applicant

Mr. Ochieng Odinga present for the Respondents

Anjeline Wanjofu - C/A

