

THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

MISCELLANEOUS APPLICATION NO. B 006 OF 2023

EMPLOYMENT COURT
BUNGOMA
04 MAY 2023
RECEIVED
P. O. Box 365-50300. BUNGOMA

BETWEEN

MAURICE WABWILE MARANGO..... 1ST APPLICANT
ABIDAN KIMKERICK KAPCHANGA 2ND APPLICANT
ARUPUT ISAAC JUMA 3RD APPLICANT
CHRISTOPHER NYONGESA SIMIYU 4TH APPLICANT
ISAAC MUKENYA WELIKHE 5TH APPLICANT

AND

COUNTY PUBLIC SERVICE BOARD – BUNGOMA COUNTY 1ST RESPONDENT
COUNTY ASSEMBLY OF BUNGOMA 2ND RESPONDENT
ACTING SECRETARY, BUNGOMA COUNTY 3RD RESPONDENT
H.E KENNETH MAKELO LUSAKA..... 4TH RESPONDENT

NOTICE OF APPOINTMENT OF ADVOCATES

TAKE NOTICE that the COUNTY PUBLIC SERVICE BOARD – BUNGOMA COUNTY, ACTING SECRETARY, BUNGOMA COUNTY and H.E KENNETH MAKELO LUSAKA the 1st, 3rd and 4th Respondents named herein, has from the date hereof appointed the firm of M/S WEKESA & SIMIYU ADVOCATES, BEADON HOUSE, 1ST FLOOR, MOI AVENUE, P.O. BOX 317 – 50200, BUNGOMA. Tel: 020 2730039/40 or 0723096671 or 0708146160 or 0738269235 E-mail: info@wsadvocates.co.ke to act in this matter on their behalf.

TAKE FURTHER NOTICE that henceforth all correspondence, pleadings and Court processes to the said Respondent must be addressed to the aforesaid Company.

Dated at Bungoma this 4th day of May 2023


WEKESA & SIMIYU

ADVOCATES FOR THE 1ST, 3RD AND 4TH RESPONDENTS

I | WEKESA & SIMIYU ADVOCATES

DRAWN & FILED BY:

Wekesa & Simiyu Advocates

Beadon House, 1st Floor

Moi Avenue

P.O. Box 317 – 50200

(REF: CGB/LIT/002/23/01)

BUNGOMA.

Tel: 020 2730039/40 or 0723096671 or 0708146160 or 0738269235

E-mail: info@wsadvocates.co.ke

TO BE SERVED UPON

Murimi, Ndumia, Mbago & Muchela Advocates

Assumption Centre, 3rd Floor

Stadium Road

P. O. Box 2779 – 20100

NAKURU

Tel: 0739707395/0700572092; Email: nkr@mmmnlaw.org.

EMPLOYMENT AND LABOUR
RE: BUNGOMA
04 MAY 2023
RECEIVED
P.O. BOX 505 BUNGOMA BUNGOMA

THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
MISCELLANEOUS APPLICATION NO. E006 OF 2023

BETWEEN

MAURICE WABWILE MARANGO..... 1ST APPLICANT
ABIDAN KIMKERICK KAPCHANGA2ND APPLICANT
ARUPUT ISAAC JUMA3RD APPLICANT
CHRISTOPHER NYONGESA SIMIYU4TH APPLICANT
ISAAC MUKENYA WELIKHE5TH APPLICANT

AND

COUNTY PUBLIC SERVICE BOARD – BUNGOMA COUNTY 1ST RESPONDENT
COUNTY ASSEMBLY OF BUNGOMA2ND RESPONDENT
ACTING SECRETARY, BUNGOMA COUNTY3RD RESPONDENT
H.E KENNETH MAKELO LUSAKA.....4TH RESPONDENT

NOTICE OF PRELIMINARY OBJECTION

TAKE NOTICE that the 1st, 3rd and 4th Respondents herein shall at the first hearing of the Notice of Motion dated 20th April, 2023 raise a Preliminary Objection for determination by the Honourable court *in limine* on the following grounds:

1. THAT this Court has no jurisdiction to hear and determine this application and grant the orders sought pursuant to section 88(4) of the Public Service Commission Act, 2017 which provides that despite the right of appeal or the right to apply for review in accordance with this Part, the implementation of the decision shall not be deferred or suspended pending the determination of the appeal or the application for review;
2. THAT Regulation 13 of the Public Service Commission (County Appeals Procedures) Regulations, 2022 divests this Court from entertaining any interim application pending hearing and determination of the appeal before the Public Service Commission and the orders issued by this Court are without force of law;

I|WEKESA & SIMIYU ADVOCATES

3. **THAT** section 87(2) of the Public Service Commission Act, 2017 precludes the Applicants from filing 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 the law has been exhausted and this Court is divested with jurisdiction to deal with any legal proceedings, applications relating to matters within the jurisdiction of the Public Service Commission;
4. **THAT** this Court having found in its ruling of 23rd March, 2023 that it does not have jurisdiction under section 77 of the County Governments Act, 2012 and sections 85, 86(1) and 87(2) of the Public Service Act, 2017, this Court lacks jurisdiction to grant orders on matters pending before the Public Service Commission and cannot grant the orders sought herein;
5. **THAT** the proceedings herein are *sub-judice* to the similar proceedings filed on 14th April, 2023 by the Applicants herein against the Respondents before the Public Service Commission and there is a statutory bar to this Court against continuation of the proceedings herein having been filed subsequent to those in the Public Service Commission;
6. **THAT** the Notice of Motion herein is fatally defective for not being premised on any suit in this Court;
7. **THAT** this Court lacks jurisdiction to exercise on matters specifically given to the Public Service Commission by law; and
8. **THAT** it is meet and in furtherance of the overriding objectives of Article 159(2) of the Constitution and the Rules made thereunder for the timely disposal of proceedings that this Court peremptorily strike out the Notice of Motion herein as an abuse of the process of the Court with costs to the Respondents.

Dated at Bungoma this 4th day of May 2023


WEKESA & SIMIYU

ADVOCATES FOR THE 1ST, 3RD AND 4TH RESPONDENTS

DRAWN & FILED BY:

Wekesa & Simiyu Advocates
Beadon House, 1st Floor
Moi Avenue
P.O. Box 317 – 50200

BUNGOMA.

Tel: 020 2730039/40 or 0723096671 or 0708146160 or 0738269235
E-mail: info@wsadvocates.co.ke

TO BE SERVED UPON

Murimi, Ndumia, Mbago & Muchela Advocates
Assumption Centre, 3rd Floor
Stadium Road
P. O. Box 2779 – 20100

NAKURU

Tel: 0739707395/0700572092; Email: nkr@mnmnlaw.org.

EMPLOYMENT & LABOUR
REL. BUNGOMA
04 MAY 2023
RECEIVED
P. O. BOX 305 BUNGOMA

THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
MISCELLANEOUS APPLICATION NO. E006 OF 2023

BETWEEN

MAURICE WABWILE MARANGO..... 1ST APPLICANT
ABIDAN KIMKERICK KAPCHANGA 2ND APPLICANT
ARUPUT ISAAC JUMA 3RD APPLICANT
CHRISTOPHER NYONGESA SIMIYU 4TH APPLICANT
ISAAC MUKENYA WELIKHE 5TH APPLICANT

AND

COUNTY PUBLIC SERVICE BOARD – BUNGOMA COUNTY 1ST RESPONDENT
COUNTY ASSEMBLY OF BUNGOMA 2ND RESPONDENT
ACTING SECRETARY, BUNGOMA COUNTY 3RD RESPONDENT
H.E KENNETH MAKELO LUSAKA..... 4TH RESPONDENT

**1ST, 3RD AND 4TH RESPONDENTS' GROUNDS OF OPPOSITION TO THE NOTICE OF
MOTION DATED 20TH APRIL, 2023**

TAKE NOTICE that the 1st, 3rd and 4th Respondent's herein shall robustly oppose the Notice of Motion dated 20th April, 2023 on the following grounds:

1. THAT the Notice of Motion herein is incurably incompetent, bad in law and an abuse of the process of this Court;
2. THAT this Court has no jurisdiction to hear and determine this application and grant the orders sought pursuant to section 88(4) of the Public Service Commission Act, 2017 which provides that despite the right of appeal or the right to apply for review in accordance with this Part, the implementation of the decision shall not be deferred or suspended pending the determination of the appeal or the application for review;
3. THAT Regulation 13 of the Public Service Commission (County Appeals Procedures) Regulations, 2022 divests this Court from entertaining any interim application pending hearing and determination of the appeal before the Public Service Commission and the orders issued by this Court are without force of law;

1 | WEKESA & SIMIYU ADVOCATES

4. **THAT** section 87(2) of the Public Service Commission Act, 2017 precludes the Applicants from filing 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 the law has been exhausted and this Court is divested with jurisdiction to deal with any legal proceedings, applications relating to matters within the jurisdiction of the Public Service Commission;
5. **THAT** this Court having found in its ruling of 23rd March, 2023 that it does not have jurisdiction under section 77 of the County Governments Act, 2012 and sections 85, 86(1) and 87(2) of the Public Service Act, 2017, it cannot have jurisdiction to issue interim injunction orders sought herein as that would be tantamount to interfering with the jurisdiction of the Public Service Commission by finding that there is a prima facie case on a subject matter the Court has no jurisdiction over which subject matter is pending before the Public Service Commission;
6. **THAT** there is no law conferring jurisdiction to this Court to grant the orders sought pending hearing and determination of the appeal before the Public Service Commission when the same Public Service Commission has statutory and inherent powers to deal with the applications such as the one before this Court;
7. **THAT** the proceedings herein are *sub-judice* to the similar proceedings filed on 14th April, 2023 by the Applicants herein against the Respondents before the Public Service Commission and there is a statutory bar to this Court against continuation of the proceedings herein having been filed subsequent to those in the Public Service Commission;
8. **THAT** this Court lacks jurisdiction to exercise on matters specifically given to the Public Service Commission by law;
9. **THAT** the Notice of Motion herein is an attempt by the Applicants to obtain orders from this Court through the backdoor which Court sent them away through its ruling of 27th March, 2023 dismissing the Applicants' application seeking the same orders and striking out the Petition for lack of jurisdiction;
10. **THAT** the 3rd and 4th Respondents are improperly joined as parties to these proceedings not being the Petitioners' employer and/or constitutional and statutory legal entities that initiated

the process the subject of these proceedings and who ought and cannot, by dint of section 133 of the County Governments Act, 2012, be sued in their personal capacity in discharge of their public mandate vested in the County Government of Bungoma and whose offices are not capable of being sued and the petition ought to be struck off as against them;

11. **THAT** the Notice of Motion herein is incurably defective as the Notice of Motion and the reliefs it is seeking are not premised on any suit and this Court cannot issue interim orders based on arguability or prima facie of the proceedings in the Public Service Commission;
12. **THAT** it is untenable to sustain same proceedings in two distinct fora and this Notice of Motion herein is an attempt by the Applicants to litigate same issues against the same Respondents in two distinct judicial fora;
13. **THAT** the Notice of Motion are constructed on misrepresentations, concealments, non-disclosures and factual deceits and they are irredeemably incapable of being the basis upon which this Honourable Court can exercise its discretion to grant interim orders;
14. **THAT** the public interest will be **prejudiced by a decision to exercise the discretion to grant the conservatory orders** in view of the grave issues under inquiry and in the absence of jurisdiction to the court to exercise the discretion; and
15. **THAT** it is meet and in furtherance of the overriding objectives of Article 159(2) of the Constitution for the timely disposal of proceedings that this Court peremptorily dismiss this application as an abuse of the process of the Court with costs to the Respondents.

Dated at Bungoma this day of 2023


WEKESA & SIMIYU

ADVOCATES FOR THE 1ST, 3RD AND 4TH RESPONDENTS

DRAWN & FILED BY:

Wekesa & Simiyu Advocates
Beaton House, 1st Floor
Moi Avenue
P.O. Box 317 – 50200

BUNGOMA.

Tel: 020 2730039/40 or 0723096671 or 0708146160 or 0738269235

E-mail: info@wsadvocates.co.ke

3 | WEKESA & SIMIYU ADVOCATES

TO BE SERVED UPON

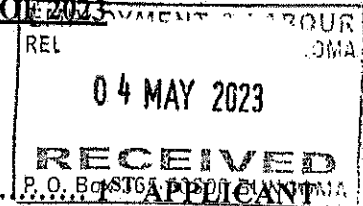
Murimi, Ndumia, Mbago & Muchela Advocates
Assumption Centre, 3rd Floor
Stadium Road
P. O. Box 2779 – 20100

NAKURU

Tel: 0739707395/0700572092; Email: nkr@miminnlaw.org.

THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

MISCELLANEOUS APPLICATION NO. E006 OF 2023



BETWEEN

MAURICE WABWILE MARANGO 1ST APPLICANT
ABIDAN KIMKERICK KAPCHANGA 2ND APPLICANT
ARUPUT ISAAC JUMA 3RD APPLICANT
CHRISTOPHER NYONGESA SIMIYU 4TH APPLICANT
ISAAC MUKENYA WELIKHE 5TH APPLICANT

AND

COUNTY PUBLIC SERVICE BOARD – BUNGOMA COUNTY 1ST RESPONDENT
COUNTY ASSEMBLY OF BUNGOMA 2ND RESPONDENT
ACTING SECRETARY, BUNGOMA COUNTY 3RD RESPONDENT
H.E KENNETH MAKELO LUSAKA 4TH RESPONDENT

**1ST, 3RD AND 4TH RESPONDENTS' SUBMISSIONS IN SUPPORT OF THEIR
PRELIMINARY OBJECTION AND IN OPPOSITION TO THE NOTICE OF MOTION
DATED 20TH APRIL, 2023**

1. The County Government of Bungoma is one of the 47 County Governments established under **Article 176 of the Constitution of Kenya, 2010**. Article 179 of the Constitution of Kenya, 2010 further provides that the executive authority of the county is vested in, and exercised by, a county executive committee and that the county governor and the deputy county governor are the chief executive and deputy chief executive of the county, respectively. The overall responsibility of the management and accountability of the County affairs and resources lie with the County Governor as the Chief Executive.
2. In February 2023, the Applicants were administratively interdicted on serious allegations stated in their letters of interdiction annexed to their application herein to allow further inquiry and/or investigations to be conducted into the allegations before further disciplinary action taken against them.

1|WEKESA & SIMIYU ADVOCATES

3. The Petitioners filed a Petition dated 17th February, 2023 challenging the interdiction letters issued by the County Government of Bungoma/County Public Service Board pending further inquiry into the allegations. Contemporaneous with the Petition, the Applicants filed an application for interim orders which this Court granted ex parte pending *inter partes* hearing for preservation of the Applicants' employment.
4. The Respondents herein raised a Preliminary Objection to the petition on pure points of law that the Court lacked jurisdiction under section 77 of the County Governments Act, 2012 and sections 85, 86(1) and 87(2) of the Public Service Commission Act, 2017 to hear and determine the Petition and the application.
5. Upon hearing the Respondents' preliminary objection, this Court in its ruling of 23rd March, 2023 upheld the preliminary objection, struck out the Petition and vacated the interim orders that were in place preserving the Applicants' employment.
6. Undeterred with the turn of events, the Applicants herein rightly filed an appeal against the decision sending them on administrative/preventive interdiction to the Public Service Commission in their appeal dated 12th April, 2023 against the Respondents herein. The Applicants similarly filed an application dated 12th April, 2023 before the Public Service Commission seeking interim orders to preserve their employment, bar the Respondents from vetting and appointing persons into the Applicants' substantive positions (**see at pages 50 – 54 of the Application herein**). This application before the Public Service Commission is yet to be heard and determined.
7. The Applicants, notwithstanding the pendency of the application for interim orders before the Public Service Commission, have filed the present application seeking for the same interim orders from this Court. The 1st, 3rd and 4th Respondents raised a preliminary objection on the grounds that:
 - a) There is a statutory bar to the grant of orders that seek to defer or suspend the decision the subject of appeal pending hearing and determination of the appeal before the Public Service Commission;
 - b) The jurisdiction to deal with interim applications is specifically given to the Public Service Commission and not this Court;

- c) There is statutory bar against the Applicants from filing any proceedings in Court on matters which the Public Service Commission has jurisdiction;
 - d) This Court lacks jurisdiction to grant the orders sought on a matter it has held that it lacks jurisdiction to entertain;
 - e) The application herein is *sub-judice* the application dated 12th April, 2023 now pending before the Public Service Commission; and
 - f) The application is fatally defective for not being premised on any suit before this court.
8. The six grounds of the Notice of Preliminary Objection constitute the issues for determination in this Preliminary Objection on the jurisdiction of this Court to hear and determine the Petition herein.
9. The Supreme Court of Kenya in *Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 others, Application No. 2 of 2011 [2012] eKLR* stated;
- "A court's jurisdiction flows from 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 by law."*
10. Given that the jurisdiction of the Court is fundamental and in the circumstances of this application, this Court lacks the jurisdiction, on account of the following, to hear and determine this application and we urge the Court to strike out and/or dismiss the application *in limine* with costs to the Respondents.

WHETHER THE COURT IS DIVESTED OF JURISDICTION UNDER SECTIONS 87(2) AND 88(4) OF THE PUBLIC SERVICE COMMISSION ACT, 2017 AND REGULATIONS 6 AND 13 OF THE PUBLIC SERVICE COMMISSION (COUNTY APPEALS PROCEDURES) REGULATIONS, 2022

11. Section 87(2) of the Public Service Commission Act, 2017 provides as follows:

"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."

12. The foregoing provision bars the Applicants from filing **ANY PROCEEDINGS** in this Court to which the Public Service Commission has jurisdiction to hear and determine. Your Ladyship, **ANY PROCEEDINGS** include the application herein for the interim orders and this Court does not have jurisdiction to bypass the statutory edict and purport to grant the orders sought in the present application.
13. The Public Service Commission has jurisdiction to hear the current application for interim orders and therefore these proceedings constitute **ANY PROCEEDINGS** barred by **section 87(2) of the Public Service Commission Act, 2017** from being instituted by the Applicants in this Court.
14. **Regulation 13(1) of the Public Service Commission (County Appeals Procedures) Regulations, 2022** provides as follows:

"A party to an appeal may, at any time after the filing of an appeal with the Commission but before the final hearing and determination of the appeal, apply in writing to the Commission for directions or orders before the appeal is heard and determined by the Commission."
15. The Public Service Commission, from the foregoing regulation, has jurisdiction to deal with the interim applications such as one before this Court and accordingly, this Court is statutorily barred under **section 87(2) of the Public Service Commission Act, 2017** from entertaining the present application for interim orders as sought. In any event, the same application is pending before the Public Service Commission for determination (**see at pages 50 – 54 of the Application herein**) and this Court will be overstepping its Constitutional and statutory mandate and acting ultra vires by entertaining a similar application as invited by the Applicants herein. We urge the Court to decline this invitation.
16. It is often stated that where there is a clear procedure for redress of a particular grievance, such procedure should be strictly followed. The Court of Appeal in *Speaker of the National Assembly v James Njenga Karume [1992] eKLR* held that:

"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."

17. It is our submission that **section 87(2) of the Public Service Commission Act, 2017 and Regulation 13(1) of the Public Service Commission (County Appeals Procedures) Regulations, 2022** gives a clear procedure, to the exclusion of this Court, for seeking interim orders such as one being sought by the current application. This Court ought not to circumvent the clear statutory provisions to entertain the application herein.

18. It is our further submission that **section 88(4) of the Public Service Commission Act, 2017** bars this Court from granting interim orders pending hearing and determination of the appeal before the Public Service Commission. The section provides that:

"Despite the right of appeal or the right to apply for review in accordance with this Part, the implementation of the decision shall not be deferred or suspended pending the determination of the appeal or the application for review."

19. This Court, differently constituted, held in *County Government of Mandera & another v Attorney General & another; Hussein Dayow Abdullahi & 3 others (Interested Parties) [2020] eKLR* that:

"The impugned provisions give the Commission an opportunity to review its own decisions within the prescribed parameters. The provisions as well as protect a decision already made by the county public service board or relevant county government's authority, or, the Commission towards its implementation but which may be subject of a review or appeal. The Court considers that such provisions foster tenets of justice and do not amount to limitation of the right of access to justice."

20. It is our submission that a plain reading of **sections 87(2) and 88(4) of the Public Service Commission Act, 2017 and Regulation 13(1) of the Public Service Commission (County Appeals Procedures) Regulations, 2022** clearly divests this Court of jurisdiction to hear and determine the present application. We urge this Court to down its tools and dismiss the application for want of jurisdiction with costs to the Respondents.

THIS COURT LACKS JURISDICTION TO GRANT THE ORDERS SOUGHT ON A MATTER IT HAS HELD THAT IT LACKS JURISDICTION TO ENTERTAIN

21. On 23rd March, 2023, this Court upheld the Respondents' preliminary objection in the petition between the parties herein that it did not have jurisdiction under section 77 of the County Governments Act, 2012 and sections 85, 86(1) and 87(2) of the Public Service Act, 2017 and dismissed a similar application for interim orders and struck out the Petition. The Court also vacated the interim order in place granted ex parte pending the hearing of the application and the petition for having been issued without jurisdiction.
22. It is our submission that this Court having previously held in the same matter between the parties herein that it did not have jurisdiction to hear the petition and the application for interim orders such as one before the Court today, the Court cannot, again, turn around and purport to exercise jurisdiction it first held that it lacked and grant the orders sought. The ex parte orders granted on 20th April, 2023 were issued without jurisdiction and ought to be discharged forthwith.
23. A Court without jurisdiction cannot grant any orders in the suit or on an application. Your Ladyship in *Oliver Mukhebi & 28 others v County Public Service Board of Bungoma & another [2022] eKLR*, dealing with the same issue as the one before the Court, you held as follows:
- "The court on finding it has no jurisdiction over the subject matter then it cannot have jurisdiction to issue interim injunction orders as that would be tantamount to interfering with the jurisdiction of the Public Service Commission by finding there is a prima facie case on a subject matter it has no jurisdiction over. In any event without jurisdiction the court acts in vain."*
24. Similarly, in *Lukale Moses Sande v Governor, County of Kakamega & 3 others [2022] eKLR*, Your Ladyship held that:
- "This court pronounced itself on a similar issue on jurisdiction over matters falling under Section 87 of the Public Service Commission and Section 77 of the County Government Act (2012) in its ruling dated 25th January 2022 in Bungoma ELRC NO E012 OF 2021, Oliver Mukhebi and 28 Others -vs- County Public Service Board of Bungoma and*

Another where the Petitioner sought conservatory orders pending hearing of his appeal by Public Service Commission. The court upholds its finding in that decision. The court in paragraph 13 of the said ruling of Oliver Mukhebi case (supra) found it had no jurisdiction over appeals for recruitments and appointments by the County Government. The Court then considered if it had jurisdiction consider and grant conservatory orders as sought in the instant case. The Court in paragraph 21 of its ruling found that, for the court to grant the temporary injunction sought it must first have jurisdiction over the subject matter being the appeal for the recruitment exercise. That the court will have to examine the merits of the dispute on prima facie basis to determine if the interim orders sought are justified..... The court having considered the submissions by the parties and considering its decision in Oliver Mukhebi case holds it has no jurisdiction to grant the conservatory orders of temporary injunction as sought under the Application dated 30th November 2021”

25. There is no reason for this Court to deviate from its own earlier holding and we urge the Court to reject the invitation to exercise a non-existent jurisdiction to grant the orders sought.

THE APPLICATION HEREIN IS SUB-JUDICE THE APPLICATION DATED 12TH APRIL, 2023 NOW PENDING BEFORE THE PUBLIC SERVICE COMMISSION

26. The Applicants herein filed an application dated 12th April, 2023 determination (see at pages 50 – 54 of the Application herein) before the Public Service Commission on 14th April, 2023 seeking for interim orders of conservatory. This application is yet to be heard and determined by the Public Service Commission.
27. While the application before the Public Service Commission is pending, the Applicant filed the instant application seeking the same orders against the same Respondents. The instant application is *sub-judice* the application dated 12th April, 2023 before the Public Service Commission which is yet to be heard. The instant application ought to be struck out or at the very least stayed having been filed after the earlier application before the Public Service Commission.

28. Section 6 of the Civil Procedure Act, 2010 provides that:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or

proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

29. The concept of *sub judice* which in latin means "under Judgment" denotes that where an issue is pending in a Court of law for adjudication between the same parties, any other Court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent Court to stay the proceeding and such order can be made at any stage.
30. The Supreme Court of Kenya in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR* had occasion to pronounce itself on the subject of *sub judice* thus: -

"The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.... We therefore find that this Reference, as framed, mainly raises issues of constitutional interpretation. These issues are also substantially in issue before the High Court in Constitutional Petition No. 68 of 2017 and Constitutional Petition No. 142 of 2017."

31. Granted that the matters in issue in the instant application being temporary injunctions and conservatory orders are also directly and substantially in issue in the earlier application dated 12th April, 2023 pending before the Public Service Commission; the proceedings are between the same parties litigating under the same title; and the Public Service Commission having jurisdiction on ther instant application under **Regulations 6 and 13 of the Public Service**

Commission (County Appeals Procedures) Regulations, 2022 to grant the reliefs sought herein, the instant application herein falls short on the doctrine of “*Res-subjudice*” under **Section 6 of the Civil Procedure Act, 2010** as there is similar application/proceedings on the same subject matter pending before the Public Service Commission.

32. In *Africa Management Communication LTE v Airtel Network Kenya Ltd [2020] eKLR*, it was stated that the doctrine of *res judicata* and *subjudice* applies to applications.

33. This Court in *Lukale Moses Sande v Governor, County of Kakamega & 3 others [supra]* held that:

“The court has found that there being an appeal before a competent body the Public Service Commission with jurisdiction drawn from the Constitution and statute, the instant application is subjudice. Radido Judge having held this court to lacks jurisdiction pursuant to Section 87 of the Public Service Commission Act. The Applicant has lodged the appeal before Public Service Commission the right forum and approached the court for conservatory orders. The court has found it has no jurisdiction to hear the Application.”

34. For the foregoing reasons, we urge the Court to decline to exercise its jurisdiction for the application is in contravention of **section 6 of the Civil Procedure Act, 2010** and dismiss it with costs.

THE APPLICATION IS FATALLY DEFECTIVE FOR NOT BEING PREMISED ON ANY SUIT BEFORE THIS COURT

35. The Applicants’ pleading in these proceedings is the Notice of Motion. There is no substantive suit filed in this Court to anchor the Notice of Motion herein that seeks temporary injunctions. In fact, the proceedings are initiated in a miscellaneous file.

36. We submit that the application herein is fatally and incurably defective for not being premised on any existing suit. An application for injunction such as the instant one must be premised on a suit and failure to premise the application on a suit renders the application incurably defective and for dismissal. Your Ladyship, in *Lukale Moses Sande v Governor, County of Kakamega & 3 others [supra]*, on an application similar to the instant application, you held that:

"The court agrees with the Respondent the application ought to have been anchored on a substantive suit or Petition as temporary order sought under Application are usually interlocutory pending hearing of subject matter for final orders. The court upholds the decision cited by the Respondent/Objector in Wilson Kaberia Nkunja -vs- The Magistrate and Judges Vetting Board & others (2016) eKLR and among other Principles of granting conservatory orders being " whether, if the conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory", and the authority in SFA -VS AOA (2021) eKLR where court held that, 'to grant the orders in the manner sought will amount to granting substantive orders with finality in an application". The court finds that temporary injunction orders under Application cannot be granted in vacuum."

37. The Court of Appeal in *Scope Telematics International Sales Limited v Stoic Company Limited & another [2017] eKLR* held that:

"The 1st Respondent did not proffer any reason or excuse for its failure to premise its application upon a suit as was required by the rules. It however sought to rely on Article 159 of the Constitution for the proposition that justice is to be administered without undue regard to technicalities. That Article also provides that alternative forms of dispute resolution mechanisms like arbitration should be promoted by the courts. There are however many decided cases to the effect that Article 159 of the Constitution should not be seen as a panacea to cure all manner of indiscretions relating to procedure..... The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction. Obviously, in overlooking a statutory imperative and the above authorities, the learned Judge cannot be said to have exercised his discretion properly..... For these reasons, we are in agreement with the submissions of the appellant that the application was fatally and incurably defective."

38. For the foregoing reasons, we submit that the instant application is fatally and incurably defective and ought to be struck out or dismissed with costs to the Respondents.

WHETHER THE 3RD AND 4TH RESPONDENTS OUGHT TO BE STRUCK OFF THE PETITION

39. The Applicants joined the 3rd and 4th Respondents to this otherwise fatally and incurably defective application. It is our submission that the 3rd and 4th Respondents are improperly joined as parties to these proceedings not being the Applicants' employer and/or constitutional and statutory legal entities that initiated the process the subject of these proceedings.
40. **Section 133 of the County Governments Act, 2012** provides that there is no personal liability of the officers of the County Government in discharging their constitutional and statutory mandate where such action or omission is done in good faith.
41. The subject matter of the proceedings herein is the interdiction issued by the County Government of Bungoma/County Public Service Board on 9th February, 2023. This is an issue arising from the employment relationship between the County Government of Bungoma/County Public Service Board and the Applicants. The 3rd and 4th Respondents have got nothing to do with the dispute herein.
42. The 3rd and 4th Respondents, under section 133 of the County Governments Act, 2012 cannot be sued in their personal capacity. The offices they hold are not bodies corporate to be sued in their names as they clearly act on behalf of the constitutional and statutory created institutions which are legal entities capable of suing and being sued.
43. In *John Mining Temoi & another v Governor of Bungoma County & 17 others [2014] eKLR*, the High Court faced with similar situation as herein held as follows:

"As regards the Chairman of the Bungoma County Public Service Board, it was Mr. Kituyi's argument that it was improper to enjoin the said Chairman in his personal capacity for acts done by the Bungoma County Public Service Board. In rejoinder, Mr. Khaoya submitted that the 3rd Respondent was properly enjoined as he was the head of the Bungoma County Public Services Board and further that, he was a party to the Petition in the capacity of the office holder and not in his personal capacity.

"The Chairman of a County Public Service Board is not liable to be sued or to sue on behalf of the said Board. The County Public Service Board as a body corporate, is a legal

entity capable of suing and being sued under Section 57 of the County Governments Act, 2012. It therefore follows that the Chairman should not have been sued or enjoined in these proceedings for the actions and omissions of the County Public Services Board which is a legal entity on its own. In this regard, the inclusion of the Chairman of that Board in Petition No. 2 "A" of 2014 was irregular. However, since that Petition was consolidated with Petition No. 2 of 2014, which had properly joined the Board, nothing turns out on it. However, the Chairman is hereby struck out of the proceedings with no order as to costs as he was not sued in his own personal, but in his official capacity."

44. Similarly, in *John Rimui Waweru & 3 others v Githunguri Constituency Ranching Co Limited & 5 others [2015] eKLR*, it was held that:

"The Plaintiffs have admitted in their submissions that they seek no personal liability as against the 5th Defendant, and therefore are suing him from acts arising from execution of his office as Governor of Kiambu County. There is thus a question of law raised as to whether in the circumstances the 5th Defendant can be sued in his capacity as Governor of Kiambu County, and the Court in this regard notes that section 133 of the County Government Act (No 17 of 2012) provides that members, staff and servants of a county government are exempted from personal civil liability for any act done in good faith in the execution of their duty or upon directions. Article 176 of the Constitution in this respect states that a county government for each county shall consist of a county assembly and a county executive, and under Article 179 the Governor is a member of the county executive committee and also the chief executive of the county. To this extent the Governor is both a member and staff of the county government and is to be afforded the protection in section 133 of the County Government Act. The suit against the 5th Defendant is therefore improperly brought and is hereby struck out with costs payable to the 5th Defendant."

45. The 3rd and 4th Respondents are not liable to sue or be sued on behalf of the County Government of Bungoma/County Public Service Board which the County Government of Bungoma/County Public Service Board are legal entities capable of suing and being sued.

46. It is our submission that the 3rd and 4th Respondents cannot, by dint of section 133 of the County Governments Act, 2012, be sued in their personal or official capacity in discharge of their public mandate vested in the County Government of Bungoma and whose offices are not capable of being sued and the petition ought to be struck off as against them.
47. For the reasons stated, we urge the Court to down its tools and strike out and/or dismiss the application herein with costs to the Respondents.

Dated at Bungoma this 4th day of May 2023


WEKESA & SIMIYU

ADVOCATES FOR THE 1ST, 3RD AND 4TH RESPONDENTS

DRAWN & FILED BY:

Wekesa & Simiyu Advocates
Beadon House, 1st Floor
Moi Avenue
P.O. Box 317 – 50200

BUNGOMA.

Tel: 020 2730039/40 or 0723096671 or 0708146160 or 0738269235
E-mail: info@wsadvocates.co.ke

TO BE SERVED UPON

Murimi, Ndumia, Mbago & Muchela Advocates
Assumption Centre, 3rd Floor
Stadium Road
P. O. Box 2779 – 20100

NAKURU

Tel: 0739707395/0700572092; Email: nkr@mimmlaw.org.