



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 34 OF 2020

IN THE MATTER OF ARTICLES 3(1), 22(2)(c) AND 258(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLES 1(1),(2), 2(1) & (2), 10, 19(2) & (3), 23(1) & (3), 35(1) & (2), 41(1), 47(1) & (2), 50(1), 176(1), 232(1) & (2), 235(1) AND 236 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, NO. 17 OF 2012

AND

IN THE MATTER OF THE EMPLOYMENT ACT, NO. 11 OF 2007

BETWEEN

JOEL OCHIENG ODUOL.....PETITIONER

VERSUS

COUNTY PUBLIC SERVICE BOARD OF SIAYA1st RESPONDENT

GOVERNOR, COUNTY OF SIAYA,

CORNEL RASANGA AMOTH.....2nd RESPONDENT

JUDGMENT

1. The County Public Service Board, Siaya (the Board), through the County Secretary, offered Joel Ochieng Oduol (the Petitioner) the position of Chief Officer – Public Works, Roads, Transport and Infrastructure through a letter dated 16 November 2015. The Petitioner accepted the offer and was issued a letter of appointment.
2. On 19 June 2019, the County Secretary issued a show-cause to the Petitioner. The allegation was the failure to respond to two memos that had been addressed to him to explain the status of some equipment within his docket. The Petitioner was given 7-days to respond.
3. The Petitioner responded on 25 June 2019 and on 21 January 2020, the County Secretary notified him of the termination of his appointment.
4. The Petitioner was aggrieved, and he lodged a Petition with the Court on 14 September 2020, alleging violation of his rights to access to information, fair labour practices, fair administrative action, fair hearing, and due process as a public officer.
5. The Court gave directions on 26 November 2020, and the Respondents filed a Memorandum of Defence on 18 February 2021 and documents on 25 February 2021.
6. When the Petition was mentioned on 27 January 2022, the Petitioner was absent. The Respondents proposed that the Petition be determined based on the record and submissions to be filed.

7. The Court therefore, directed the parties to file and exchange submissions (the directive partly reviewed the directions given on 26 November 202. The Respondents were requested to notify the Petitioner of the directions (the submissions were to include an address on a jurisdictional question arising from the application of Article 234(2)(i) of the Constitution).

8. The submissions were not on record by the agreed timelines. Nevertheless, the Court will examine the jurisdictional question.

Jurisdiction

9. Article 234(2)(i) of the Constitution bestows upon the Public Service Commission the mandate of hearing and determining appeals from certain decisions of a county public service board.

10. To give effect to the mandate, the legislature enacted the County Governments Act and the Public Service Commission Act, 2017.

11. It is not in dispute that the gravamen of the Petitioner's grouse revolves around the purported exercise of disciplinary powers by the Respondents to terminate his appointment.

12. Section 77 of the County Governments Act provides:

Appeals to the Public Service Commission 77(1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in the 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 the employment of a person in a county government, including a decision in respect of —

(a)

(b)

(c) disciplinary control;

(d)

(e) retirement and other removal from service;

(f)

(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.

13. On the other hand, section 87(2) of the Public Service Commission Act provides that:

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.

14. The above statutory provisions leave no doubt that the first port of call for a county public officer whose appointment has been terminated or who has been removed from office is through an appeal to the Public Service Commission of Kenya.

15. Such an approach was endorsed by the Court of Appeal in *Secretary, County Public Service Board & Ar v Hulbhai Gedi Abdille* (2017) eKLR wherein the Court stated:

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 specialised one, specifically tailored by the legislators to meet the 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 than resort to the judicial process in the first instance.

16. The decision by the Court of Appeal which binds this Court is in consonance with an earlier decision by the same Court in *Speaker of the National Assembly v Karume* (1992) KLR 21 that:

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.

17. The Petitioner did not disclose or show that he had exhausted the appeal procedures as set out in the Supreme Law and contextualised in the County Governments Act and the Public Service Commission Act.

Conclusion and Orders

18. Without the first instance jurisdiction and no demonstration of any exceptional circumstances, the Court has to regrettably down its pen.

19. The Petition is struck out with costs to the Respondents.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 11TH DAY OF APRIL 2022.

RADIDO STEPHEN, MCIARB

JUDGE

APPEARANCES

FOR PETITIONER TRIPLE OK LAW LLP, ADVOCATES

FOR RESPONDENTS OLENDI, ORARE & SAMBA, LLP ADVOCATES

COURT ASSISTANT CHRISPO AURA