



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT BUNGOMA

PETITION NO. E009 OF 2021

CATHERINE GATHONI OTENYO.....PETITIONER

VERSUS

THE GOVERNOR,

COUNTY GOVERNMENT OF KAKAMEGA.....1ST RESPONDENT

THE KAKAMEGA COUNTY PUBLIC SERVICE

BOARD.....2ND RESPONDENT

THE COUNTY GOVERNMENT OF KAKAMEGA.....3RD RESPONDENT

CATHERINE RAINI OMWENO.....4TH RESPONDENT

RULING

1. The Ruling is on the Notice of Preliminary Objection dated 12th November 2021 against the Notice of Motion Application by the Petitioner dated 1st November 2021 filed by Law firm of Behan & Okero Advocates seeking the following reliefs: -

(a) Service of this Application be dispensed with for the hearing hereof exparte in the first instance for the issue of temporary orders in terms of prayer 2 pending the hearing inter parties hereof.

(b) Conservatory orders do issue against the Respondents restraining them, their employees, servants and/or agents from advertising for applications to the office of Secretary and Chief Executive Officer of the Kakamega County Public Service Board and from taking any step towards the recruitment or installation of the Petitioner's replacement as Secretary and Chief Executive Officer of the Kakamega County Public Service Board pending the hearing and determination of the Petitioner's appeal to the Public Service Commission from the purported termination of her appointment as such and removal from said office.

2. The Application is supported by the affidavit of Catherine Gathoni Otenyo, the Petitioner, sworn on the 1st November, 2021 and grounds stated therein. The Applicant annexed documents in support of the Application to her Affidavit. Together with the Application the Applicant filed Petition dated 1st November 2021 and filed on the 4th November 2021.

3. Prayer 1 of the Application is spent.

4. The Respondents through the County Attorney Office entered appearance and filed Notice of Preliminary Objection in response to the Application dated 12th November 2021 . The Respondent seeks for the striking out of the Application on the following grounds:-

(a) That the matter has been commenced unprocedurally and is thus fatally defective as there is no petition properly before court for determination.

(b) That the application as filed offends Rule 7 (1) of the Employment and Labour Relations Court(Procedure) Rules, 2016 and rules 10 (1) and 19 of the Constitution of Kenya (protection of Rights and Fundamental Freedoms) practice and Procedure Rules, 2013 for being filed without a substantive petition outlining the alleged contravention of rights or fundamental freedoms rendering it incurable, untenable and a clear abuse of court process.

(c) That this Honourable Court lacks jurisdiction to entertain this petition as (by the Petitioner's own admission), an appeal brought under the provisions of Section 77 of the County Government Act, 2012 is currently pending before the Public Service Commission and the Petitioner seeks to mischievously to bypass the available mandatory alternative employee disciplinary mechanisms as provided for by the following provisions of the law namely:-

- Article 234(2)(a)(c) of the Constitution of Kenya

- Sections 85(c) and 87(2) of the Public Service Commission Act, 2017 which provides for hearing and determination of appeals in respect of County Government Public Service by the Public Service Commission and prohibits any legal proceedings in any court of law before exhaustion of the procedure therein.

d. That Regulations 9,10,11,12,13,15,16, 17 and 21 of the Public Service Commission (County Government Public Services Appeals Procedures) Regulations, 2016 provides for the procedure of lodging and Hearing appeals and the timelines involved in an appeal before the Public Service Commission.

e. That the Application and this matter is premature , misplaced, incurably defective , incompetent, a blatant abuse of court process and cannot stand on its feet thus ripe for striking out with costs.

5. On the 11th February 2022 the court gave directions for the Preliminary Objection to be canvassed by way of written submissions. The parties filed their written submissions. The Applicant's /Petitioner submissions are dated 14th January 2022 and filed on same date. The Respondent's submissions are dated 22nd December 2021 and filed in court on the 6th January 2022.

DETERMINATION

6. *On Grounds 1 and 2 of the Preliminary Objection.*

The Respondent objects to the Application for being fatally defective and for being filed without a substantive petition. The court on Perusal finds that the Applicant filed a Petition dated 1st March 2022 on the 4th November 2021 concurrently or together with the Application.

The Respondent submits that there ought to be a petition under Rule 7 (1) of the Employment and Labour Relations Court (Procedure Rules) 2016 and Rules 10 (1) (19) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 and this the application is defective for being filed without a substantive petition outlining the alleged contravention. The Petitioner/Applicant submits that Grounds 1 and 2 of the preliminary objection are based on factual misrepresentation and relies on the Petition dated 1st November 2021 filed together with the Application.

7. The court on perusal of the pleadings finds that the Applicant filed a Petition on 4th November 2021. The Petitioner pleads on matters within the jurisdiction of the Public Service Commission as they all concern her terms of service and states her grievance. The court finds that there is a petition on record hence no basis for grounds 1 and 2 of the Preliminary Objection.

8. Grounds 3 and 4 relate to the question of jurisdiction of the Court to grant the Conservatory order sought under the Application.

The Respondent submits that an appeal is pending before the Public Service Commission (PSC) under Section 77 of the County Governments Act 2012. That the Public Service Commission jurisdiction to handle appeals in respect of decision of County Governments Public Service Board is provided for under Article 234 (2) (a) (c) of the Constitution of Kenya and Section 85 (c) and 87 (2) of the Public Service Commission Act of 2017.

The Respondent further submits that Regulations 9,10,11,12,13 15,16.17 & 21 of the Public Service Commission (County Government Public Services Appeals) Procedural Regulations 2016 provide for the procedure of lodging and hearing appeal and the timeline involved in an appeal before the Public Service Commission. The Respondent submits that Article 234 (2) (a) (i) of the Constitution is couched in mandatory terms. The Respondent submits that the Applicant rightly filed appeal before Public Service Commission but jumped gun by filing instant application before the outcome of the appeal by Public Service Commission.

9. The Court opines the grounds 3 & 4 raised question of the jurisdiction this court. The Applicant submits that the petitioner does not seek by the Petition a resolution as to whether or not the termination was lawful. That is not the issue before court. The Applicant submits that the relief sought concerns only the issuance of conservatory orders pending hearing and determination of her appeal aforesaid to preclude recruitment of her successor, which order she submits the Public Service Commission has no power or jurisdiction to grant. The Applicant relies on the decision of Justice *Byran Ongaya in Abdikadir Suleiman -vs- County Government of Isiolo & Another (2015) eKLR* where the Judge held at page 3 last paragraph as highlighted that, in part, " *It is this court's opinion and holding that in appeals to the Commission, the Commission can only make decisions that the County Public Service Board or relevant lawful authority could have made or vary such decision by simply setting aside or making a decision that was in the Board's or the other relevant lawful authority's jurisdiction to make. .*

The court has guided itself that on appeal the appellate authority applies the same substantive law and facts as applied by the Primary authority that made the decision appealed against and generally considers facts as they were presented before the primary authority so that the appellate authority in absence of anything else may only set aside the decision appealed against or substitute the decision with any of the remedies that the primary authority was empowered to make, in other words, the appeal process deals with the merits or substance of the case and not procedural or legal propriety of the case".

10. The court in that case held it had jurisdiction on the claim on merit as constitutional and legality issues on the dismissal were raised. This court is not pursued with the opinion of that court as such action by the Court is tantamount to meddling with the jurisdiction of the Public

Service Commission as granted under the constitution and statutes. Further, the court also notes that the cited case is different from the instant case as the appeal is pending before the Public Service Commission.

11. This court has in the recent past addressed itself on similar application and held it has no jurisdiction to grant conservatory orders on matters falling under Public Service Commission jurisdiction pursuant to Section 77 of the County Governments Act, 2012. In the Case of *Oliver Mukhebi & 28 others -vs- County Public Service Board of Bungoma & Another* (2022) eKLR, this court considered in detail the jurisdiction of this court on a similar application . In that case the court upheld the decision in *Owners of the Motor vessel “ Lilian S” -vs- Caltex Oil (Kenya) ltd (1989) eKLR* the decision of Nyarangi JA on jurisdiction being everything and that without it the court must down its tools.

12. The court appreciated it has original and appellate jurisdiction in all Employment and Labour matters including Constitutional issues under such matters pursuant to Article 162 (2) (b) of the Constitution. In the *Oliver Mukhebi Case (supra)* the court considered the decision of the Court of Appeal in the case of *Secretary County Public Service Board and another -vs- Hulbhai Gedi Abdalla (2017) eKLR Makhandia, Ouko, Minoti (JA)* where the court allowed appeal as Respondent had failed to utilize the process under Section 77 of the County Government Act. The Court of Appeal also further stated that Section 77 of County Governments Act has placed no fetter to the jurisdiction of the Public Service Commission. Since there is no fetter to its powers, this court is of the considered opinion that the conservatory orders sought by the Petitioner from this court to preserve a position is not merited.

13. In the aforesaid *Oliver Mukhebi case*, the court opined that for it to grant conservatory order as sought it needed to establish there is a prima facie case in the appeal and without jurisdiction over the appeal against the decision of the Respondent. It has no way of establishing a prima facie case within the threshold established under the Giella Cassman Brown Case. The court found it had no basis to grant the conservatory order as doing so would be tantamount to usurping or meddling with the jurisdiction of Public Service Commission.

14. This court has not found a reason in the instant application to deviate from the Oliver Mukhebi case decision in the instant case. The Court upholds its own decision in *Oliver Mukhebi & 28 others -vs- County Public Service Board of Bungoma & Another* (2022) eKLR, and holds it has no jurisdiction to grant the conservatory orders sought in the Application and Petition and upholds the Preliminary Objection on basis of lack of jurisdiction.

15. Consequently the Application dated 1st November 2021 is dismissed and the Petition dated 1st November 2021 struck off.

16. Costs to the Respondent.

17. The orders of this court dated 5th November 2021 are hereby vacated.

DATED, SIGNED AND DELIVERED AT BUNGOMA COURT THIS 17TH DAY MARCH, 2022.

J.W.KELI,

JUDGE.

IN THE PRESENCE OF:-

COURT ASSISTANT: MS WESONGA

FOR APPLICANT /PETITIONER: MR. OKERO.

FOR RESPONDENT: WABUKO holding brief for MMBAKA ADVOCATES