



Ojode v Kenya National Shipping Line Limited & another (Cause E009 of 2024) [2024] KEELRC 1407 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEELRC 1407 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E009 OF 2024**

**M MBARŪ, J
MAY 23, 2024**

BETWEEN

JOSEPH JUMA OJODE CLAIMANT

AND

KENYA NATIONAL SHIPPING LINE LIMITED 1ST RESPONDENT

BOARD OF DIRECTORS, KENYA NATIONAL SHIPPING LINE

LIMITED 2ND RESPONDENT

RULING

1. The ruling herein relates to the Notice of Preliminary Objections by the respondents dated 15 April 2024 on the grounds that;
 1. The claimant’s amended claim and application offend the provisions of section 9(2) of the *Fair Administrative Action Act* because the claimant has failed to exhaust all remedies and dispute resolution mechanisms available under the provisions of the Public Service Commission Act as read together with the provisions of the *Employment and Labour Relations Court Act* before filing the amended claim and application.
 2. Before bringing the amended claim and application, the claimant has failed to invoke and exhaust the following statutory mechanisms and legal remedies for dispute resolution provided under the law as follows;
 - a. Section 15(1) and (4) of the *Employment and Labour Relations Court Act* states that ...
 - b. Sections 59, 60, 61, 74(1) and 75(10) of the *Public Service Commission Act* and Section 12 of the *Employment and Labour Relations Court Act* provide as follows ...
 3. The 1st respondent is a state corporation incorporated under the provisions of Section 3 of the *State Corporations Act* and the claimant’s service at the 1st respondent is within the meaning of



public service as provided under article 232(2)(b), 233, 234 and 260 of the Constitution and Section 2 of the Public Service Commission Act. This fact is expressly pleaded and admitted by the claimant in paragraphs 2 and 3 of his amended memorandum of claim.

4. In respect to matters touching on inter alia disputes arising from a recruitment process at the 1st respondent, the payment of remuneration and provisions of other conditions of service and general exercise of disciplinary control by the 2nd respondent including the imposition of a surcharge against the claimant as a public officer, the Employment and Labour relations Court is the appellant Court and not a court of first call. The ELRC does not have jurisdiction to hear and determine disputes relating to the exercise of disciplinary control of public officers in the first instance.
 5. Consequently, this court lacks jurisdiction to hear and determine the claimant's amended claim and application dated 26 March 2024 and the same should be struck out with costs for being an abuse of the court process.
2. In response, the claimant filed his Grounds of Opposition that;
1. This court has jurisdiction to hear and determine the claim in view of the provisions of Article 162(2) (a) and Section 12 of the Employment and Labour Relations Act.
 2. The court has jurisdiction since there is an employer-employee relationship between the claimant and the respondent.
 3. The preliminary objections herein are bad in law as the respondent is on a fishing expedition citing laws not substantive to state corporations: County Government Act, and Public Service Commission Act, it did not state with specificity under what order or statutory provision it was made.
 4. The preliminary objection herein is in view of section 59 as read together with sections 60, 61 and sections 74(1) and 75(1) of the Public Service Commission Act as read together with Section 12(5) of the Employment and Labour Relations Court Act an abuse of the due and court process of law and ought to be struck out and dismissed with costs.
 5. The petitioners' orders or statutory provisions cited fail to satisfy the legal threshold of establishing a preliminary objection that issues raised are not free from difficulty, therefore the court is obligated to take into account facts that require *viva voce* evidence upon hearing.
 6. The objections ought to be struck out with costs.
3. Both parties field written submissions and attended court for oral highlights. The totality of these submissions is analyzed and the issues which merge for determination are whether the court has jurisdiction to hear the instant claim based on the provisions of Section 15(1) and (4) of the Employment and Labour Relations Court Act, 2011 (the ELRC Act), Sections 59, 60, 61, 74(1) and 75(10) of the Public Service Commission Act, and 232(2)(b), 233, 234 and 260 of the Constitution.
4. The gist of the claimant's amended claim is that he was employed as an accountant by the 1st respondent on 19 March 1999 and on 23 January 2012 he was appointed acting managing director. In the year 2022, an audit was conducted by the office of the Auditor General who issued a letter dated 26 January 2023 citing irregularities in the 1st respondent remuneration scheme as well as the prolonged acting appointment of the claimant as the acting managing director.
5. The claimant's case is that the 2nd respondent responded to the Office of the Auditor General admitting that the amounts paid to him in his salary were beyond what the Salaries and Remuneration



Commission had determined and that it would be recovered from him by way of a surcharge until full payment, the earning in salaries, telephone and housing allowance and the acting managing director earned for 7 years be revoked and revised downwards.

6. The claim is that these findings and resolutions are unfair and unlawful and the surcharge is a disciplinary issue imputing wrongful conduct on the part of the claimant. He is seeking an injunction stopping the surcharge or other disciplinary action arising out of the salaries paid during the tenure of the acting managing director and claims for Ksh.22, 578,765.95 payment for services rendered, acting allowances and general damages for unfair labour practices.
7. The court is conferred with jurisdiction to hear and determine employment and labour relations disputes and for connected purposes under the provisions of Article 162(2)(a) of the [Constitution](#) read together with Section 12 of the [ELRC Act](#) and any other statute that regulates employment and labour relations as held in the case of [Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees & 13 others](#) (Petition E004 & E002 of 2023 (Consolidated)) [2024] KESC 3 (KLR) (21 February 2024) (Judgment) that;

Pursuant to article 162(2)(a) of the Constitution, the ELRC was operationalized by the Employment and Labour Relations Court Act No 20 of 2011, whose purpose is to “establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations”.

By dint of section 12(1) of the Act, the jurisdiction of the court is delineated as follows: 12. Jurisdiction of the court ...

Section 12(2) of the Act provides that:

“An application, claim, or complaint may be lodged with the court by or against an employee, an employer, a trade union, an employers’ organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.”

8. From the above provisions of the Constitution and the Act, it is clear that the jurisdiction of the ELRC is limited in terms of the types of disputes and the parties. ...
9. The claimant being an employee of the 1st respondent, the claimant relating to his employment, there exists an employee and employer relationship. The primary forum to agitate his case is this court.
10. It is however recognized that parties are allowed internal mechanisms of dispute resolution and where available to utilize them before invoking the judicial process.
11. The respondents have relied on the provisions of Section 15(1) and (4) of the [ELRC Act](#) to urge this court that there is no jurisdiction pending the claimant applying the internal methods for dispute resolution first.
12. With respect, the motions of Section 15 of the [ELRC Act](#) only come alive after parties are in court. Upon filing his claim, parties are at liberty to seek to apply alternative dispute resolution mechanisms and report back to court as held in [Teachers Service Commission \(TSC\) v Kenya Union of Teachers \(KNUT\) & 3 Others](#) [2015] eKLR that;

... Section 15(1) of the Employment and Labour Relations Court Act provides as follows:-

“Nothing in this Act may be construed as precluding the court from adopting and implementing, on its own motion or at the request of the parties, any other



appropriate means of dispute resolution, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution.” (Emphasis mine).

The said Article 159(2) (c) provides as follows:-

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

- (c) Alternative forms of dispute resolution including reconciliation mediation, arbitration and traditional dispute resolution mechanisms shall be promoted
...

Hence, the motions for Section 15 of the ELRC Act at that;

15 Alternative dispute resolution

- (1) Nothing in this Act may be construed as precluding the court from adopting and implementing on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159 (2) (c) of the Constitution.
- (2) ...
- (3) ...
- (4) If at any stage of the proceedings, it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration.

13. Upon filing suit, on its motion or upon being moved by the parties, the court is allowed to stay proceedings pending conciliation or mediation. These motions do not in any manner deny the court its original jurisdiction to hear and determine an employment or labour relations dispute.

14. With regard to the provisions of Sections 59, 60, 61, 74 (1) and 75(1) of the Public Service Commission Act, the dispute herein relates to the alleged unfair and unlawful application of unfair labour practices against the claimant. These are matters within the exclusive jurisdiction of the court and removed from the Public Service Commissions. The application of Section 59 through personnel practices or section 60 with regard to investigations or section 74 with regard to appeal cannot in my humble view resolve such matters outside the court.

15. It is not in dispute that there exists an employment relationship between the claimant and 1st respondent. The motions of his being in the public service and regulated under the provisions of Article 232 on the values and principles of public service and whether the Public Service Commission is the body to address his case first while this court should be moved on appeal, these are questions of fact even though addressed as constitutional questions.

16. I have gone through the cited authorities by the respondents, particularly the case of Secretary, County Public Service Board & another v Hulbbai Gedi Abdille [2017] eKLR, with respect, the motions of Section 77 of the County Government Act, 2012 were well gone into by the Court of Appeal, the claimant is an employee of the 1st respondent noted to be a state corporation. Whereas the Public Service Commission is given mandate to address appeals with regard to matters arising from disciplinary cases from County Governments, employees of State Corporations are not regulated



under this statute. Indeed under Article 243 of the Constitution, the Public Service Commission is mandated to uphold the principles and values of public service under Article 232 of the Constitution but each case must be given context.

17. Indeed the respondents will cite the case of Katiba Institute & another v Attorney General & another [2020] eKLR where the High Court analyzed the different levels of government and that employees of the national government and county governments are in the public service and hence their remuneration is not generated from the Consolidated Fund as public officers. A public officer is defined under Article 260 of the Constitution as outlined in the case of Manyara Muchui Anthony v Communications Authority of Kenya & 3 Others [2022] eKLR. These citations only give credence to the fact that the mandate of the Public Service Commission is constitutional but must be addressed in the context of each case.
18. Upon the amendment of the claim, the respondents will have a fair chance to respond and urge their response to the allegations made by the claimant.
19. Before the commencement of the hearing, parties are at liberty to apply the motions of Section 15 of the ELRC Act.
20. Objections dated 15 April 2024 addressed above are found without merit and are hereby dismissed. The court will hear the claim on the merits.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 23 DAY OF MAY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant:

..... and

