IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 202 OF 2015

BETWEEN

THE SECRETARY,

COUNTY PUBLIC SERVICE BOARD .....1ST APPELLANT

THE SECRETARY,

WAJIR COUNTY GOVERNMENT……..……2ND APPELLANT

AND

HULBHAI GEDI ABDILLE……RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (G.V.Odunga, J.)

in

J.R Appl. No. 271 of 2014)

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JUDGMENT OF THE COURT

By an advertisement carried in the *Daily Nation* newspaper of 24th July, 2013, the respondent learnt that the County Government of Wajir intended to recruit competent and qualified persons to fill vacant positions of sub-county administrators and deputy sub-county administrators. The position of sub- county administrator for Wajir East caught her eye. Satisfied that she met the criterion, she applied for the position. On the 29th April, 2014, she was amongst the candidates shortlisted for the position and was invited for an interview. Following the interview, successful applicants were hired to fill the respective posts with the respondent being left out without any communication to her whatsoever. This did not sit well with the respondent, who felt that some of the individuals hired and in particular the person appointed to be the sub-county administrator for Wajir East, had lower qualifications to hers. In her view, the only discernible reason why the successful candidate had beaten her to the position was that the appellants were engaging in concerted efforts to lock her out of the job solely because she came from a minority Somali clan in Wajir. To add salt to the injury, her discriminatory and ethnically motivated exclusion from

employment notwithstanding, the recruitment exercise had seen an increase of the posts filled from the advertised six to eight. Further, that out of the twenty-four shortlisted applicants for the post, she was the only woman and was nonetheless left out.

Consequently, she felt that the respondents' conduct smacked of a blatant abuse of the principles of natural justice, gender equality and a transgression of the established procedures. With this in mind, she instituted in the High Court at Nairobi, Judicial Review proceedings seeking the following:-

> **"1. An order of certiorari to remove to the High Court for purposes of quashing the decision to appoint sub-county administrators, deputy sub-county administrators and the non advertised positions of deputy director sub-county administrator units and assistant director sub-county administrator units pursuant to a list of the officers appointed on 9th June 2014 and published on 12th June 2014.**
>
> **2. An order of prohibition to prohibit the 2nd respondent from implementingandorgazettingthedecisionof recruitment/appointment of 9th June, 2014 and subsequently carrying out such unlawful and unprocedural recruitment exercises in future without any legal justification.**
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> **3. Any other order that the Honourable court may deem fit and just to grant.**
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> **4. The costs of this application are provided for."**

The action was commenced through a Notice of Motion dated 16th July, 2014 which was filed pursuant to leave granted on 11th July, 2014. In support of the motion were verifying and supplementary affidavits sworn by the respondent on 10th July, 2014 and 1st December, 2014. Reiterating her sentiments aforesaid, the respondent added that the respondents had compromised the transparency of the process, by later creating and recruiting for positions that were never advertised, with the recruited persons having neither been interviewed nor shortlisted for any such positions. This she said, was a violation of the provisions of **Sections 66** and **68** of the **County Governments Act No. 17 of 2012**.

The application was opposed, with the 1st appellant filing a replying affidavit sworn on 14th August, 2014 by **Shukri Alasow Mohamed**. According to the 1st appellant, the proceedings were premature, given that, the decision complained of was made pursuant to the mandate conferred upon the 1st appellant by **Section 63** of the Act. As such, any appeal against such decision lay at first instance, with the Public

Service Commission, as per **Section 77** of the Act. As a result, the 1st appellant maintained, the court as moved lacked jurisdiction to entertain the dispute.

With regard to the positions advertised, it was deponed that the board had not only advertised posts for sub-county administrators, but for deputy sub-county administrators as well. Consequently, the allegation that some people had been appointed to an unadvertised positions was false. Further, that in a meeting held on 13th December 2013, the 1st appellant had resolved that the qualification and experience requirements would be strictly adhered to and that applicants who did not meet the threshold would not be considered for the positions. It was also said that during the meeting it was established that there were a total of 143 applicants for the 6 sub-county administrator positions where 33 (the respondent included), were short-listed. On the other hand, 47 individuals were shortlisted for the deputy sub-county administrator posts and that all persons shortlisted met the qualifications requirements. Thereafter, the Board published the names of all those short listed for both positions together with a schedule for the interviews. Following the interviews, the 1st appellant held a meeting on 6th June, 2014, where

the score sheets for the interviews were tabled and discussed following which the successful candidates were appointed. In light of all this, the 1st appellant deposed that the entire process was transparent and above board.

The 1st appellant however added that aside from the advertised positions, it had deemed it fit and well within its powers under **Section 69** of the Act, to create two additional job titles, whose holders would be tasked with the duty of coordinating the activities of the sub-counties. The first position so created was that of deputy director in charge of sub-county administration, where one candidate was appointed while the second position was that of assistant director in charge of sub-county administration units, to which three individuals were appointed. The 1st appellant was also quick to add that in order to save time and resources, the board decided to select the deputy director and assistant directors aforesaid from the pool of candidates who had already been interviewed for the positions of sub-county administrators and deputy sub-county administrators in observance of **Section 69** of the Act. As such, all those appointed had been competitively interviewed and no new candidates had been introduced as alleged. In conclusion, the 1st appellant deposed that the allegations of discrimination leveled against it by the respondent were untrue, as it had not only complied with the Constitution and all legal provisions, but that it always strives for gender and ethnic balance in its recruitment, as evidenced by its employee database. With that, the 1st appellant sought the dismissal of the application with costs.

Equally opposed to the application was the 2nd appellant, who by an affidavit sworn by one **Abdirizak Sheikh** on 8th August, 2014 contended that the respondent was non-suited as against it, as it had no role in the impugned recruitment process. Secondly, that the application was in any event premature and against the provisions of **Section 77** of the Act. Similarly, the 2nd appellant sought dismissal of the application with costs.

Reacting to these depositions, the respondent, through her supplementary affidavit, maintained that the 2nd appellant was properly sued on behalf of the Wajir County Government, as even by the 2nd appellant's own admission she was in-charge of the public service of the County Government. As the in-charge, she should neither turn a blind eye to an irregularity in the appointment process nor accept staff who had been unlawfully recruited. The respondent further deposed that the recruitment process was highly discriminative, full of nepotism and that most of the appointees were absorbed on the basis of being related to the officials of the respondents, which explained why some of the key positions under challenge were never advertised. That the entire process was rigged to weed her out of any of the positions. To her, the minutes dated 6th June, 2014 were a smoke screen calculated to defeat the intention of the application before court and to cover up the irregularity already committed. Her position was that the respondents failed, avoided and neglected to advertise the positions of a Deputy Director and Assistant Deputy Directors in a deliberate scheme to bar her from applying and being considered for the same.

On the choice of forum, the respondent contended that since no communication was proffered as to why she was unsuccessful in being offended the job, she could not pursue the appeal under **Section 77** of the Act, but could only seek the remedy of judicial review since she was challenging the process and not the merits thereof. On this proposition, she focused on the case of **Republic vs. Chairperson Business Premises Rent Tribunal exp Ibrahim Sheikh Abdulla & 2 Others [2015] eKLR**, for the holding that there is no requirement that an applicant for judicial review must exhaust all other available remedies. Lastly, she deposed that **Article 174(e)** of the **Constitution** provides that the objects of the devolution of Government were, *inter alia*, to protect and promote the interests and rights of minorities and marginalized communities and the same had been violated. Similarly, that **Article 232** which sets out the values and principles of public service including accountability for administrative acts and representation of Kenya's diverse communities as well as affording adequate and equal opportunities for

appointments had also been violated.

The application proceeded by way of written submissions. In a reserved judgment delivered on 17th July 2015, **Odunga J.,** found that the court had jurisdiction to entertain the application and that while the respondent's claim could not succeed on grounds of gender discrimination, tribalism and nepotism, it nonetheless succeeded in part on account of the unadvertised posts that were filled. In view of this, while disallowing the prayer for an order of prohibition, the learned judge granted an order of *certiorari* together with costs as earlier stated.

Displeased with this outcome, the appellants lodged the present appeal, in which they contend that the learned judge erred; when he entertained judicial review proceedings yet the court lacked jurisdiction under **Section 77** of the **Act**; when he allowed the application yet the respondent was non-suited against the 2nd appellant; when he allowed the respondent's application which was challenging the merits and not the procedure of the 2nd appellant's decision; when he disregarded the binding decision of this Court in the case of **Speaker of the National Assembly v. Karume [1990-1994] EA 549**; when he disregarded the provisions of **Order 53 rule 3(2)** of the **Civil Procedure Rules** by revoking the appointments made by the Wajir County Public Service Board despite the respondent's failure to serve the affected persons with the application; when he granted an order of *certiorari* without affording the affected persons a hearing contrary to **Article 47** of the **Constitution**; by allowing the application despite having dismissed the grounds upon which it was premised; when he quashed appointments that had been lawfully carried out under the provisions of **Sections 63** and **65** of the **Act**; when he disregarded the evidence and reasons tendered by the Wajir County Public Service Board in making appointments as per its statutory mandate; and lastly, that the learned Judge erred when he exercised his discretion improperly.

Following a case management conference held on 4th October, 2016, parties agreed to argue the appeal through written submissions and limited highlights. However, on the hearing date, parties were content with their respective written submissions and did not wish to highlight.

Being a first appeal, we are enjoined to reconsider the proceedings afresh, evaluate them and draw our own independent conclusions being cognizant however of the fact that we should not interfere with findings of fact by the trial court unless they were based on no evidence or on a misapprehension of the evidence or the trial judge is shown demonstrably to have acted on wrong principles in reaching his findings. (See **Ephantus Mwangi & Another v. Duncan Mwangi Wambugu [1982- 88] 1 Kar 278).**

That said, the central issue for determination in this appeal is whether the trial court had the jurisdiction to entertain the application. Being a jurisdictional question, it has to be determined first, for should we find that indeed the court lacked jurisdiction, we shall not need to consider the other grounds of appeal. The contrary will follow in the event that we find otherwise.

The appellants maintain that the respondent's application was premature, on account of the respondent not having first lodged an appeal to the Public Service Commission as required by the provisions of **Section 77** of the Act. This submission has been discounted by the respondent, who maintain that since she had been given no reasons for her non-recruitment, she could not have pursued the appeal and the application filed before court was her only viable option for redress. Secondly, that the presence of an alternative remedy to judicial review does not preclude her from opting for judicial review instead.

Section 77 of the Act provides for an avenue for appeals against the decisions of County Service Boards to the Public Service Commission. In particular, **Section 77(1)** provides *inter alia*:-

> **"Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of the disciplinary**

control against any public officer may appeal to the Public Service Commission against the decision."

Section 77(2) is in terms:-

"The Commission shall entertain appeals on any decision relating to-

a) Recruitment, selection, appointment and qualifications attached to any office;

b) ……

c)……

d) ……

e) ……

f) ……

g) ……"

It is thus without doubt that an appellate procedure has been provided for by statute to address grievances such as those raised by the respondent. The issue is whether, the appeal, as a dispute resolution mechanism should have been invoked and or exhausted before the respondent thought of approaching the High Court by way of judicial review.

The learned judge in his judgment conceded: "***I agree that where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first***…." However, the learned judge thereafter appears to have turned what was a simple and straightforward judicial review application into a constitutional petition when he opined thus:

> **"……The right to access this Court should not be impeded or**
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> **stifled in a manner that frustrates the enforcement of fundamental rights and freedoms except in the circumstances noted in Belfonte** (supra). **The applicant instituted these proceedings claiming breach of her rights and fundamental freedoms. The mandate and jurisdiction to determine that question lies in this Court under Articles 22, 23 (3) and 165(3) of the Constitution. The Board, in my view, does not have the jurisdiction to determine alleged violations of the Constitution…."** (Emphasis provided)

In our view, this was a gross misdirection on the part of the learned judge. The respondent's claim was not initiated on the basis of violation of fundamental rights and freedoms or alleged violation of the Constitution. The respondent's case was that the process of recruitment was flawed and not in accord with the Act. Indeed, in her own pleadings, she is categorical that she was not challenging the merits of the decision but rather the process. If the considerations of enforcement or breach thereof of the fundamental rights and freedoms were to come into play, then the challenge on that basis will be a matter of merit. Is it also not surprising therefore that even in the body of the application, the respondent does not cite any of the articles of the Constitution that were violated or breached; nor did the respondent in her initial affidavit in support of the application demonstrate how and in which manner her fundamental freedoms and rights were breached or violated in the recruitment exercise? Reference to the Constitution only came through the supplementary affidavit and was merely peripheral. It is therefore apparent that the learned judge misapprehended the essence of the respondent's case, took a totally different tangent which resulted in a decision that ran counter to the respondent's real

case.

Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime. In the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR**, this Court emphasized:-

> **"….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. We observed without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.…"**

Similarly, in the case of **Republic v National Environment Management Authority *exparte* Sound Equipment Ltd, [2011] eKLR**, this Court observed:-

> **"…..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…."**

This authority obviously puts to rest the submission by the respondent that she need not have exhausted all other available remedies before suing the appellants for judicial review.

Still on the same note, and even if this had been a constitutional petition as the learned judge assumed, this Court in the case of **Daniel N. Mugendi v Kenyatta University & 3 Others [2013] eKLR**, stated:-

> **"……Citing the case of Alphonse Mwangemi Munga & Others**
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> **vs. African Safari Club Ltd [2008] eKLR, the learned judge was persuaded that the Constitution had to be read together with other laws made by Parliament. It should not be so construed as to be disruptive of other laws in the administration of justice and that accordingly parties should make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the constitutional court and making constitutional issues of what is not. With all the foregoing, the learned judge concluded that the claim**
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> **placed before her by the appellant was based on employment-a matter that should have instead been taken to the Industrial Court which had constitutional and statutory jurisdiction over such matters and not the High Court in the form of a constitutional reference**."

On the basis of the foregoing, the constitutional petition could not have seen the light of the day as well.

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 specialized one, specifically tailored by the legislators to meet 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 rather than resort to the judicial process in the first instance. In terms of **Republic v National Environment Management Authority** (*supra*), we discern no exceptional circumstances in this appeal that would have warranted the bypassing of the statutory appellate process by the respondent. Her contention that she disregarded the appeal because it could not afford her an opportunity to question the procedure followed by the appellant is in our view, without basis because **Section 77** has placed no fetter to the jurisdiction of the Public Service Commission. There is no requirement for instance that reasons for the decision be availed to an aggrieved party before he can prosecute an appeal before it.

It does not also matter that an applicant in judicial review proceedings need not exhaust all other available remedies. The invocation of judicial review jurisdiction of the court was in the circumstances premature and uncalled for. The first ground of appeal therefore succeeds.

The appeal accordingly is allowed, the judgment and decree of the High Court dated 17th July, 2015 is set aside and *in lieu* thereof we order that the Notice of Motion dated 16th July, 2014 be and is hereby dismissed with costs. The respondent shall also bear the costs of this appeal.

Dated and delivered at Nairobi this 24th day of March, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

…….……...

JUDGE OF APPEAL

K. M'INOTI

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR