



**Shukare v County Government of Kajiado & 4 others (Cause E613 of 2023)
[2024] KEELRC 13199 (KLR) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13199 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E613 OF 2023
SC RUTTO, J
NOVEMBER 22, 2024**

BETWEEN

OLUBI J SHUKARE CLAIMANT

AND

COUNTY GOVERNMENT OF KAJIADO 1ST RESPONDENT

KAJIADO COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

**COUNTY ADMINISTRATIVE COMMITTEE MEMBERS-PUBLIC SERVICE &
ADMINISTRATION 3RD RESPONDENT**

KAJIADO COUNTY ASSEMBLY 4TH RESPONDENT

FINANCE CHIEF OFFICER 5TH RESPONDENT

RULING

1. The Claimant herein filed a Statement of Claim which was amended on 11th April 2024, in which he avers that on 21st April 2020, he was appointed as a Deputy Budget & Economic Planning on a contract term of three years with effect from 1st May 2020. The contract was expected to lapse on 1st May 2023.
2. According to the Claimant, he was an exemplary employee who carried out his duties with faithfulness, diligence and professionalism thereby fulfilling the demands of his job.
3. Owing to his sterling performance and competency in service delivery, the Respondents reassigned the Claimant new duties vide a letter dated 27th January 2022. He continued to execute his duties professionally and with diligence.
4. In the month of December 2022, the 1st Respondent stopped paying his salary and other benefits despite his contract subsisting. That the Respondents further stopped assigning him duties with no explanation.



5. Vide a letter dated 1st February 2023, he sought the intervention of the 2nd and 3rd Respondents.
6. Having received no response from the 3rd Respondent, the Claimant sought clarification over the same by lodging a complaint dated 28th March 2023 with the county labour office. However, the Respondents blatantly refused and or ignored to give an explanation to his concerns.
7. In the Claimant's view, this was in blatant violation of the Respondent's Employment Policy. He further believes that he was constructively dismissed amounting to unfair termination of his employment.
8. It is against this backdrop that the Claimant has asked the Court to grant him a number of reliefs being payment of salary for six months from December 2022 to May 2023, gratuity, severance pay, compensation for unfair treatment in accordance with Section 49 of the Employment Act, compensation for traumatic experience and emotional distress, as well as costs of the suit plus interest.
9. Upon being served with the Statement of Claim, the 1st, 3rd and 5th Respondents filed a Response dated 10th January 2024.
10. Subsequently, the 1st, 3rd and 5th Respondents filed a Notice of Preliminary Objection dated 14th May 2024 in which the following grounds were raised:
 1. That the cause has been filed prematurely, hence contravenes Section 77 of the County Government Act, No. 11 of 2012, Laws of Kenya.
 2. That this Honourable Court lacks jurisdiction to entertain the Claimant's cause dated 1st August 2023.
11. In response to the preliminary objection, the Claimant filed a Replying Affidavit dated 23rd September 2024 in which he avers that no official decision has been rendered by the 2nd Respondent regarding his employment status. That therefore, there is nothing he was to appeal against. He is advised by his advocates on record whose advice he believes to be true that he cannot appeal to the Public Service Commission without a formal decision being given by the 2nd Respondent.
12. It is the aforementioned preliminary objection that now comes up for determination. On 17th July 2024, the Court directed that the objection be canvassed by way of written submissions.

Submissions

13. According to the 1st, 3rd and 5th Respondents, the issues raised by the Claimant relate to employment of persons in the county governments which are subject to an appeal to the Public Service Commission. The Respondents have further submitted that by dint of Section 77 (2) of the County Governments Act, an issue relating to the recruitment, remuneration and conditions of service, that fall within the ambit of the County Public Service Boards are appealable to the Public Service Commission in the first instance.
14. The Respondents have further contended that the Claimant has not demonstrated to this Court that they indeed exhausted the existing statutory mechanism.
15. Submitting against the preliminary objection, the Claimant is emphatic that there is no official decision by the 2nd Respondent regarding his employment hence he could not appeal to the Public Service Commission. That his failure to exhaust the mechanisms is not deliberate but rather caused by the actions of the 2nd Respondent. The Claimant opines that the 2nd Respondent is acting in bad faith since they want the matter to be held in abeyance until the limitation of filing the suit lapses.



Analysis and Determination

16. As I see it, the single issue for determination is whether the preliminary objection by the 1st, 3rd and 5th Respondents has merit, and should be allowed.
17. The crux of the instant preliminary objection by the 1st, 3rd and 5th Respondents is that by dint of Section 77 of the [County Governments Act](#), the Claimant ought to have moved the Public Service Commission in the first instance prior to filing the suit herein. On his part, the Claimant has contended that he is yet to receive a decision from the 2nd Respondent to allow him appeal to the Public Service Commission.
18. Section 77(1) of the [County Governments Act](#) provides as follows:
 - (77) (1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in 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.
19. The facts of this case as pleaded by the Claimant is that the 2nd Respondent stopped paying his monthly salary and other benefits in December 2022 while his employment contract was still subsisting. That further, the Respondents stopped assigning him duties. Subsequently, he wrote a letter to the 2nd and 3rd Respondents seeking their intervention over the issue. He did not receive a response.
20. As such, he lodged a complaint with the labour office but the Respondents were non-responsive.
21. It is this Court's considered view that the stoppage of the Claimant's salary and the Respondents' failure to assign him duties was in itself a decision that was appealable to the Public Service Commission. It did not matter that the decision was not in writing.
22. As a matter of fact, the Claimant avers that he was constructively and unfairly dismissed. This means that from his standpoint, the 2nd Respondent's actions amount to constructive dismissal. Going by the Claimant's version of events, it follows that there is a decision that is appealable to the Public Service Commission.
23. Therefore, it is not accurate for the Claimant to state that he did not receive any decision from the 2nd Respondent to allow him appeal to the Public Service Commission. The Respondent's conduct was sufficient to make him move the Public Service Commission just as he has moved this Court.
24. Accordingly, pursuant to Section 77(1) of the [County Governments Act](#) as read together with Section 86 (1) of the [Public Service Commission Act](#), the Claimant was required to first move the Public Service Commission by way of an appeal prior to instituting the suit herein.
25. It is worth mentioning that the power of the Public Service Commission to hear appeals emanating from the decisions of the County Public Service Boards is primarily derived from Article 234 (2) (i) of [the Constitution](#) which provides as follows;

The Commission shall.... hear and determine appeals in respect of county governments' public service....
26. What's more, Section 87(2) of the [Public Service Commission Act](#) precludes any person from filing 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 appellate procedure has been exhausted.



27. Needless to say, the Claimant has moved this Court prematurely as it is evident that he is yet to exhaust the dispute resolution mechanisms established under the Constitution, the County Governments Act and the Public Service Commission Act.
28. As was held by the Court of Appeal in the case of Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017] eKLR:
- “...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 the only 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.”
29. I reiterate the position taken by the Learned Judges of the Court of Appeal and redirect the Claimant to first seek redress within the established dispute resolution mechanism in the Public Service Commission.
30. In view of the foregoing, I arrive at the inescapable conclusion that this Court lacks jurisdiction to entertain the Suit herein in the first instance, and must down its tools. In arriving at this determination, I am guided by the holding in the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR, where Nyarangi JA (as he then was) rendered himself thus;
- “Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
31. To this end, the Court upholds the preliminary objection dated 14th May 2024 and strikes out the Amended Statement of Claim dated 11th April 2024, with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2024.

STELLA RUTTO

JUDGE

In the presence of:

Ms. Morara for the Claimant

Ms. Wafula instructed by Mr. Kiunga for the 1st, 3rd and 5th Respondents

No appearance for 2nd and 4th Respondents

Millicent Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article



159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

