



Achuti & 27 others v County Government of Nakuru & another (Cause E039 of 2022) [2023] KEELRC 281 (KLR) (31 January 2023) (Ruling)

Neutral citation: [2023] KEELRC 281 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E039 OF 2022
HS WASILWA, J
JANUARY 31, 2023**

BETWEEN

REBECCA BITENGO ACHUTI & 27 OTHERS CLAIMANT

AND

COUNTY GOVERNMENT OF NAKURU 1ST RESPONDENT

NAKURU COUNTY SERVICE BOARD 2ND RESPONDENT

RULING

1. The 1st Respondent /Applicant, County Government of Nakuru filed a Notice of Preliminary Objection dated November 30, 2022 seeking to raise a Preliminary Objection to the hearing of the matter on the following grounds:-
 1. That the suit is premature, misconceived, inept, scandalous and a blatant abuse of the due process of the Court and ought to be dismissed with costs.
 2. That honorable Court at this stage lacks jurisdiction to hear and determine the matter in view of the mandatory provisions of suit offends the provisions of section 77(1) (2) of the *County Governments Act*.
 3. That there is an alternative statutory mechanism provided under section 77(1) of the *County Governments Act* that provides thus: 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 against the decision.
 4. That the Claimants having failed to utilize and or exhaust the existing efficacious dispute resolution mechanism prescribed by law, makes the suit ex-facie incompetent and premature



and thus the Honourable Court lacks the requisite jurisdiction to determine the suit at this stage.

5. That the suit contravenes express provisions of sections 44, 58, 60 and 86 of the [County Governments Act](#) that enjoins the County Government to operate within a uniform framework of norms and standards for establishing and abolishing offices in its public service and appointing persons to hold and act in those offices.
 6. That aforementioned provisions of the law exclusively vest powers of appointments to the Public Service Board and not the County Secretary who in her capacity had no powers to make such appointments making the same illegal and unlawful.
 7. That the suit is an abuse of the Court process and should be dismissed with costs to the Respondent.
2. The Preliminary objection was disposed of by way of written submissions.

Applicant/Respondents' Submissions.

3. The Respondent submitted from the onset that the honorable Court lacks the requisite jurisdiction to hear and determine the suit in light of the provisions of section 77 of the [County Governments Act](#) on the doctrine of exhaustion which stipulates that a party to a suit ought to first exhaust all the available legal avenues provided for by the [constitution](#) and statutes prior to such a litigant invoking the jurisdiction of a Court. To buttress this position, they relied on the case of [Martin Kabubii Mwangi v County Government of Laikipia](#) [2019] eKLR the Court held:

“The exhaustion principle enunciated in precedents such as the case of Secretary, County Public Service & Another v Hulbhai Gedi Abdille (supra) does not permit an election as to the parts of a statute that one should rely on. Put another way, it removes discretion on the part of a litigant from choosing whether to follow the provision or not. In this case the suit was filed before the exhaustion of the remedy under the law, namely the provisions of Section 77 of the [County Governments Act](#), The Claimant ought to have appealed against his removal to the Public Service Commission before moving the Court. The suit did not fall in the category of suits that can be entertained by the Court. As he did not appeal as provided for in law, the suit is a non-starter and is accordingly struck out with no order as to costs.”

4. The Respondent also relied on the case of [Geoffrey Muthiga Kabiru & 2 others vs Samuel Munga Henry & 1756 others](#) [2015] eKLR, where the Court held that:

“...it is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be for of last resort and not the first port of call the moment a storm brews.... the exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The ex parte applicants argue that this accords with Article 159 of the [constitution](#) which commands Courts to encourage alternative means of dispute resolution...”

5. Based on the above cited case law, the Respondent submitted that, the Claimants have not demonstrated any exceptional circumstances to warrant them bypassing the statutory appellate process. Thus the suit as presented is premature, misconceived, vexatious, frivolous and a blatant abuse of due process for failing to exhaustively invoke the jurisdiction of forums legally established to deal



with the issues presented. On that basis, it was argued that the Court lack jurisdiction and should down its tools as held in the celebrated case of *Owners of Motor Vessel 'Lilian S' Vs Caltex Oil(Kenya) Ltd* (1989) 1 KLR 1.

6. On whether the suit offends the express provisions of sections 44, 58, 60, 62 and 86 of the *County Governments Act*, it was submitted that the powers of the County Secretary are spelt out in section 44 of the *County Governments Act* and making appointments is not listed as one of the powers because employment of staff is a preserve function of the County Public Service Board. It was submitted that the County Secretary has no such powers unless the County Public Service delegates such powers as provided for under section 86 of the *Act*, which was not done in this case. On that basis, the Respondent submitted that since sections 60 and 62 enjoins that the County government to operate within a uniform framework of norms and standards for establishing and abolishing offices in its public service; and appointing persons to hold and act in those offices; the appointment of the Claimants herein is illegal and has no protection in law. To support this argument, they relied on the case of *Erick Oricho & 6 others v County Public Service Board and 2 others* [2019] eKLR the Court stated:

“... The letters of appointment of the petitioners are on the letterhead of the County Government of Kisumu and signed by the then County Secretary, Mr. Humphray O. Nakitari. The letters for Philip Odour Ochieng, Dan Kidha Kidha and Erick Awuondo Odida expressly state that their appointments are with the approval of the County Public Service Board. The letters of the other petitioner’s state that their appointment was by the Governor. Under the *County Governments Act* the Governor has powers to appoint members of the County Executive Committee and accounting officers for each department, entity or decentralized unit of the County Government. The Governor further has powers to remove a member of the County Executive Committee but does not have powers to remove the accounting officers. Power to remove any officer from the County Public Service, other than members of the County Executive Committee is vested in the County Public Service Board under Section 76 of the Act. The County Secretary may only terminate the services of an officer of the County Public Service where such powers have been delegated the County Secretary in writing as prescribed under Section 86 of the Act. Further, the Governor, or County Secretary have no powers to appoint officers in the public service unless such powers have been delegated under Section 86. Section 63 of the Act gives the County Public Service powers to appoint officers to all offices either on its own motion or at the request of a county Chief Officer or Clerk of the County Assembly.”

7. It was also submitted that since, the employment of the Claimants emanated out of an illegal contract, the same cannot be enforced by this Court. It then cited the case of *Five Forty Aviation Limited v Erwan Lanoë* [2019] eKLR the Court of Appeal held:

“In the case of *Kenya Airways Limited v Satwant Singh Flora* (supra), the Court set out the following guidelines when determining rights and obligations of parties where one party pleads alleged illegality of the contract as justification for refusal to be bound under such a contract: -

(i) No person can claim any right or remedy whatsoever under an illegal transaction in which he/she has participated. The Court is bound to veto the enforcement of a contract once it knows that it is illegal whether that knowledge comes from the statement of the guilty party or from outside.

(ii) If the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not.



(iii) No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of the contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him.”

(iv) No Court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the Court is himself implicated in the illegality.

(v) In order for the doctrine to act as a defence to the claim, there must be illegal performance of the contract by one party to the contract and knowledge that illegal performance and participation in it by the other party to the contract.”

Claimants’ Submissions.

8. The Claimant submitted that as much as the County Governments Act at section 77 mandates the County Government employees to appeal any administrative decision by the County to the Public Service Commission, the said appeal is only limited to the merit or substance of the decision by the board and not on the procedure or legal propriety of the case, therefore that once the issue at hand relates to procedural or legal propriety of the decision of the board, the issue are removed from the jurisdiction of the commission and placed on this Court. To support this argument, the Claimant relied on the case of *Abdikadir Suleiman v County Government of Isiolo & another* [2015] eKLR where the Court held that;-

“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 an 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.”

9. The said Court went further and stated that;

“In disciplinary matters, section 76 of the *County Governments Act, 2012* is elaborate that punishment contrary to he *Constitution* cannot be imposed against a public officer. In particular, the section provides that the rules of natural justice must be observed, and the punishment cannot be contrary to provisions of he *Constitution* and Acts of Parliament. It is clear that the legitimacy of the procedure or punishment imposed as measured against the provisions of section 76 of the Act would be an issue of law and therefore not appealable to the Commission but subject to the jurisdiction of the Court.

10. Accordingly, it was submitted that the issues complained of by the Claimants was on termination which was not preceded by any notice or hearing, to enable them prefer an appeal to the commission, if at all. It was argued further that the issues complained of relate to procedure, lawfulness and legitimacy of the decision and not on the merit of the decision, therefore the issues raised could not have been handled by the Commission as was held in the case of *Abdikadir Suleiman (supra)* that;

“In the present case the Claimant has alleged that the oral dismissal was illegal, unlawful and unconstitutional. It is the holding of the Court that the jurisdiction to entertain that



allegation and to make a primary conclusive finding thereon is vested in the Court and the Commission does not enjoy constitutional or statutory jurisdiction to determine that issue and to make appropriate remedy as is prayed for by the Claimant in this case. The Court considers that the line is thin but clearly sets apart the matters that can go to the Commission as of necessity in the first instance and those that may be argued before the Court as of first instance without having to go through the Commission by reason of exhausting the prescribed alternative and statutory procedure and remedy... This Court's opinion is that it is not for the County Public Service Board or the person exercising disciplinary control in the county government, as the case may be, to determine a dispute as to its or person's compliance with section 76 of the Act, and similarly, the Commission would not have jurisdiction to decide such issue on appeal, which essentially would not be conceivable as a matter of a primary decision and therefore subject to the Commission's appellate jurisdiction under section 77 of the Act."

11. The Claimants further reinforced the need to have a disciplinary hearing before an appeal to the commission can be considered and cited the case of *Patrick Wahome & 114 others V County Government of Laikipia & Laikipia County Public Service Board* [2020] eKLR where the Court held that;

"Even where the Claimants may have wished to prefer an appeal, Without the opportunity of a hearing at the shop floor in the first instance, the Respondents effectively denied the Claimants the fair chance to urge any form of an appeal with the Public Service Commission for the Respondents now urge the Court to extend time to allow the Claimants apply the provisions of section 77(3) of the *County Governments Act*... Where the employer suo moto and without any written notice proceeds to terminate employment, such employer effectively removes the employee from the shop floor and the employee is left at liberty to urge his/her rights under the provisions of article 162(2) (a) read together with section 12 of the *Employment and Labour Relations Court Act*, 2011 and section 87 of the *Employment Act, 2007*."

12. Therefore that, it is the Respondents' action of failing to subject the Claimants to the right procedure of disciplinary control that remove them from being subjects to the dictates of appeal procedure provide for under the *County Governments Act*.
13. It was further submitted that section 77(1) of the *County Governments Act*, with regards to Appeal to the commission uses the word "May" which in essence gives the Claimants options to elect the fora to air out their grievances. This was illustrated further by lady justice Monica Mbaru in the case of *Patrick Muretithi Wahome (supra)* that held ;

"In my humble view, there is a deliberate application by Parliament of the word(s) may with regard to section 77(2) of the County Governments Act... My reading of these provisions in whole is that where an employee is allowed internal disciplinary mechanisms by the employer such as the County Public Service Board, a decision is rendered and then the employee may invoke the appeal procedure with the Public Service Commission."

14. The Claimant also relied on the case of *James Oree v office of the Governor, County Government of Marsabit and another* [2021] eKLR where the Court held that; -

"The petition is outside the limits of Section 77 of the *County Governments Act, 2012* in that it seeks to test the constitutionality and legality of the termination of the employment



of the petitioner. These are weighty issues touching on the validity of the actions of the Respondents in a manner advanced so as to oust the jurisdiction of the Public Service Commission as an arbiter of the issues in dispute in the circumstances.”

15. On whether the claim offends the provisions of section 44, 58, 60 and 86 of the [County Governments Act](#) and whether the appointment of the Claimants was illegal for being appointed by the County secretary, it was submitted that a Preliminary Objection should be raised on only pure points of law as was held in the celebrated case of [Mukbisa Biscuits Manufacturing Company Limited v West end Distributors](#) [1969] EA. On the contrary that the issues that the Respondents is raising is on appointment of the Claimant and legality of the said appointment which can only be ascertained by this Court through fact finding and analysis of evidence of the parties. Hence, that the preliminary objection does not meet the threshold created in [Mukbisa Biscuit](#) case.
16. On whether the claim should be struck out, it was submitted that the Court has original and unlimited jurisdiction to hear and determine the issues before and prayed for the preliminary objection to be dismissed and the claim heard and determined on merit.
17. I have examined the averments and submissions of the parties herein. The applicants herein raised a preliminary objection on issues of this Court’s jurisdiction to determine this matter. It being a claim against the Respondents herein and where decision is appellable to the PSC.
18. The applicants have invoked the exhaustion principal and even that the applicants have not exhausted the provision of Section 77 (1) (2) of the [County Governments Act](#) (CGA) which enjoins them to appeal to the PSC against a decision made by the CPSB.
19. Section 77 (1) & (2) of the [CGA](#) states as follows;-
 - “77. 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.
 - (2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of—
 - (a) recruitment, selection, appointment and qualifications attached to any office;
 - (b) remuneration and terms and conditions of service;
 - (c) disciplinary control;
 - (d) national values and principles of governance, under Article 10, and, values and principles of public service under Article 232 of the [Constitution](#);
 - (e) retirement and other removal from service;
 - (f) pension benefits, gratuity and any other terminal benefits; or



(g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard”.

20. My reading of subsection 1 above show that the provision is not couched in mandatory terms.
21. In any case, this provision cannot oust this Court’s original and appellate jurisdiction granted to it by Article 162 (2) of the Constitution.
22. On issues raised on the illegality of the appointments by the Respondents the matter cannot be resolved as a preliminary issue without calling evidence.
23. The issue therefore falls beyond the ambit of the Mukhisa Biscuit case which will in essence extend into facts as opposed to pure point of law.
24. In the circumstances, it is my finding that the preliminary objection is not merited and therefore dismissed accordingly.
25. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 31ST DAY OF JANUARY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Gitau for Claimant – present

Respondent – absent

Court Assistant – Fred

