



Idris v County Government of Mombasa & 2 others (Cause E003 of 2022) [2023] KEELRC 967 (KLR) (17 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 967 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E003 OF 2022**

**AK NZEI, J
APRIL 17, 2023**

BETWEEN

MAJOR [RTD] ABDIRAHMAN IDRIS CLAIMANT

AND

COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

MOMBASA COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

THE GOVERNOR MOMBASA COUNTY 3RD RESPONDENT

RULING

1. The suit herein was instituted by the Claimant on 24th January 2022 *vide* an evenly dated Memorandum of Claim. The Claimant pleaded:-
 - a. that at all times material to the suit, the Claimant was an employee of the Respondents, having been engaged on 29th March 2013 as a political advisor to the Governor, Sub-County Administrator (1st December 2016), and Security Advisor to the Governor (1st February 2018), and that he concurrently served the last two offices.
 - b. that the Claimant served the Respondents diligently and with utmost professionalism and always acted in the best interest of the Respondents and the general Public, and was never a subject of any disciplinary proceedings.
 - c. that on 1st December 2021, the Claimant received a letter from the 1st Respondent, signed by the County Secretary on behalf of the 3rd Respondent, alleging desertion of work by the Claimant and purporting to terminate him from the role of security advisor to the 3rd Respondent immediately and directing him to vacate office immediately and to hand over all the government assets and properties in his possession with immediate effect.



- d. that the Claimant was not accorded a chance to respond to the allegations levelled against him, and was not given a show cause letter prior to being terminated without any prior warning and without being subjected to an expeditious, efficient, lawful, reasonable and procedurally fair administrative process.
 - e. that the Claimant's purported termination was void ab initio, and the Respondents' acts offended articles 21,24,41,47, 50 and 236 of the Constitution of Kenya, 2010, sections 41,43 and 45 of the Employment Act 2007 and Section 45 of the County Governments Act no. 17 of 2012.
 - f. that the grounds for the Claimant's termination were unfounded and were not supported by any evidence, and were never interrogated through a fair administrative or disciplinary process, and that the Respondents did not have justifiable reasons to terminate the Claimant's employment or to compel him to hand over and to vacate office.
2. The Claimant seeks the following reliefs against the Respondents
 - a. A declaration that the letter dated November 30, 2021, Reference Number MsaCG/APP/CECM/11/33, purporting to terminate the Claimant and directing that he vacates office immediately and hands over Government properties in his possession as he plans to exit is null and void and of no legal effect.
 - b. Reinstatement of the Claimant to his position as the Security advisor to the Governor Mombasa County forthwith with all the entitlements and benefits payable in full.
 - c. Compensation for loss, suffering and inconvenience occasioned by the acts of the Respondents.
 - d. In the alternative to prayer (b) above, damages for unlawful dismissal as follows:-
 - i. unpaid salary for the months of November and December at 369,740.
 - ii. three months salary in lieu of notice @184,870 total 554,610.
 - iii. salary from the date of the unlawful termination at ksh. 184,870 per month to the end of the term of contract of the Claimant on 31st August 2022 at ksh. 1,848,700.
 - iv. gratuity accrued at 31%
 - v. unpaid leave days
 - e. Costs of the suit and interest.
 - f. Damages for unlawful termination at ksh. 184,870 X12 total ksh. 2,218,440.
 - g. A Certificate of Service under Section 51 of the Employment Act.
 3. The suit was filed contemporaneously with a Notice of Motion dated 24th January 2022 whereby the Claimant was seeking "conservatory" and injunctive orders against the Respondents. The said application was, however, withdrawn by the Claimant on 8th February 2022.
 4. Among the documents filed together with the Claimant's memorandum of claim are:-
 - a. a letter of appointment dated 29th March 2013 signed by the 3rd Respondent, appointing the Claimant as the 3rd Respondent's political advisor.



- b. a letter by the 2nd Respondent dated 1st December 2016 appointing the Claimant as County Administration Coordinator on contract basis for a period of two (2) years.
 - c. the 1st Respondent's letter dated 1st February 2018 appointing the Claimant to the position of security Advisor.
 - d. the 1st Respondent's letter dated 30th November 2021 terminating the Claimant's appointment as the 3rd Respondent's Advisor.
5. On 24th March 2022, the 1st and 2nd Respondents filed a Notice of Preliminary Objection dated 23rd March 2023, stating that this Court is devoid of the requisite jurisdiction to entertain the claim herein, and setting out the following reasons:-
- a. The claim is defective and pre-mature and any attempts to entertain the present proceedings before this Court is bound to be unconstitutional as there exists sufficient and adequate mechanisms to deal with appeals from decisions of (the) County Public Service Board pursuant to clear provisions of the [County Government Act](#).
 - b. The claim herein is incurably defective as it emanates from decisions of the County Public Service Board in respect of which the right of appeal lies with the Public Service Commission which exercises both appellate and review jurisdiction vis-à-vis decisions of the Public Service Board.
 - c. The claim is incurably defective because the administrative decisions by Public bodies even after exhausting the avenues stipulated under the Act, being the [County Governments Act](#), can only be challenged by way of Judicial Review. The Jurisdiction as the ultimate guarantor of legality to scrutinize actions and decisions of administrative officers, institutions, bodies and/or tribunals is vested on the High Court sitting as a Judicial Review Court.
 - d. The suit discloses no sustainable cause of action against the defendants.
 - e. Consequently, the claim herein is incurably defective as it is repugnant to, and offends the provisions of the law, in particular the [County Governments Act](#) No 17 of 2012 and the [Constitution of Kenya](#) 2010.
6. Section 77(1) & (2) of the [County Governments Act](#) provides as follows:-
- “(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.
 - (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 222 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.
7. From the averments made in the Claimant’s memorandum of claim, which are reproduced in paragraph 1 of this Ruling, and the documents filed therewith which are stated in paragraph 4 of this Ruling, it is clear that the Claimant was a County Public Officer in the 1st Respondent’s employment as at November 30, 2021 when his employment is said to have been terminated by the 1st Respondent. Although the Claimant’s employment was not terminated pursuant to a decision of Mombasa County Public Service Board as contemplated in section 77(1) of the County Governments Act, section 77(2) mandates the Public Service Commission to entertain appeals from any decision relating to employment of a person in a County Government. Section 77(2) (g) widens the Commission’s appellate jurisdiction and mandates it to entertain appeals against any decision the Commission considers to fall within its constitutional competence to hear and determine. This, in my view, means that a County Government’s employee aggrieved by a decision to terminate his or her employment, regardless of whether or not the termination is effected by the County Public Service Board, must as a matter of law appeal to the Public Service Commission. It is for the Commission to determine whether the appeal falls within its constitutional competence to determine.
8. In any case, under section 77(1) of the County Governments Act, the Public Service Commission’s appellate jurisdiction encompasses decisions made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any County Public Officer. In the present case, the County Government of Mombasa (the 1st Respondent) terminated the Claimant’s appointment in purported exercise of disciplinary control over him. I say purported exercise of disciplinary control regarding the 1st Respondent because under section 59(1) (c) of the County Government Act, some of the statutory functions of a County Public Service Board is to establish and abolish offices in the County Public Service and to exercise disciplinary control over, and remove persons holding or acting in offices in County Public Service.
9. The Claimant has pleaded that he was employed by the Respondents herein, and Mombasa County Public Service Board is one of the Respondents. He was, therefore, an officer holding office in Mombasa County Public Service. He ought to have first appealed against his termination to the Public Service Commission before coming to this Court.
10. Section 87(2) of the Public Service Commission Act provides as follows:-
- “(2) A person shall not file any 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 procedure provided for under this part has been exhausted.”
11. I agree with the 1st and 2nd Respondents that the suit herein was filed in this Court pre-maturely and that this Court lacks jurisdiction to entertain it, and more so in view of the foregoing statutory provisions



which, in my view, bring into operation the principle of exhaustion of alternative remedies against the Claimant herein.

12. The Court of Appeal stated as follows in *Secretary, Public Service Board & Another v Hulbbhai Gedi Abdille* [2017] eKLR:-

“time and again it has been said that where there exists other sufficient and adequate avenue or form 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 Antional 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 must 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...

There is no doubt that the Respondent initiated the Judicial Review proceedings in utter disregard to the dispute resolution mechanisms 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 specialised one, specifically tailored by the legislators to meet needs such as the Respondents. 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 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, 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.”

13. As demonstrated in this Ruling, issues revolving around the Claimant’s employment and termination are rather complex, if not interesting. He was initially appointed by the 3rd Respondent on March 29, 2013 for an unspecified period, then by the County Public Service Board for a contractual period of two years, and after the two years by the 3rd Respondent on 1st February 2018 for an unspecified period of time. He was finally terminated by the 1st Respondent on 30th November 2021. As stated by the Court of Appeal in the *Secretary, County Public Service Board & Another v Hulbbhai Gedi Abdille case* (*supra*) the Claimant ought to have invoked the appellate jurisdiction of the Public Service Commission, which is a specialised jurisdiction, specifically tailored by the legislators to meet needs such as the Claimant’s.
14. I decline jurisdiction over the Claimant’s suit herein as it was prematurely filed in this Court. This Court must down its tools. It was stated as follows in the celebrated case of *Owners Of Motor Vessel Lilian S’ v Caltex Oil [Kenya] Limited* [1989] KLR (Nyarangi, JA)

“...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 the 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.”

15. Finally, and having considered written submissions filed by Counsel for parties herein, I uphold the 1st and 2nd Respondent’s Preliminary Objection in terms of grounds (a), (b) and (e) thereof. Grounds (c) and (d) are dismissed as they do not fall within the description of a Preliminary Objection as defined in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] E.A 696 as follows:

“so far as I am aware, a Preliminary Objection consist of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which, if urged as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

16. Sir Charles Newbold stated as follows in the *Mukisa Biscuits Case (supra)*:-

“...a preliminary objection is in the nature of what used to be called a demurrer. It raised a pure point of law, which was urged on assumption that all the pother facts pleaded by the other party were correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion...”

17. The Claimant’s suit is hereby struck off with no orders as to costs.

18. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17TH APRIL 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....for Claimant

..... for Respondent

