



Kenya Union of Pre-Primary Education Teachers v County Public Service Board of Nyeri County Government & another; Salaries and Remuneration Commission (Interested Party) (Employment and Labour Relations Cause E030 of 2022) [2023] KEELRC 1433 (KLR) (9 June 2023) (Ruling)

Neutral citation: [2023] KEELRC 1433 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E030 OF 2022
ON MAKAU, J
JUNE 9, 2023

BETWEEN

KENYA UNION OF PRE-PRIMARY EDUCATION TEACHERS APPLICANT

AND

**COUNTY PUBLIC SERVICE BOARD OF NYERI COUNTY
GOVERNMENT 1ST RESPONDENT**

COUNTY SECRETARY NYERI COUNTY GOVERNMENT . 2ND RESPONDENT

AND

SALARIES AND REMUNERATION COMMISSION INTERESTED PARTY

RULING

1. This ruling relates to the respondents Notice of Preliminary Objection dated December 14, 2022 which seeks for striking out of the suit with costs for the following grounds:-
 - a. The court lacks jurisdiction to hear the suit by dint of Article 234(2) of the Constitution, section 88 of the Public Service Commission (PSC) Act and section 77 of the County Government Act.
 - b. The suit offends the mandatory provisions of section 9(2) of the Fair Administrative Action (FAA) Act and section 87(2) of the PSC Act

Factual Background

2. The Claimant is a registered trade union and brings this suit on behalf of its members, (hereinafter called the grievants). In the year 2017, the County Government of Nyeri employed the grievants as ECDE teachers on contracts which it continues to renew under the same terms and conditions



- of service. The salary has remained Kshs 12,650.00 regardless of the different levels of professional qualification of the teachers, unlike the other employees hired by the County Public Service Board (PSB).
3. The claimant avers that the grievants have been discriminated against and subjected to unfair labour practices by the respondents who continue to deny them good terms and conditions of service. Further that the respondents have breached the ECDE Act, Employment Act and the County HR Manual. Therefore they prayed for the following reliefs:
 - a. The court to convert the grievants' engagement into permanent and pensionable terms.
 - b. The court to order the 1st and 2nd respondents to pay the grievants the salary difference between the actual salary as per the appropriate job group and the applicable ECDE schemes of service and the Kshs 12,650.00 they have been receiving, with effect from November 2016 when the High Court delivered a decision in Petition 127 of 2014 that regularized payments.
 - c. Payment of accumulated annual leave days since the date of employment.
 - d. An order directing the Teachers Service Commission (TSC) and Salaries and Remuneration Commission (SRC) to offer technical supervision to ensure compliance with this court's order for conversion and regularization of the terms and conditions of service for the grievants.
 - e. Costs of the suit.
 4. The respondent has denied the allegations by the claimant and averred that the court lacks jurisdiction to hear the matter. It further averred that the suit is founded on failure to comply with orders in Petition 127 of 2014 and as such the claimant's recourse is to file contempt proceedings in the said case. Therefore the respondents prayed for the suit to be dismissed with costs.

Submissions on the Objection

5. It was submitted on behalf of the respondent that this court lacks jurisdiction to hear the petition because it relates to failure by the respondent to improve the terms and conditions of service for ECDE teachers. It was submitted that under Article 234 (2) of the Constitution and section 88(5) of the Public Service Commission Act 2017 the jurisdiction to hear such matters and give the remedies has been donated to the Public Service Commission. For emphasis, reliance was placed on the case of Secretary County Public Service Board & another v Hulbbhai Gedi Abdile [2016] eKLR where the Court of Appeal in a similar matter held that it is the Public Service Commission which is clothed with the primary jurisdiction.
6. Further reliance was placed on the case of Kenya County Government Workers Union v Nyeri County Government & another [2019] eKLR, Nakuru County Human Rights Network (NAHURINET) v Nakuru County Government & another [2014] eKLR, James Tinai Murete & others v County Government of Kajiado & 22 others [2015] eKLR, Wilson Mutegei Nyaga & others v The County Public Service Board, Kitui County & 2 others [2016] eKLR and Ismael Noo Onyango & another v Siaya county Public Service Board & another [2018] eKLR were the Courts differently constituted declined jurisdiction on ground that the mechanism for an appeal to the Public Service Commission, provided under section 77 of the County Governments Act.
7. It was further submitted that the petitioner herein ought to have first sought redress from the Public Service Commission through an appeal under section 77 of the County Government Act read with section 85, 86 and 87(2) of the Public Service Commission Act. Consequently the court was urged to



uphold the preliminary objection because the petition offends the exhaustion doctrine under Section 9(2) of the *Fair Administrative Actions Act*.

8. The Petitioner submitted that the respondent's preliminary objection lacks merits and prayed for the same to be dismissed with costs. It was admitted that the issue in dispute is regularization employment of ECDE teachers who are members of the claimant. It was submitted that since the High Court pronounced itself on the rights of ECDE teachers in HC Petition of 2014 and therefore this court ought to have jurisdiction on the instant matter of regularizing the appointments of the claimant's members.

Determination

9. The issues for determination in the preliminary objection are:
 - a. Whether the preliminary objection raises a pure point of law.
 - b. Whether the court lacks jurisdiction to hear and determine the suit.

Pure Point of Law

10. In the case of *Mukisa Biscuits manufacturing co Ltd v West End Distributors Ltd* [1969] EA 699 the court held that:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implications out of pleadings and which if argued as a preliminary Point may dispose of the suit. Examples are an objection to the jurisdiction of the court or plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of demurrer. It raises a pure Point Of Law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertain or if what is sought is the exercise of judicial discretion.”

11. I have carefully considered the grounds for the objection raised herein and I am satisfied that pure Points of law have been raised. The respondent is contending that the court also lacks jurisdiction pursuant to the exhaustion doctrine. Such issues do not require evidence to establish nor is judicial discretion necessary to determine the same. Besides if the same succeeds the suit will be disposed of and save judicial time.

Jurisdiction

12. The Respondent contends that this court lacks jurisdiction to entertain the suit because the internal appeal mechanism has not been exhausted. Article 234 of the *Constitution*, section 87 (2) and 88 of the *Public Service Commission Act*, and Section 9(2) of the *Fair Administrative Actions Act* were cited as the basis for the preliminary objection. The petitioner opposed the preliminary objections and maintained that the court has the necessary jurisdiction over the suit. Further that just as the High Court pronounced itself on the matter of regularizing appointments for the ECDE teachers and therefore this court can also determine the same matter here in respect of the two grievants.
13. Article 234 of the *Constitution of Kenya* provides that the Public Service Commission shall have jurisdiction to hear appeals from decisions made by a County Public Service Board. In order to give



effect to the foregoing provision, the Parliament enacted section 77(1) of the [County Government Act, 2012](#) as follows;

“ 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.”

14. The use of the word “May”, in my view suggests an option to be exercised by the affected or dissatisfied person. However, the enactment of the [Public Service Commission Act](#) in 2017, the position morphed drastically. Section 85 of the Act provides that;

“The Commission shall, in order to discharge its mandate under Article 234 (2) (i) of the Constitution, hear and determine appeals in respect of any decision relating to engagement of any person in a County Government...”

15. Section 87(2) of the [Public Service Commission Act](#) then provides that;

“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 the County Government Public Service unless the procedure provided for under this part has been exhausted.”

16. The appealable matters are then set out under Regulation 8 of the [Public Service Commission \(County Government Services Appeals Procedure\) Regulations](#), thus:-

“The Commission may hear and determine an appeal from a public officer in a County Government Public Service regarding any decision relating to the engagement of the person in the County Government, including an appeal in respect of –

- a. Recruitment, selection, appointment, promotion, re-designation, deployment and qualifications attached to any office;
- b. remuneration, and terms and conditions of service;
- c. disciplinary control including imposition of any punishment including dismissal;
- d. ...
- e. ”

17. It is common ground that the dispute herein concerns the failure by the respondents to regularize employment of the ECDE teachers who are members of the claimant from fixed term contracts to permanent and pensionable terms, and be placed in the appropriate job groups. The said grievance falls on all fours with Regulation 8 of the [PSC Regulations](#) and therefore the first port of call ought to be the Commission and not this court. This is to say that the court lacks jurisdiction rather that the jurisdiction has been postponed. Consequently, I find merits in the preliminary objection and proceed to strike out the suit with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 9TH DAY OF JUNE, 2023.

ONESMUS N MAKAU

JUDGE



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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

