



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwalukumbi v Mombasa County Public Service Board & another (Cause E078 of 2021) [2023] KEELRC 2938 (KLR) (16 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2938 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**  
**CAUSE E078 OF 2021**  
**AK NZEI, J**  
**NOVEMBER 16, 2023**

**BETWEEN**

**TUNI MAJALA MWALUKUMBI ..... CLAIMANT**

**AND**

**THE MOMBASA COUNTY PUBLIC SERVICE BOARD ..... 1<sup>ST</sup> RESPONDENT**

**THE GOVERNOR - MOMBASA COUNTY - ALI HASSAN**

**JOHO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The suit herein was filed by the Claimant on 12/8/2021 vide a memorandum of claim dated 4/8/2021. It was pleaded in the memorandum of claim:-
  - a. that the Claimant was a Chief Officer incharge of Trade, Industrialization and Energy of Mombasa County, appointed vide a letter of appointment dated 16/12/2013 and a contract of employment dated 11/12/2013, earning ksh. 250,000 per month upto the time of termination.
  - b. that the terms and conditions of the Claimant's employment were that it was permanent and pensionable.
  - c. that on 30/8/2016, the Claimant received a letter from the Chief Executive Officer Mombasa County Public Service Board, changing her terms of service from permanent and pensionable to a contract ending December 2017, upon which gratuity at the rate of 31% of the annual basic pay for every year served would be paid.
  - d. that the Claimant opposed the said change vide a letter dated 24/10/2016 and stated that her terms were permanent and pensionable.



- e. that there was a reshuffle of County Chief Officers of Mombasa County on or about 31/1/2020, and the Claimant's name was omitted from the list of appointees, with someone else being appointed to her position. That the Claimant was left out, with no notice or reason being given, and that her salary and allowances were stopped.
  - f. that the Claimant was recruited from the banking sector and accepted the appointment on condition that it was permanent and pensionable.
  - g. that the 1<sup>st</sup> Respondent did not issue any notice or warning of termination, and that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to observe, and to comply with Sections 55 and 59 of the County Governments Act and Sections 40,41,43 and 45 of the Employment Act.
2. The Claimant sought the following reliefs from the Respondent:-
    - a. Ksh. 250,000 being one month salary in lieu of notice.
    - b. Ksh. 3,000,000 being twelve months' salary in compensation for unfair termination.
    - c. Ksh. 1,500,000 being unpaid leave.
    - d. Ksh. 1,000,000 being severance pay.
    - e. Costs of the suit and interest.
    - f. Certificate of service.
  3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a rather lengthy and wordy preliminary objection dated 26/10/2021, whose creed is an objection to the Court's jurisdiction over the Claimant's suit herein on ground that the claim arises from the County Public Service Board's decision, and that an appeal against such decision lies to the Public Service Commission. That the matter could only come to this Court by way of a judicial review.
  4. On 2/2/2023, I directed that the preliminary objection be heard first, and ordered parties to file written submissions thereon. Only the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed written submissions on the preliminary objection; which I have considered.
  5. Where a Court's jurisdiction over a particular matter is challenged, proceedings in that matter come to a stand still until the Court addresses its mind to the jurisdictional issue raised and determines the same one way or the other. This is the creed of the Court of Appeal's decision in Owners of Motor Vessel Lilian "s" -vs- Caltex Oil [kenya] Limited [1989] eKLR where the Court of Appeal stated:-
 

“...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.”
  6. Although the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not state the specific provisions of the County Governments Act and the Public Service Commissions Act in issue in the preliminary objection herein as the basis thereof, and only mentioned the County Governments Act and the Public Service Commission Act generally, the Court cannot close its mind to provisions of the statute. The Claimant's claim herein is clearly pleaded to have arisen from the decision of Mombasa County Public Service Board.



7. Section 77(1) 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) .....

8. Section 87(2) of the Public Service Commission Act on the other hand provides:-

“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.”

9. The import of the foregoing statutory provisions is that this Court has no jurisdiction to entertain, to hear and to determine the claim herein. The Claimant ought to have appealed to the Public Service Commission before coming to this Court.

10. As stated by the Supreme Court in Kenya in Samuel Macharia Kamau & Another -vs- Kenya Commercial Bank Limited & 2 Others [2012] eKLR:-

“(68) “A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

11. It is clear, from both the facts of the suit herein and the aforesaid provisions of the statute, that the suit herein was filed in a Court without jurisdiction. The only remedy that this Court can give, under the circumstances, is to strike off the incompetent suit herein. Accordingly, the suit herein is hereby struck off with no order as to costs.

12. The Court file herein shall be closed forthwith.

13. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16<sup>th</sup> NOVEMBER 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 the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

..... for Claimant

.....Respondent

