



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO E020 of 2022

SAMMY NDANA KALUNDU.....APPLICANT

VERSUS

THE AG. CLERK OF THE NAIROBI

CITY COUNTY ASSEMBLY.....RESPONDENT

RULING

1. The Claimant/Applicant instituted a statement of claim dated 14th January, 2022 and through which he challenges his interdiction by the Respondent. Contemporaneously, he filed a Notice of Motion Application under a Certificate of Urgency. The Motion Application is supported by the Affidavit of Sammy Ndana Kalundu, the Applicant herein.

2. The Application seeks the following main orders;

a. Spent.

b. Pending Inter partes hearing of this Application, this Honourable Court be pleased to stay the implementation of the decision contained in the Respondent's letter dated 7th January, 2022 interdicting the Applicant/ Claimant and reinstate him back to work.

c. Pending the interpartes hearing of this Application, this Honourable Court be pleased to stay the implementation of the decision contained in the Respondent's letter dated 7th January, 2022 interdicting the Applicant/ Claimant and reinstate him back to work.

d. Pending the interpartes hearing of this Application, this Honourable Court be pleased to issue a temporary injunction restraining the Respondent from proceeding with any further disciplinary proceedings against the Claimant/ Applicant as indicated in the letter of interdiction of 7th January, 2022.

e. Pending the interpartes hearing of this Cause, this Honorable Court be pleased to stay the implementation of the decision contained in the Respondent's letter dated 7th January, 2022, interdicting the Claimant/Applicant and reinstate him back to work.

f. Pending the interpartes hearing of this cause, this Honorable Court be pleased to issue a temporary injunction restraining the Respondent from proceeding with any further disciplinary proceedings against the Claimant/ Applicant as indicated in the letter of interdiction of 7th January, 2022.

g. This Honourable Court be pleased to issue such other orders and directions as may appear just and convenient.

h. THAT costs of this application to be borne by the Respondent.

3. The main grounds upon which the Application is premised are that;

i. upon resuming from the Christmas break, the Respondent herein without any notice to the Applicant and without the authority of the National City County Assembly Services Board, the Staff Advisory Committee and/or any colour of right interdicted the Applicant on allegations that were totally strange to him and those that were unsubstantiated.

ii. the actions of the Respondent were unilateral and without consultation with the Nairobi City County Assembly Service Board that

is the Applicant's employer, arbitrary and ultra vires the County Assembly Services Act.

iii. the Respondent's decision to interdict the Applicant is initiated in bad faith and is only a backlash stemming from the various suits pending before this court for redress and the fact that the Applicant has refused to execute an illegality within his department.

iv. the interdiction has no legal or factual basis and its sole objective is to victimize and intimidate the Applicant for lawful carrying out of his mandate.

v. the interdiction in so far as it is grounded on issues related to the suit the Applicant together with other employees filed against the O herein and the board, it is a violation of section 46 (h) of the Employment Act that prohibits an employer from initiating any disciplinary action against an employee on grounds of the employee's initiation of a complaint or other legal proceedings against their employer in that regard contrary to section 6(2) of the County Government Act.

4. The Application was certified urgent on 18th January, 2022 and the Applicant directed to serve the same upon the Respondent within 3 days. When the Application came up for mention on 24th January, 2022, parties were directed to maintain the *status quo* and the Respondent was granted leave to file its response. A further mention dated was given for 27th January, 2022 and on the said date, the Respondent informed Court that it had filed a Notice of Preliminary Objection in answer to the Application, on grounds that the disciplinary process mechanism as established by statute was yet to be exhausted.

5. Counsel for the Respondent Mr. Maina, beseeched the court not to grant any orders in the interim and instead, consider the preliminary objection which raised jurisdictional issues.

6. Ms. Nasimiyu, appearing for the Applicant, urged the Court to grant interim orders in terms of prayer 2 and order reinstatement of the claimant pending conclusion of the disciplinary process as he was already out of work and without any salary.

7. The Court directed both parties to file skeleton submissions.

8. Since the Preliminary Objection dated 25th January, 2022, has raised a jurisdictional issue, I will deal with it first.

9. The crux of the Respondent's Preliminary Objection is that this Court lacks the jurisdiction to hear and determine the Application and the Petition pursuant to the provisions of Article 234(2) (i) of the Constitution, Section 85 of the Public Service Commission Act, 2017 and Section 77(1) & (2), of the County Governments Act, 2012. The Respondent further based its preliminary objection on the provisions of Section 27 of the County Assembly Services Act, Sections N.5.0 and N.13.0 of the Human Resource Policies and Procedural Manual of the County Assembly Service 2016.

Submissions

10. The Respondent submitted that pursuant to Section 77(1) of the County Governments Act 2012 read together with Rule 7 of the Public Commission (County Government Public Services Appeals Procedures) Regulations 2016, a person dissatisfied with the decision of the County Public Service Board in its discharge of a human resource function may lodge appeal to the Public Service Commission (PSC). That pursuant to Section 77(2)(c) of the County Government Act, the PSC is mandated to entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of among others, disciplinary control.

11. The Respondent further invited the Court to consider the provisions of Section 87(2) of the Public Service Commission Act, 2017, which mirror the provisions of section 77 of the County Governments Act, 2012 and which operationalize Article 234(2) (i) of the Constitution. The Respondent further placed reliance on the provisions of Section 87(2) of the Public Service Commission Act, 2017, which bars legal proceedings in respect of matters within the jurisdiction of the PSC.

12. The Respondent further submitted that the primary forum for dispute resolution and which the Claimant ought to have appealed to or applied for review, was the County Assembly Service Board (Board) pursuant to Sections N.13.1 and N.13.2 of the Human Resource Policies and Procedural Manual.

13. The Respondent further urged that Section 27 of the County Assembly Service Act gives the Board the mandate to exercise disciplinary control over officers in regards to matters of review and appeal. That in the event the Applicant lodges an appeal or review to the Board and is still dissatisfied with the decision therefrom, then he has a right to lodge an Appeal to the PSC, pursuant to Sections 85 and 86 of the PSC Act.

14. The Respondent further invited the court to consider various case law in which the Courts have upheld the principle of exhausting statutorily ordained dispute resolution mechanisms before resorting to court process. On this score, it fortified its arguments on the following authorities; **Geoffrey Muthinja & another vs Samuel Muguna & 1756 others [2015] eKLR**, **Lilian Wangui Nuthu vs County Assembly Service Board & the Clerk, County Assembly of Kiambu [2021]** and **Secretary, County Public Service Board & Another vs Hulbhai Gedi Abdille (2017) eKLR**.

15. The Respondent further buttressed its submissions on several authorities in which Courts have upheld preliminary objections where a claimant has failed to exhaust the appellate process established under a statute.

16. The Claimant/Applicant did not file any submissions or response in answer to the Preliminary Objection.

Analysis and Determination

17. At the outset, the claimant has stated that the Respondent acted ultra vires as he did not have power to interdict him. That in this case, he acted unilaterally without consulting with the Nairobi City County Assembly Services Board. This does not seem to be the case since section N.3.0 gives delegated authority to the Clerk to the County Assembly to exercise disciplinary control over officers of the County, including interdiction. Therefore, the assertion by the Applicant does not seem accurate.

18. It is also notable from section N.13.0. that appeals and reviews against the decision of the Respondent lies with the Board. Further Appeal from the decision of the Board lies with the PSC pursuant to section 77 of the County Government Act.

19. In this regard, **Section 77 (1) and (2)** 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).....

(b).....

(c)disciplinary control;...”

20. The power of the PSC to hear appeals from 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...”**. It is also notable that this constitutional provision has been given effect by Section 85 of the Public Service Commission Act.

21. From the foregoing, it is apparent there is an elaborate appeal/review mechanism established by the County Government Act and the Public Service Commission Act. More significantly, it is worth noting that the appeal structure flows primarily from the Constitution.

22. The Court further takes note of the provisions of Section **87(2)** of the **Public Service Commission Act** which provides as follows;

[87 (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.]

23. In view of the foregoing, it is therefore apparent that the Applicant has moved the court prematurely as he is yet to exhaust the dispute resolution mechanisms established under the Constitution, various statutes and the relevant Human Resource Policies and Procedure Manual.

24. The Court of Appeal in the case of **Secretary, County Public Service Board & another vs Hulbhai Gedi Abdille [2017] eKLR** determined that **“...where there exists other sufficient and adequate avenue or forum 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 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.”**

25. I fully adopt and reiterate the position taken by the Learned Judges of the Court of Appeal and redirect the Applicant to first seek redress within the established dispute resolution mechanism.

26. The upshot of the foregoing is that this Court lacks jurisdiction to entertain this Application and the Suit as a whole at this instance, and must down its tools. In arriving at this determination, I am guided by the finding 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.”

27. In the premises, the Court upholds the Preliminary Objection dated 25th January, 2022 and strikes out the Application and the Statement of Claim both dated 14th January, 2022 with no orders as to costs.

28. Finally, and by way of obiter, the Court notes that the relief sought by the Applicant at this juncture is a temporary injunction which would have effectively reinstated him back to work. By all means, an injunction cannot act retrospectively and undo what has already been done.

DATED, SIGNED and DELIVERED at NAIROBI this 31st day of January, 2022.

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STELLA RUTTO

JUDGE

Appearance:

Ms. Nasimiyu for the Applicant

Mr. Maina for the Respondent

Court Assistant Barille Sora

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.

STELLA RUTTO

JUDGE