



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. E014 OF 2021

EVANS SHIPALA MULUNJI (Suing as an Administrator of the Estate of

EVELYNE KHABUKWI MULUNJI).....CLAIMANT

VERSUS

THE COUNTY GOVERNMENT OF KAKAMEGA..... RESPONDENT

RULING

Introduction

1. This ruling relates to the Respondent's Notice of Preliminary Objection dated 31st March, 2021. The Preliminary Objection is hinged on Article 234(2) of the Constitution, Section 77 of the County Government Act, 2012, and Sections 85 and 87(2) of the Public Service Commission Act, 2017.

2. The Respondent argues that the Claimant ought to have followed the appeal mechanisms provided for under Article 234(2) of the Constitution and Section 77 of the County Government Act, as read with Sections 85 and 87(2) of the Public Service Commission Act.

3. The Respondent further argues that for reason that the Claimant did not adhere to the aforementioned provisions, renders the suit as filed premature, misplaced and a blatant abuse of the court process and should be struck out. It sought to rely on the holding in the case of **Lukale Moses Sande v the County Government of Kakamega & 3 Others Cause No. 23 of 2020** where the court opined thus:

“The Claimant did not exhaust the appeal procedures in respect to his removal, purported removal and or terms and conditions of service as contemplated by the Constitution, the County Government Act and the Public Service Commission Act, before moving this court, and the court therefore declines jurisdiction.”

4. The Respondent further submits that the dispute mechanisms provided under the law had not been given a chance, yet, it was the most convenient. It sought to buttress this position by having reliance in the holding in **Susan Wanjiru Mwai & 65 Others v County Government of Kirinyaga & 2 Others** where the court held that the Claimants' suit offends the exhaustion doctrine and the court lacks jurisdiction.

5. The Claimant opposed the Preliminary Objection and submitted that Section 77 of the County Government Act and Section 87(2) of the Public Service Commission, do not oust the jurisdiction of the court. He sought to rely in the holding in **Karisa Chengo & 2 Others v Republic (2015) eKLR**

6. The Claimant further submitted that for matters falling under Article 163(3) of the Constitution, the High court (read ELRC), has specific and unique jurisdiction which cannot be exercised through alternative mechanisms, and hence those mechanisms cannot possibly oust the court's jurisdiction.

Determination

7. I have considered the law under which the Preliminary Objection is premised, and the submissions of the Parties. The issue for determination is whether Section 77 of the County Government Act and Section 87(2) of the Public Service Commission Act, 2017, oust this Court's jurisdiction in respect of the instant suit.

8. Section 77 of the County Government 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).....

(b)

(c) disciplinary control;..”

Section 87(2) of the Public Service Commission Act;

“(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 service unless the procedure provided under this Part has been exhausted.”

9. Arising from the above provisions, there is no doubt that employment disputes emanating from the County Government Public Service should, in the first instance, be referred to the Public Service, Commission by way of appeal.

10. In the case of *Geoffrey Muthinji & Another V Samuel Henry & 7 Others (2015) eKLR*, 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 court is invoked, and that, courts ought to be a for a last resort, and not the first port of call the moment a storm brews. In a further case of *Republic v National Environment Management Authority Ex Parte Sound Equipment Ltd [2011] eKLR*, the Court of Appeal held that a party should not be allowed to bypass the statutory appellate process provided under the County Governments Act, and the Public Service Commission Act, save in exceptional circumstances.

11. The wording of Section 87(2) of the Public Service Commission Act, 2017, ousts this court’s jurisdiction in respect of employment disputes arising from the County Government Public Service.

12. In the often-quoted case of *Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Limited [1989] eKLR*, the Court had this to say on jurisdiction: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

13. Following the mandatory provisions of the law, and the binding decisions cited herein, I find and hold that this suit offends the doctrine of exhaustion, and this court declines jurisdiction.

14. The upshot is that the Claimant’s suit dated 14th December, 2021, is struck out with no orders as to costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 17TH DAY OF FEBRUARY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Maina present for the Claimant

N/A for the Respondent

Ms. Christine Omollo-C/A