



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

ELRC PETITION NUMBER 6 OF 2021

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 20(1), 22 (2)(d), 27, 28, 41, 43, 47, 258, 259 AND 162(2) OF THE CONSTITUTION AND SECTION 12 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT

AND

IN THE MATTER OF THE ALLEGED VIOLATION AND/ OR THREATENED VIOLATION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUALS AS ENSHRINED UNDER ARTICLES 27, 28, 41 AND 47 OF THE CONSTITUTION OF KENYA

BETWEEN

KENYA MEDICAL PRACTITIONERS, PHARMACISTS

AND DENTISTS' UNION [KMPDU].....PETITIONER

VERSUS

COUNTY GOVERNMENT OF KILIFI..... RESPONDENT

RULING

1. The Petitioner is a Trade Union representing members of the medical profession in matters concerning negotiation of terms and conditions of service with their respective employers both in the public and private realms. These individuals include medical doctors, pharmacists and dentists practicing in Kenya.

2. By reason of section 2 of Part 2 of the 4<sup>th</sup> Schedule to the Constitution of Kenya 2010, health services were transferred to County Governments established under the said Constitution. In effect, matters to do with human resource in public health institutions in the various Counties are now dealt with by County Governments as employers of the health service providers in the various public health institutions within their jurisdiction.

3. Whilst the County Governments are the employers of these various service providers, they manage the said service providers through the various County Public Service Boards established under the County Governments Act. This arrangement is self evident in the following provisions of law: -

a) Article 235 (1) of the Constitution provides as follows: -

***“A county government is responsible, within a framework of uniform norms and standards prescribed by an Act of Parliament, for: -***

***Ø Establishing and abolishing offices in its public service;***

***Ø Appointing persons to hold or act in those offices, and confirming appointments; and***

***Ø Exercising disciplinary control over and removing persons holding or acting in those offices.”***

b) Section 2 of the County Governments Act defines county public service as: -

***“the collectivity of all individuals performing functions within any department of the county government or its agency,***

***but does not include the governor, deputy governor, members of the county executive committee and the members of the county assembly.”***

c) Section 56(1) of the County Governments Act provides: -

***“ Each county shall, in accordance with Article 235 of the Constitution, have its own public service to be known as county public service.”***

d) Section 57 of the County Governments Act provides: -

***“There is established a County Public Service Board in each County, which shall be: -***

***Ø A body corporate with perpetual succession and a seal; and***

***Ø Capable of suing and being sued in its corporate name.”***

e) Section 59 of the County Governments Act provides, inter alia as follows: -

***“ The functions of the County Public Service Board shall be, on behalf of the county government, to:-***

***Ø Establish and abolish offices in the county public service;***

***Ø Appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments;***

***Ø Exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under this Part.”***

4. Section 63 (1) of the County Governments Act provides as follows: -

***“Except as provided for in the Constitution or legislation, the County Public Service Board has the power to make appointments including promotions in respect of offices in the county public service.”***

5. Therefore, the County Public Service Board as an institution is merely a vehicle of convenience to handle, on behalf of a particular County Government, the human resource issues relating to the public service that is hired by that County Government. The Public Service Board does the hiring, management and termination of personnel in a County Government not for its own benefit but for the benefit of the County Government. I imagine the justification for this arrangement is to ensure that the County Governments are released from the burden of attending to human resource issues within their dockets so as to attend to other core issues of service delivery and as well maintain some level of impartiality of the public service at this level.

6. To my mind therefore, the County Public Service Boards are in this respect, agents of the respective County Governments on human resource management. They are not in law, the employers of these various personnel within the meaning of the Employment Act. They are the legally constituted agents of the employers, the County Governments.

7. In discharge of its mandate to provide medical services to the public within its jurisdiction, the Respondent has hired a number of medical service providers. Some or perhaps all of these service providers are members of the Petitioner.

8. In exercise of its mandate on behalf of its members under the Labour Relations Act, the Petitioner appears to have negotiated a Collective Bargaining Agreement (CBA) between it and the Respondent. This CBA allegedly covers the individuals on whose behalf the Petitioner has filed these proceedings.

9. It is indicated that the CBA was registered by the Employment and Labour Relations Court (ELRC). If this is the position, the said CBA is binding on the parties and provides a point of reference on the agreed terms and conditions of engagement between the parties.

10. The Petitioner’s case is that the Respondent has failed to implement some of the agreed terms in the CBA. That this is despite a recommendation by a conciliator that the said terms be implemented. The terms of the CBA alleged to have been breached by the Respondent relate to promotions, re-designation and further training for the Petitioner’s members. It is because of this alleged inaction on the part of the Respondent in implementing the CBA that the Petitioner has filed these proceedings seeking the court to compel compliance.

11. The Respondent has responded to the Petition. It disputes obligation to honour the 2017 CBA.

12. In addition to the response aforesaid, the Respondent filed a Preliminary Objection (the P O) to the Petition. In my view, the Preliminary Objection raises two issues: -

***a) Whether the Petition as presented is maintainable against the Respondent in view of the provisions of section 57 and 59 of the County Governments Act (CGA);***

**b) Whether the Petition as presented is maintainable in view of article 234 (2) (i) of the Constitution as read with section 77 of the CGA.**

13. In respect of issue number one (1), I have no doubt that to the extent that the County Public Service Board, Kilifi County, was the agent hiring the medical personnel involved in this dispute, and to the extent that the said County Public Service Board enjoys corporate personality and further to the extent that this entity manages the public service for the Respondent, it is a proper party to the current cause. However, to the extent that the actual employer of the said personnel is the Respondent, I think that the Respondent is equally a proper party to this cause.

14. Accordingly, I consider that this is a case of non joinder of necessary parties. I do not think that the failure to join the County Public Service Board, Kilifi County ought to be fatal to the Petition.

15. Rule 4 of *the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* provides as follows: -

a) .....

**b) A petition shall not be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every proceeding deal with the matter in dispute.**

c) .....

**d) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just: -**

**(i) Order that the name of any party improperly joined, be struck out; and**

**(ii) That the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.**

**e) Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents.”**

16. I think that this is one such matter that can be saved under these rules. I say so because to strike out the Petition will not settle the issues in dispute between the parties. Rather, such action will only amount to acting like the proverbial ostrich: burying our heads in the sand.

17. This view is informed by the fact that nothing prevents the Petitioner from commencing fresh compliant proceedings after the defective ones have been struck out. The critical question is whether this will have aided in attaining the court’s objective of ensuring the just, expeditious, efficient and proportionate resolution of the dispute as is dictated by section 3 of the Employment and Labour Relations Court Act. I think not. Such action only increases the cost of litigation besides stealing precious judicial time as the court will in effect most likely end up handling more than one Petition on the same subject.

18. I have of course considered the position taken by my brothers and sisters in the cases that have been quoted before me on this matter. Whilst agreeing that to continue with the Petition in its current form is tantamount to acting in vain, I think that it is more appropriate to save the proceedings through ordering the addition of the omitted party and having the Petition amended accordingly rather than having it struck out. On this, let me quote from the Court of Appeal in *Kivanga Estates Limited v National Bank of Kenya Limited [2017] eKLR* where the learned Judges quoting from other decisions stated as follows on the power to strike out pleadings: -

**“Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defense and are incurable by amendment.”**

19. The second issue relates to the principle of exhaustion. It is the Respondent’s case that the Petition is premature as the issues raised in it are matters that ought to have first been presented to the Public Service Commission by way of an appeal from the decision of the Respondent under article 234 (2) (i) of the Constitution as read with section 77 (2) of the CGA.

20. For ease of analysis, I will reproduce the aforesaid provisions here below. Section 77(2) of the CGA says verbatim thus: -

**“The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of:-**

**Ø Recruitment, selection, appointment and qualifications attached to any office;**

**Ø Remuneration and terms and conditions of service;**

**Ø Disciplinary control;**

Ø *National values and principles of governance, under Article 10, and, values and principles of public service under Article 232 of the Constitution;*

Ø *Retirement and other removal from service;*

Ø *Pension benefits, gratuity and any other terminal benefits; or*

Ø *Any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.*

And article 234 (2) (i) of the Constitution provides as follows:-

***“The Commission shall hear and determine appeals in respect of county governments’ public service.”***

21. It has been observed by the Supreme Court that such clauses need not necessarily be construed as ouster clauses in relation to the jurisdiction of courts over the matters they relate to. They just provide an alternative avenue for dispute resolution. An aggrieved litigant only needs to first submit to the first port of call created by statute before moving to the courts if unsatisfied with the resultant decision. In this way, the court will ultimately adjudicate over the matter but only either by way of judicial review or appeal (see **Law Society of Kenya v Attorney General & another [2019] eKLR**).

22. This reasoning is of course sound. However and as has been observed in some decisions, conceptualizing section 77 of the CGA in like manner does sometimes present some challenges. For instance, what then is to become of complaints raised relating to violation of rights under the Bill of Rights which constitutionally do not fall for consideration by the Public Service Commission? What if the dispute touches on the interpretation or alleged violation of the Constitution generally? And what happens if submitting to this arrangement in effect pushes a party out of accessing the court due to the cause of action getting caught up by limitation of actions under section 90 of the Employment Act due to constraints of time that are not of an aggrieved party’s making? (See **Evans Ladtema Muswahili v Vihiga County Public Service Board & 2others; Marley Ezekiel Ayiego (Interested Party) [2021] eKLR**).

23. Having observed thus, I think that section 77 (2) of the CGA does not affect this particular litigation. In my view, the obligation on parties to appeal to the Public Service Commission under the said section arises only where there is a decision rendered by the County Government against which an appeal can be lodged. Black’s Law Dictionary defines the term **“decision”** to mean **“a judicial or agency determination after consideration of the facts and law.”**

24. If this is what is to be considered as comprising a decision, then the silence and inaction by the County Public Service Board, Kilifi County in relation to the recommendations of the conciliator does not amount to a decision capable of triggering an appeal to the Public Service Commission.

25. The above view is fortified by the provision of section 77(3) of the CGA which provides as follows: -

***“An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of the Commission, the circumstances warrant it.”***

26. Clearly, for an aggrieved party to exercise the right to appeal within the timelines provided above (90 days from the date of the decision), there must be an identifiable decision rendered on a specified date. In the current case, the Respondent’s silence or inaction in respect of the conciliator’s recommendations does not provide an indication on when time starts running for purposes of moving on appeal against the inaction or silence. Such conduct does not fit in the meaning of the term **“decision”** as indicated above. We cannot tell when the Respondent elected to remain silent about whether or not it will implement the recommendation of the conciliator for purposes of instituting an appeal against the election. And in my view, this provides the distinguishing feature between the facts in the current case and the case of **Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017] eKLR**.

27. That said I have considered the provisions of the Labour Relations Act (LRA). This, in my view, is the parent statute on matters relating to Trade Unions. I note that Part VIII of the said Act permits disputes which have been subjected to conciliation without resolution to be filed before the ELRC. This read together with section 12 of the ELRC Act, in my view vests the court with the requisite jurisdiction to handle this matter.

28. Further, as the parties had elected vide article 1(f) as read with article VIII of the CBA to submit collective grievances to conciliation and where necessary the ELRC as provided for under the LRA, this in effect places this matter within the purview of the procedure under the LRA. Accordingly and as was observed by Ongaya J in **Kenya Medical Practitioners Pharmacists and Dentists’ Union v County Secretary, Taita Taveta County Government & 3 others [2021] eKLR**, the court’s jurisdiction has been rightly invoked.

29. I also agree with the Petitioner that under section 12(1) (j) of the ELRC Act, the court is specifically clothed with jurisdiction to adjudicate on disputes relating to the registration and enforcement of terms of collective bargaining agreements. The dispute between the parties in this cause is centered on enforcement of the CBA between them. Consequently, under section 12(1) (j) of the ELRC Act, this court has jurisdiction to hear the matter.

30. I will therefore order as follows: -

***a) That the P O is declined.***

- b) That the cost of prosecuting the P O shall be in the cause.*
- c) That the Petitioner is ordered to add the County Public Service Board, Kilifi County as a necessary party to this cause.*
- d) That upon addition of the party aforesaid, the Petitioner is ordered to amend the Petition appropriately.*
- e) That the Petitioner is ordered to serve the amended Petition on the resultant Respondents forthwith.*
- f) That orders c), d) and e) be complied with within 14 days of this ruling.*
- g) That the Respondents file their responses within 14 days of the court order.*
- h) The parties do list the Petition for directions on the mode of its disposal soon thereafter.*

**DATED, SIGNED AND DELIVERED ON THE 17TH DAY OF FEBRUARY, 2022**

**B.O. M. MANANI**

**JUDGE**

In the presence of:

Kishe for the Petitioner

Nyoya for the Respondents

**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 15<sup>th</sup> 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.**

**B. O. M. MANANI**

**JUDGE**