



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. E659 OF 2021

IN THE MATTER OF ARTICLES 1 (3) (c), 2(1) & (4), 3(1), 19, 20(3) & (4), 21(1) & (93) 22(1) & (2) (c), 23(1) AND (3), 159, 162(2) (a), 165(3), (d) (I), (ii), (4), (6) & (7), 258(1) & (2) (b) & 11 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 4, 12(1) (a), (2), (3) & (4), 20, 21, AND 35 OF THE INDUSTRIAL COURT ACT, 2011

AND

IN THE MATTER OF SECTION 5(1), (2), (3), (4), (5) & 6, 9(2) & (3), 10(1), (2) & (5) 35(2) & (4) (a), 36, 41, 43, 44(2) & (4), 45, 47(3) & (5), 49, 50, 51, 75, AND 87 OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF SECTION 3(a), 4(1), (2), (3), (4) & (6), 6, 12 OF THE FAIR ADMINISTRATIVE ACT, 2015

AND

IN THE MATTER OF SECTION 3, 4(a), 5 AND 7(1) OF THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT, 2015

AND

IN THE MATTER OF SECTION 7, 8, 9(a), (b), (d), & (g), 10, 17, 18, 19, 22(a) AND 24 OF PUBLIC OFFICER ETHICS ACT, 2003

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES: 19, 20(1), (2) & (4), 21(3), 24(1) & (3), 25(a) & (c), 27(1), (2), (3), & (5), 28, 29(d) & (f), 35(1) (b) & (2), 41(1) & (2) (a) & (b) (47(1) & (2) AND 236 AND THE ALLEGED VIOLATION OF ARTICLES 2(1) & (4), 3(1), 10, 73(2), 201(d), 258(1) & (2) (b) & (c) 1 and 232(1), (a), (e), (f), (g), (i), (j), & (2) OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

MARGARET NJERI MBUGUA.....PETITIONER

VERSUS

KIAMBU COUNTY ASSEMBLY SERVICE BOARD..... RESPONDENT

RULING

1. The Notice of motion by the Petitioner/Applicant seeks an order in the following terms:-

(a) *Spent*

(b) *Spent*

(c) *Spent*

(d) **THAT** pending the hearing and determination of this Claim, the Honourable Court be pleased to issue orders restraining the Respondent and/or any other person or entity whether by themselves or by their agents from accepting any applications and subsequently recruiting and substantively filling the position of the **Principal Human Resource Officer (CAKSB 10)**.

(e) **THAT** pending the hearing and determination of this claim, the Honourable Court be pleased to issue an order directing the Respondent to unconditionally reinstate the claimant to employment as the **Principal Human Resource Officer (CAKSB 10)**.

(f) **THAT** the Honourable Court be pleased to make such further orders and/or directions that are necessary for the ends of justice.

(g) **THAT** the Respondent be condemned to pay the costs of this Application.

2. The application is premised on grounds set out on the face of the Notice of Motion and in the Supporting Affidavit of the Petitioner attached thereto. The gravamen of the application is that the petitioner was employed by the respondent as a Principal Human Resource Officer of the County Assembly of Kiambu by a letter of appointment dated 9th November, 2020.

3. That in terms of the letter, the petitioner was placed on probation for a period of 3 months which period may be extended to a maximum of six (6) months.

4. That the three months' probation period ended on 9th February, 2021. However, by a letter dated 8th March, 2021, the respondent purported to extend the period of probation for a further period of three (3) months pursuant to a resolution of the board made on 15th February, 2021 stating that Respondent needed more time to assess the claimant's performance and capacity in her role. That at no time did the Respondent indicate that it was dissatisfied with the performance of the petitioner.

5. That the probation period having lapsed, it could not be revived willy-nilly.

6. That by a letter dated 19th July, 2021, the respondent terminated the employment of the petitioner with effect from 31st July, 2021. That the decision was made without giving the petitioner any opportunity to be heard and therefore was arbitrary and unlawful. That the Court grants the petitioner the reliefs sought.

7. The suit was filed on 12th August, 2021 after the termination of employment of the petitioner.

8. The respondent filed a notice of Preliminary Objection to the suit dated 15th September, 2021 and a replying affidavit sworn by the clerk of the Respondent on 22nd September, 2021.

9. The Court shall proceed to deal with the Preliminary Objection first as guided by the decision of the Court of Appeal in **Owners of Motor Vessel "Lilians" –vs- Caltex Oil (Kenya) Limited (1989) eKLR**.

10. The nub of the objection is as follows:-

(i) *The Court lacks jurisdiction to entertain this suit by dint of Section 77 of the County Government's Act, 2012 which provides:-*

(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) Recruitment, selection, appointment and qualifications attached to any office;

(b) Remuneration and terms and conditions of service;

(c) Disciplinary control;

(d) National values and principles of governance, under Article 10, and values and principles of public service under Article 232 of the Constitution;

(e) Retirement and other removal from service;

(f) Pension benefits, gratuity and any other terminal benefits; or

(g) Any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard."

11. That the petitioner is mandated to appeal to the Public Service Commission before filing this suit. That having not done so, the suit is premature and the Court should strike it out.

12. That Section 85 of the Public Service Commission Act provides as follows:-

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

(e) Retirement and other forms of removal from the public service.”

And Section 86(1) provides:-

“86(1) Any person who is dissatisfied or affected by a decision made by any authority or a person in respect of a County Government, Public Service may appeal to the Commission against the decision.”

13. The Court of Appeal has weighed in on this matter in the case of Speaker of the National Assembly –vs- James Ng’ang’a Karume (1992) eKLR where the Court of Appeal held:-

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

14. The Court of Appeal followed this decision in Geoffrey Muthinja & Another –vs- Samuel Muguna Henry and 1756 Others [2015] eKLR thus:-

“We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed. We think there were sufficient safeguards in place for a valid determination of the various plaintiffs’ disputes had they filed them within the church set up. And there was always the right, acknowledged by the learned Judge, of approaching the courts after exhaustion of the church mechanisms. By failing to do so, and quite apart from the force of their apprehensions, the appellants effectively failed to exhaust their remedies and essentially short-circuited the process by filing suits prematurely.”

15. We find that the applicant did not exhaust the internal remedies available to her and this suit was filed prematurely.

16. Accordingly, the Preliminary Objection is upheld and the suit is struck out for want of jurisdiction.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 3RD DAY OF FEBRUARY, 2022.

MATHEWS N. NDUMA

JUDGE

APPEARANCES

MR. NG’ANG’A FOR PETITIONER

MRS KANG’ETHE FOR RESPONDENT

EKALE – COURT ASSISTANT.