



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

CAUSE NO E 012 OF 2021

SILAS NGUNDO KENROS.....CLAIMANT

VERSUS

THE KILIFI COUNTY PUBLIC SERVICE BOARD.....RESPONDENT

RULING

1. On 8th March 2022 the parties in this action appeared before me for pre-trial directions. In the process, it was pointed out that the Respondent had taken out a preliminary objection to the jurisdiction of the court to entertain the dispute. From the Notice of Preliminary Objection filed, the objection is said to be founded on section 59 (c) of the County Governments Act 2017 as read with section 28 of the Urban Areas and Cities Act.

2. Although the provisions of law cited appear to address entirely different matters, the Respondent indicates that the preliminary objection relates to the exhaustion principle. Therefore, it appears to me that the Respondent may in effect have intended to address the effect of section 77 of the County Governments Act (CGA) on the right of employees and even prospective employees of a County Government to move the court in respect of disputes relating to human resource issues and which have been the subject of consideration by a County Public Service Board (CPSB) of a particular County Government.

3. The law, as currently framed appears to require that any person aggrieved by a decision of a CPSB aforesaid and who wishes to challenge it, ought to file an appeal against the decision to the Public Service Commission. And hence the question whether a suit that is filed in court in disregard of this requirement flies in the face of the principle that an individual litigating under legislation that provides for alternative dispute resolution mechanisms ought to exhaust such mechanisms before approaching a court of law.

4. It is perhaps necessary to mention here that section 77 of the CGA has its foundation in article 234(2) (j) of the Constitution of Kenya 2010. This provision of the Constitution empowers the Public Service Commission to “hear and determine appeals in respect of county governments’ public service.”

5. The effect of these provisions of law has been the subject of extensive litigation before this and other courts. There appears to be no settlement on the true effect of the provisions as yet. Courts have continued to pronounce themselves variously on the subject. For instance, in *James Orre v Office of the Governor, County Government of Marsabit & another [2021] eKLR*, the court declined to uphold an objection similar to the one now taken in this cause for reasons inter alia that the suit raised serious issues of legality and constitutionality of the impugned action, factors which removed the matter from the purview of the Public Service Commission. Yet in *Martin Kabubii Mwangi v County Government of Laikipia (2019) eKLR* and *Evans Ladema Muswahili v Vihiga County Public Service Board [2022] eKLR*, the courts upheld a similar objection premised on the principle of exhaustion.

6. In *Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017] eKLR*, the Court of Appeal appeared to give some firm directions on the import of the foresaid provisions of law when it said the following of section 77 of the CGA: -

“There is no doubt that the respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by Section 77 of the Act. The section provides not only a forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one, specifically tailored by the legislators to meet needs such as the respondent’s. 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.”

7. In effect, the emerging position in law in respect of the issue raised in the preliminary objection is that where an alternative dispute resolution mechanism is provided in law, parties ought to turn to it before resorting to court action. They will only be permitted to depart from this position where it is demonstrated that the alternative dispute resolution mechanism provided is not suitable to address the dispute at hand.

8. I have perused the pleadings as filed by the Claimant. There is no indication why this dispute is not suitable for resolution under the mechanism set out under section 77 of the CGA. Absent this, it will be improper for the court to assume jurisdiction on the matter.

9. I will however not strike out the suit. Instead, I will stay it pending the Claimant invoking the procedure under section 77 of the CGA so as to file an appeal before the Public Service Commission. I note the limitation period of 90 days imposed on a party seeking to appeal to the Public Service Commission. However, the law permits the commission to admit an appeal outside the 90 days where the circumstances of the case permit.

10. In reaching this decision, I have considered the overriding constitutional duty to do justice to all. I will not lock out a party from the seat of justice except as a last resort. I am also guided by the decision in ***Henry Shadrack Anjila v Vihiga County Public Service Board & 2 others [2021] eKLR***.

11. In relation to whether I should impose timelines on processing the intended appeal before the Public Service Commission, I do not think that I can do so for three reasons. First, the commission is an independent constitutional organ which is not subject to control and directions by other persons and bodies while exercising its mandate. Second, the commission has to admit the appeal first before determining the timelines within which it will determine it. Third, the commission has in any event elaborate regulations that adequately cover the timelines for hearing appeals presented before it.

12. Final orders: -

a) The filing of the case before the Employment and Labour Relations Court without first filing an appeal before the Public Service Commission was in violation of section 77 of the CGA.

b) In order to do substantive justice to the parties, the cause before this court is stayed to enable the Claimant file an appeal before the Public Service Commission if at all.

c) The parties shall be at liberty to file the Commission's decision (if any) for adoption as a judgment of the court or seek further and or other directions.

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

B. O. M. MANANI

JUDGE

In the presence of:

Mr. Kilonzo for the Claimant

Mulama for the Respondent

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 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