



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

JUDICIAL REVIEW MISC.APPLICATION NO.E002 OF 2020

(Before D.K.N.Marete)

KENYA COUNTY GOVERNMENT WORKERS UNION.....EX PARTE APPLICANT

VERSUS

COUNTY GOVERNMENT OF NYERI.....1ST RESPONDENT

NYERI COUNTY PUBLIC SERVICE BOARD.....2ND RESPONDENT

R U L I N G

This is an application by way of Preliminary Objection dated 23rd November, 2020. It comes out as follows;

- i) The court lacks jurisdiction to hear the claim as the Claimant is first required to appeal to the Public Service Commission under Section 77 of the County Governments Act.*
- ii) This Claim is misconceived and incompetent as the Claimant has not first invoked the provisions of Section 77 of the County Governments Act.*

The Ex-parte Applicant in her written submissions dated 3rd June 2021 denies the objection and prays that the same be dismissed with costs.

Section 77 of the County Governments Act, 2012 is a first window for recourse in employment matters and relations. It provides that those aggrieved by decisions in terms of their employment resort to the Public Service Commission as a first point of call.

However, it is now clear that section 77 is not coaxed in mandatory terms. Two, its application shall depend on the subject matter in issue as it relates to the fundamental rights of the Applicant. In the instant case, an application of the section would cause hardship and injure the basic rights of the Applicant.

Again, passing the application would only satiate a situation where the Applicant would be facilitated to raise a judicial review application for consideration by court. This is a fundamental right that cannot be taken for granted.

The main issue in this matter is the conversion of the Employees of the Respondent from casual to terms and conditions of service consistent with the Employment Act. This falls within the preview of the Commission. The court is guided by **Secretary, County Public Service Board & another v Hulbhai Gedi Abdille (2017) eKLR Civil Appeal Number 202 of 2015**.

Again, and on a similar note, even if this had been a constitutional petition as the learned judge assumed, this Court in the case of **Daniel N.Mugendi v Kenyatta University & 3 others (2013)eKLR**, stated:-

10. “.....citing the case of *Alphonse Mwangemi Munga & Others vs African Safari Club Ltd (2008) eKLR*, the learned judge was persuaded that the constitution had to be read together with other laws made by Parliament. It should not be so construed as to be disruptive of other laws in the administration of justice and that accordingly parties should make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the constitutional court and making constitutional issues of what is not. With all the foregoing, the learned judge concluded that the claim placed before her by the appellant was based on employment a matter that should have instead been taken to the Industrial Court which had constitutional and statutory jurisdiction over such matters and not the High Court in the form of a constitutional reference.”

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. In terms of Republic v National Environment Management Authority (supra), we discern no exceptional circumstances in this appeal that would have warranted the by passing of the statutory appellate process by the respondent. Her contention that she disregarded the appeal because it could not afford an opportunity to question the procedure followed by the appellant is in our view, without basis because Section 77 has placed no fetter to the jurisdiction of the Public Service Commission. There is no requirement for instance that reasons for the decision be availed to an aggrieved party before he can prosecute an appeal before it..."

In a test of the applicability of Section 77 of the County Government Act, 2012, the gravity and breadth of the issues in dispute becomes paramount. This becomes the eye opener to the route to be adopted in a resolution of the procedural aspects of the matter.

In the circumstances of this case, I find a case of non-application of Section 77 aforesaid. This is because the issues involve a test of constitutionality and fundamental rights of the Applicant. The application therefore fails.

I am therefore inclined to dismiss the application with costs to the Respondents.

DATED AND DELIVERED AT NYERI THIS 9TH DAY OF MARCH, 2022.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Brian Otieno for the Union/Applicant.
2. Mr. Wahome Gikonyo instructed by Wahome Gikonyo & Company Advocates for the Respondents.