



Republic v County Government of Kilifi (Miscellaneous Cause E001 of 2021) [2022] KEELRC 14672 (KLR) (23 June 2022) (Ruling)

Neutral citation: [2022] KEELRC 14672 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

MISCELLANEOUS CAUSE E001 OF 2021

BOM MANANI, J

JUNE 23, 2022

IN THE MATTER OF AN APPLICATION BY ALFRED SIFA FOR LEAVE TO APPLY FOR ORDERS OF MANDAMUS, PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF ARTICLES 24 AND 47 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO 4 OF 2015

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT NO 17 OF 2012

AND

IN THE MATTER OF THE EMPLOYMENT ACT NO 11 OF 2017

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY GOVERNMENT OF KILIFI RESPONDENT

RULING

1. The application pending for determination is one for judicial review. By it, the Ex-parte Applicant seeks several reliefs against the Respondent following an earlier decision by the Respondent to suspend the Ex-parte Applicant from employment on disciplinary grounds. When the matter came up for hearing, the Respondent intimated that it would be taking up a preliminary objection to the cause. A notice of the points of law to be raised dated April 1, 2022 was filed on April 4, 2022.



2. The 1st point of law raised by the Respondent relates to the court's jurisdiction to hear the matter. It is contended that the court lacks jurisdiction to entertain the case. This objection is premised on the principle of exhaustion. According to the Respondent, since the dispute between the Ex-parte Applicant and the Respondent arises from the employer-employee relationship between the parties, it should by law be the subject of an appeal before the Public Service Commission pursuant to section 85 of the [Public Service Commission Act](#), section 77 of the [County Governments Act](#) as read with article 234 (2) (b) & (i) of [the Constitution](#).
3. In summary, the import of these provisions of statute and Constitution is that an employee of a County Government who is dissatisfied with a decision of the employer should challenge such decision before the Public Service Commission. Relying on these provisions of law, the Respondent contends that the current application by the Ex-parte Applicant is improperly before the court. The court has no jurisdiction to entertain it.
4. Whilst I am in general agreement with the Respondent's interpretation of the law, I should point out that the effect of the several provisions quoted is not to oust the court's jurisdiction. In several decisions the court has emphasized that in deserving cases a litigant may bypass such provisions and approach the court directly for a remedy. This is particularly in instances where the litigant is unlikely to get a suitable remedy from the alternative dispute resolution mechanism provided. However, this should happen only in exceptional cases.
5. Again, these provisions only operate to prevent a litigant from approaching the court as the first port of call. It does not mean that a party who has exhausted the dispute resolution procedures provided cannot thereafter approach the court for a remedy if he still feels dissatisfied with the results or desires to move the court for some other compelling reason. Indeed, some of the statutes relied on by the Respondent recognize the fact that once the alternate avenues are exhausted, a party may resort to the court to enforce the decision of the quasi-judicial body. For instance, section 89 of the [Public Service Commission Act](#) provides the right to apply to the court to enforce its decision arising from the adjudication process.
6. It is true that the dispute between the Ex-parte Applicant and the Respondent falls within the realm of the Public Service Commission by way of appeal as stipulated in the provisions of law set out above. Indeed, this is the very reason why the court declined jurisdiction over the matter when it was presented to it through Mombasa ELRC Petition No 1 of 2020 ([Alfred Sifa Dena v Benjamin Kai Chilumo](#) [2020] eKLR).
7. From the affidavit by the Ex-parte Applicant in response to the preliminary objection, he has annexed a letter by the Public Service Commission addressed to the Respondent and dated December 9, 2021. From the title of the letter, it is clear to me that the Ex-parte Applicant at some point and in compliance with the requirements of section 77 of the [County Governments Act](#), section 85 of the [Public Service Commission Act](#) and article 234 of [the Constitution](#) submitted to the jurisdiction of the Public Service Commission to adjudicate on the question of his suspension.
8. The aforesaid letter which appears to communicate the decision of the Public Service Commission to the Respondent on the Ex-parte Applicant's appeal is to my mind evidence of the Ex-parte Applicant having exhausted the alternative procedure for resolving the dispute between the parties. In terms of section 89 of the [County Governments Act](#), he is entitled to apply for enforcement of the recommendations of the Public Service Commission if the Respondent has not acted on them.



9. It is therefore clear to me that the principle of exhaustion of alternative remedies is no longer applicable to this dispute. Having submitted the appeal to the Public Service Commission and a decision on the appeal having apparently been rendered, this matter is ripe for consideration by this court.
10. The second objection relates to the cause being res-judicata. It is the Respondent's case that the Ex-parte Applicant having filed two previous causes on the matter to wit ELRC Petition No 1 of 2020 at Mombasa and ELRC Cause No 3 of 2020 at Malindi, this cause is res-judicata. However, the Respondent confirms that in ELRC Petition No 1 of 2020, the court declined jurisdiction to hear the case and struck out the cause and ELRC Cause No 3 of 2020 was withdrawn before it was heard.
11. I have already addressed the effect of the two causes on the current case in my ruling on the application for leave in Malindi ELRC Miscellaneous Cause No 4 of 2021 (unreported) where I said that by reason of the two cases having not proceeded to trial, they were not determined on merit. Accordingly, the principle of res-judicata does not apply to subsequent litigation on the same facts.
12. Finally, the Respondent contends that the current cause is defective in view of the sections 57 and 59 of the County Governments Act. The effect of these provisions is to vest the power to handle matters relating to the management of human resource of a County Government in its County Public Service Board.
13. Under article 235 of the Constitution, the function of constituting and abolishing office in the county public service vests in the respective County Governments. In addition, County Governments are empowered to appoint persons to occupy those offices and to exercise disciplinary control over the said staff.
14. The County Public Service Boards are established under section 57 of the County Governments Act to assist County Governments to manage their county public service portfolios in terms of sections 56 and 59 of the County Governments Act. In other words, County Public Service Boards are merely agencies through which County Governments manage their staff. However, in actual fact, all personnel hired by a County Public Service Board are employees of the respective County Government for which they were hired.
15. My view has been and remains that whenever there is a dispute relating to personnel of a County Government, the necessary parties to the cause are the County Government itself and the County Public Service Board in service of the County. Therefore, the fact that a County Government is sued instead of its County Public Service Board does not render the suit fatally defective. Such anomaly can be corrected through an amendment to bring on board all the necessary parties. This is so because both the County Government and its Public Service Board are necessary parties in the cause (see Kenya Medical Practitioners, Pharmacists and Dentists' Union [KMPDU] v County Government of Kilifi [2022] eKLR).
16. For the reasons advanced above, I hold that the preliminary objection raised by the Respondent is unmerited. Accordingly, I disallow it with costs to the Ex-Parte Applicant.

DATED, SIGNED AND DELIVERED ON THE 23RD DAY OF JUNE, 2022.

B. M. MANANI

JUDGE

In the presence of:

Ex-parte Applicant

No appearance 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.

