



Abdi v Governor, Kakamega County Government & 2 others (Employment and Labour Relations Court Appeal E004 of 2022) [2022] KEELRC 1155 (KLR) (14 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 1155 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

EMPLOYMENT AND LABOUR RELATIONS COURT APPEAL E004 OF 2022

JW KELI, J

JULY 14, 2022

IN THE MATTER OF IN THE MATTER ARTICLES 1,10,19,20,21,22,23(3) (A-C),27(2),28,41,47(1),50,165,236(A &B)258(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: UNLAWFUL, UNFAIR, UNPROCEDURAL AND UNREASONABLE SUSPENSION FROM THE OFFICE OF CHIEF EXECUTIVE OFFICER FOR THE KAKAMEGA COUNTY WATER AND SANITATION COMPANY LIMITED.

AND

IN THE MATTER OF THE EMPLOYMENT ACT

BETWEEN

ABDIKADIR MOHAMED ABDI PETITIONER

AND

THE GOVERNOR, KAKAMEGA COUNTY GOVERNMENT 1ST RESPONDENT

THE BOARD OF DIRECTORS OF KAKAMEGA COUNTY WATER AND SANITATION COMPANY LIMITED 2ND RESPONDENT

KAKAMEGA COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

RULING

1. The Ruling is on the Notice of Preliminary Objection by the Respondents dated 28th April, 2022 received in Court on even date in the Petition dated 15th March 2022 to the effect that the court lacks jurisdiction to entertain the matter and for the suit to be struck out from the court's record with costs for the following reasons:-



- (1) That the Petitioner’s ought to have exhausted the available internal employee dispute resolution mechanisms provided for by the following provisions of the law-
- (a) Article 234(2) (a) (c) of *the Constitution* Kenya.
- “ 234 Functions and Powers of the Public Service Commission.
- The functions and powers of the Commission are as set out in this article,
- The Commission shall-
- (i) Hear and determine appeals in respect of county governments public service’
- (b) Article 235(1)(c) *the Constitution* of Kenya
- ‘235. Staffing of county governments
- (1) A county government is responsible within a framework of uniform norms and standards prescribed by an Act of Parliament , for-
- (c) exercising disciplinary control over and removing persons holding or acting in those offices.”
- (c) Section 77 of the *County Governments Act*, 2012 provides-
- ’77. Appeals to the Public Service Commission
- (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 against any county public officer may appeal to the Public Service Commission against the decision”.
- (d) Sections 85(c) and 87(2) of the *Public Service Commission Act* 2017 –
- ‘PART XV- Hearing and Determination of Appeals in Respect of County Government Public Service
85. The Commission shall, in order to discharge its mandate under Article 234(2) (i) of *the constitution*, hear and determine appeals in respect of any decision relating to engagement of any person in a County Government including a decision in respect of –
- c. disciplinary control”
- 87(1)
- A person shall not file any legal proceedings in any court of law in respect to matters within the jurisdiction of the Commission to hear and determine appeals for County Government Public Service unless the procedure provided for:- under this part has been exhausted.
- e. Human Resources Policies and Procedures Manual for the Public Service 2016 Appeals.
- Section- K - Disiplinary Control



K.1 The objective of disciplinary control is to create a motivated and dedicated public service which upholds the rules of conduct and work ethics for optimal service delivery. It is expected that public officers will maintain integrity and uphold the dignity of office to which they are appointed. Further disciplinary cases shall be dealt with expeditiously, efficiently, lawfully and in a procedurally fair manner.

K.10 an officer who is dissatisfied by a decision made by an authorized officer may (1) appeal to the Commission within a period of thirty (30) days from the date of the letter conveying such decision, provided that the Commission may consider an appeal that is made out of time if in the opinion of the Commission the circumstances warrant such consideration.”

f. Clause P.11 of the Kakamega County Human Resources Policies and Procedures Manual 2016

"p.11

Appeals

p.11

(1) an officer who is dissatisfied by a decision made by an authorized officer may appeal to the Commission within a period of ninety(90) days from the date of the letter conveying such a decision ,provided that the County Public Service Board may consider an appeal that is made out of time if, in the opinion of the County Public Service Board , the circumstances warrant such a consideration.”

2. That the suit is premature , misplaced and a blatant abuse of the court process rendering it incurable and fatally defective.

2. The Court directed that the Notice of Preliminary Objection be canvassed by way of written submissions.

3. The Respondent’s written submissions on their Notice of Preliminary Objection are dated June 3, 2022 drawn by Vivianne Mmbaka Komwonyo Advocate for 1st, 2nd & 3rd Respondents and received in court on June 8, 2022

4. The Petitioner’s written submissions on the Notice of Preliminary Objection are dated June 23, 2022 drawn by M/S Hassan N. Lakicha & Company Advocates and received in court on the June 27, 2022.

Determination

5. The Notice of Preliminary Objection by the Respondents challenges the jurisdiction of this court to handle and determine the instant Petition. It is trite law that jurisdiction is everything and without it the court must down its tools. The law is settled on the question of jurisdiction as per landmark



decision of Nyarangi JA in Owners of the Motor Vessel Lilian "S" -VS- Caltex Oil (Kenya) ltd 1989 eKLR where the court of Appeal stated :-

“Jurisdiction is everything without it, a court has power to make one more step. A court of law downs tools in respect of the matter before court the moment it holds the opinion that it is without jurisdiction”.

6. The above decision was upheld by the Supreme Court of Kenya in its advisory opinion reported as “ in Re The matter of the Interim Independent Electoral Commission (2011) eKLR in paragraph 30 where it is said: “ The Lilian “S” case (1989) KLR 1 establishes that jurisdiction flows from the law, and the recipient – court is to apply the same , with any limitation embodied therein. Such a court may not arrogate itself jurisdiction through the craft of interpretation, or by any of endeavors to discern or interpret the intentions of parliament, where the wording of legislation is clear and there is not ambiguity”.
7. The two decisions(Supra) are binding on this court. The court will proceed then to establish if it has jurisdiction in the instant case. The challenge on the jurisdiction in the instant case is based on the failure by the Petitioners to exhaust the statutory dispute resolution mechanisms of appealing to the Public Service Commission under the Constitution Article 234, Section 77 of the County Government's Act, Section 87 of the Public Service Commission Act and provided for under clause K of the Human Resources and Procedures Manual for the Public Service, 2016. The Respondents submit that the petition is premature for failing to exhaust those mechanisms in the first instance hence the lack of jurisdiction.
8. The Respondents submit that the Petitioner in Petition dated March 15, 2022and Notice of Motion Application of even date challenge the decision of the 1st Respondent to suspend him on basis that it was in breach of his constitutional rights. That the employment of the Petitioner has not been terminated but the Respondent are discharging their mandate over employee which mandate includes instituting disciplinary measures on account of gross misconduct.
9. The Petitioner filed supplementary affidavit sworn on May 4, 2022in opposition to the Respondents' notice of preliminary objection setting out reasons why he believes the disciplinary process against him is flawed. The Petitioner submits that the petition is valid.

Is the Notice of Preliminary Objection merited ?

10. The Respondents submit that the 2nd Respondent is a company wholly owned by the County Government of Kakamega hence subject to their control, direction and guidance under the relevant national and county statutes, that the Petitioner was appointed by the 1st Respondent pursuant to provisions of Section 13 of Kakamega County Water Act which appointment was subject to the powers of the 3rd Respondent under section 6(3) of the Kakamega County Public Service Board Act 2017. That the Petitioner has only been issued with a suspension letter pending subsequent disciplinary processes which have not been concluded on account of the instant proceedings. That suspension shall not exceed 3 months under the Kakamega County Human Resources Policies and Procedures Manual 2016 and this claim was brought before expiry of that period hence premature. The Respondents rely on various decisions of this court upholding of exhaustion of available dispute resolution remedies available under section 77 of the County Government Act. The decisions relied on include Kenya National union of Nurses v County Government of Kirinyaga & 6 others (2020) eKLR, Turkana County Government & 20 others v Attorney General and 4 others , Kisumu ELRC NO. E023 of 2020 Lukale Moses Sande v County Government of Kakamega & 3 others and recent decision of this court in Dominic Chugani Muteshi v County Government of Kakamega & Another (2021) eKLR where the court upheld



- the emerging jurisprudence of the court that parties employed by the County Public Service Board ought to exhaust the remedies under section 77 of the County Government's Act being appeal to the board on its decision and to the Public Service Commission before coming to court.
11. On the other hand the Petitioner submits that his dismissal and interdiction is governed by the 2nd Respondent's Human Resources Policies and Procedures Manual 2020 of which the Respondents have not complied with. That the powers of disciplinary and removal of company officers is vested in the said Board under clause N.3(1) and N. 4(1) of the said 2nd Respondent's Manual.
 12. The Petitioner in his submissions against the Preliminary Objection relies on the decision in *Mark Gerald Brierley & 2 others v Drifthood Beach Club Ltd* (2007) eKLR which upheld the landmark decision in *Mukhisa Biscuit V West End Distributors* (1969) which defined a preliminary point of law as consisting of points of law which has been pleaded or which arises by clear implications out of pleadings and which if argued as a preliminary point may dispose the suit..... a preliminary objection... raises pure points of law which is argued on the assumption that all facts pleaded by either side are correct. It cannot be raised if any facts have to be ascertained or if what is sought is the exercise of judicial discretion.”
 13. In *Drifthood Beach Club case*(supra) the court in dismissing the preliminary objection found there was disagreement on the status of the plaintiffs and the defendants with regard to the subject premises and that it was necessary to ascertain the relationship between the parties by adducing evidence at the hearing.
 14. The Petitioner has relied on several other authorities to buttress its position which the court looked at.
 15. The court finds that the facts on who is the employer of the Petitioner and the relationship between the petitioner and the three respondents has to be ascertained by producing evidence. For example, which of the 3 respondents has the role to carry out disciplinary processes against the Petitioner. The merit of the Preliminary Objection cannot be decided when the facts are not settled. The court is guided by the landmark case of *Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors* (1969) E. A 696 where the court stated:- “ a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are on objection to the jurisdiction of the court... it raises a pure point of law which is argued on the assumption that all the facts pleaded by the others are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion”. (emphasis given).
 16. I uphold the above decision and the holding in *Drifthood Beach Club case*(supra) to apply in the instant case for the reason that the terms of the employment with respect to disciplinary process of the Petitioner have to be ascertained. The court notes that the Respondent is yet to file substantive response to the Petition hence facts are not settled.
 17. The court agrees that jurisdiction is an issue that can be raised under a Preliminary Objection and the law is settled that challenge to decisions of the County Public Service Board have to first be appealed to the Public Service Commission under Section 77 of the *County Governments Act*. In the instant Preliminary Objection, it is not a settled fact that the Petitioner is an employee under the Kakamega County Service Board. The court has original jurisdiction to decide on that issue on employment on merit basis.
 18. The court determines that the instant Notice of Preliminary Objection does not meet the threshold of a preliminary objection as the court has to ascertain facts in the dispute. The *Mukisa Biscuits case*(Supra)



was upheld by the Supreme Court of *Kenya in Independent Electoral & Boundaries Commission -vs- Jane Cheperrenger and 2 others* (2015) eKLR as follows:-

“As to whether a Preliminary Objections is one of merit, this court has already pronounced itself on the threshold to be met. The court endorsed the *Principle in Mukisa Biscuits Manufacturing Co. Ltd -vs West End Distributors (1969) EA 696*. In the case of Hassan Ali Joho & Another -vs- Suleiman Said Shalbal & 2 others(Petition No. 10 of 2013) (2014) eKLR (paragraph 31)”.

19. In conclusion and for the foregoing reasons and guided by case law (Supra) the court finds the Notice of Preliminary Objection dated 3rd June, 2022 by the Respondents is not properly raised as the facts in the dispute have to be ascertained.
20. The Court has original jurisdiction in all employment disputes and it is only in cases where facts are ascertained on application of alternative remedies will it cede its original jurisdiction to other bodies as per their statutory mandates.
21. The Notice of Preliminary Objection dated 28th April 2022 is dismissed for being improperly raised.
22. Costs in the cause.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 14th DAY OF JULY, 2022

J. W. KELI,

JUDGE.

In the presence of :-

Court Assistant : Brenda Wesonga

Petitioners:- Mr Lakicha

Respondents: -Mr Wabuko

