



Gikama v County Government Of Laikipia & 2 others (Cause 62 of 2016) [2022] KEELRC 4166 (KLR) (27 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 4166 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 62 OF 2016
HS WASILWA, J
SEPTEMBER 27, 2022
(AS CONSOLIDATED WITH ELRC 47 - 71 OF 2016)

BETWEEN

EUNICE WANJURU GIKAMA CLAIMANT

AND

COUNTY GOVERNMENT OF LAIKIPIA 1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD OF LAIKIPIA COUNTY 2ND RESPONDENT

COUNTY SECRETARY (CPSB 3RD RESPONDENT

RULING

1. Before me for determination is the respondent's preliminary objection dated May 19, 2022 in which the applicants argue as follows;
 - a) That the consolidated causes are incurably and fatally defective.
 - b) That the court lacks jurisdiction to entertain the consolidated causes in light of section 77 of the [County Government Act, 2012](#) & section 87(2) of the [Public Service Commission Act](#).
2. The preliminary objection was canvassed by way of written submissions with the respondent's filing on the July 13, 2022 and the claimant filing theirs on the July 22, 2022.

Respondent Submissions.

3. The respondent in support of their preliminary objection submitted on two issues; whether the court had jurisdiction to hear and determine these causes and whether the causes are incurably defective.



4. On the first issue it was submitted that the claimants, being employees of the respondent seeking to challenge among other things their employment status, ought to have appealed against the decision of the respondent, to the public services commission as provided for under section 77 (2)(e) of the *County Government Act* as read with 87(2) of *Public Service Commission Act* & article 234(2)(i) of the *Constitution* of Kenya. To support their argument, they relied on the case of *Evans Muswahili Ladtema v Vibiqa County Public Service Board; Liason officer Emuhaya sub-county & 7 others (interested parties)* [2021] eKLR where the court held that;

“In the view of this court, the logical interpretation to be given to section 77 of the County Governments Act as buttressed by sections 85 and 87(2) of the *Public Service Commission Act*, 2017, is that the first port of call to challenge to the establishment of, recruitment to and removal from an office in the county public service is an appeal to the public service commission. The appellate jurisdiction of the public service commission under such circumstances is ordained by article 234(2)(i) of the *Constitution*.”

5. They also relied on the Court of Appeal decision in *Secretary, County Public Service Board and another V Hulbbai Gedi Abdille* [2017] eKLR where the court held that;

“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 the forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one specifically tailored by 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.”

6. In view of the above, the respondents submitted that the claimant ought to have raised the issue of their employment with the commission and not run to this court as their first port of call. Accordingly, it was argued that the claims herein are incurably defective and urged this court to strike them out for want of jurisdiction.

Claimants’ Submissions.

7. It was submitted for the claimants that the issue for determination in their various claims revolve around their confirmation of employment, allowances not paid and payment arrears. Therefore, that the issues raised are not within the ambit of the commission but in the purview of this court. It was argued further that section 77 of the *County Government Act*, contemplated the appeal to emanate from a decision of the county service board and not indecision and being that what is in dispute is an inaction by the respondents, the same has to be raised in this court. Additionally, that even if a decision had been made by the county government capable of being appealed to the commission, the said section used the word “may”, therefore providing the claimants with opportunity to elect the forum to raise their grievance in.
8. It was further argued that this claims were instituted in 2016, while the *Public Service Commission Act*, came to force in 2017, therefore inapplicable to the claims here as the law cannot operate retrospectively as envisaged under section 23(3) of the *Interpretation and General Provisions Act*, chapter 2 laws of Kenya. To support their case, the claimants relied on the case of *Mistry Jadva Parbat & Company*



Limited v Ameer Kassim Lakha & 2 others [2008] eKLR where the court cited the case of Municipality of Mombasa v Nyali Ltd [1963] EA 371 Newbod, J A said at page 374, paragraph G:

“Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation, the courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights, it will not be construed to have retrospective effect unless a clear intention to that effect is manifested. Whereas, if it affects procedure only, *prima facie*, it operates retrospectively unless there is good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and rule of construction is only one of the factors to which regard must be had in order to ascertain that intention”.

9. Similarly, that the enacted Public Service Commission Act, cannot operate retrospectively to affect the claims before this court which were filed prior to the enactment of the act.
10. On whether the court has jurisdiction to hear and determine these claims, the applicant submitted that jurisdiction of this court sprouts from article 162(2) of the Constitution as read with section 12 of the Employment and Labour relations Court Act, which might be curtailed by among other things the provisions of section 77 of the County Government Act, however that in the circumstances and in light of the grievances before the court, section 77 of the County Government Act does not apply and therefore the jurisdiction of this court stands.
11. On whether the claims are incurably defective, it was submitted that the objectors misapprehended the law and based their objection on section 77 of the County Government Act. In any case that striking out a suit should be a means of the last resort as was held in Yaya Towers Limited v Trade Bank Limited (in liquidation) Civil Appeal No 35 of 2000[2000] eKLR where the court held that;

“A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial. In Lawrence v Lord Norreys (1890) 15 App Cas 210 at 219, Lord Herschell said:

...It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved.”

12. In conclusion, the claimants submitted that their claims are well founded and urged this court to dismiss the preliminary objection and order for their claims to be heard to their logical conclusion.
13. I have examined the averments and submissions of the parties herein.
14. The contention of the applicants herein is that this court lacks jurisdiction to entertain the claim because the respondents claimants didn’t file an appeal to the PSC.
15. They content that this is as provided under section 77 of the County Government Act.
16. Section 77 of the County Government Act deals with appeals to the PSC. Under section 77(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 process against any county public officer, may appeal to the PSC.

17. I wish to state that the claim before me as submitted by the respondent is in relation to none issuance of appointment letter to the claimants and payment of arrears.
18. As it were, there is no decision already made by the county public service board that can be appellable.
19. Section 77 (1) is also not couched in mandatory terms and there is therefore no compulsion for appeal to the PSC.
20. Lastly the jurisdiction of this court is drawn from article 162(2) of the Constitution.
21. This jurisdiction envisages that anybody having an employment or labour relations matter can approach this court for redress.
22. To close out the claimants at this eleventh hour on a technicality would in my view be an injustice which this court will be unwilling to entertain.
23. I therefore find the preliminary objection as raised lacks merit and is therefore disregarded and dismissed.
24. The claim should accordingly proceed.
25. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 27TH DAY OF SEPTEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Kibuge holding brief for Wachira for Claimant – present

Kimuyo for Ndichu for Objector – present

No appearance for respondents

Court Assistant – Fred

