



Muthinga v Nakuru County Public Service Board & 2 others (Cause E024 of 2022) [2022] KEELRC 12699 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 12699 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E024 OF 2022
HS WASILWA, J
SEPTEMBER 22, 2022

BETWEEN

DANIEL MUTHINGA CLAIMANT

AND

NAKURU COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT

GOVERNOR NAKURU COUNTY GOVERNMENT 2ND RESPONDENT

COUNTY GOVERNMENT OF NAKURU 3RD RESPONDENT

RULING

1. The application before me is the claimant/ applicant's notice of motion dated June 20, 2022, brought pursuant to section 1A, 1B and 3A of the [Civil Procedure Act](#), order 40, order 51 rule 1 of the [Civil Procedure Rules, 2010](#) and all other enabling provisions of law, seeking the following orders:
 - a) That this application be certified as of utmost urgency and the same be heard *ex parte* in the first instance without the requirement of service.
 - b) That this honorable court be pleased to issue an order directing the 1st, 2nd and 3rd respondents herein to forthwith and unconditionally lift the suspension of the claimant/ applicant from employment and order for his immediate reinstatement to his duties and place of work pending the hearing and final determination of this application.
 - c) That this honorable court be pleased to issue an order of injunction restraining the 1st, 2nd and 3rd respondents either by themselves, their employees, servants and/or agents from terminating, suspending, demoting and/or in any other manner interfering with the employment of the claimant/ applicant pending the hearing and final determination of this application.



- d) That this honorable court be pleased to make an order directing the 1st, 2nd and 3rd respondents to forthwith and unconditionally lift the suspension of the claimant/applicant from employment and order for his immediate reinstatement to his duties and place of work pending the hearing and final determination of the main claim.
 - e) That this honorable court do make an order of injunction restraining the 1st, 2nd and 3rd respondents either by themselves, their employees, servants and/or agents from terminating, suspending, demoting and/or in any other manner interfering with the employment of the claimant/ applicant pending the hearing and final determination of the main claim.
 - f) That this honourable court be pleased to direct that an external auditor do conduct a full forensic audit into the entire procurement process of the department of roads, transport and public works, Nakuru county government as from the March 20, 2019 up to date and a report on the findings thereof be filed in court within 30 days.
 - g) That the cost of this application be met by the respondents.
2. The application is premised on the grounds set out in the body of the motion and the supporting affidavit sworn by Daniel Muthiga, the claimant, on the June 21, 2022. The grounds upon which the application is anchored is as follows;
- i. That on or about the March 20, 2019, the respondents herein lawfully entered into a contract of employment with the applicant whereof, he was engaged as the chief officer, department of roads, transport and public works, job group S, on a contract that run for a period of four (4) years effective from March 20, 2019 up to March 20, 2023.
 - ii. That upon his appointment, the applicant carried out his duties dutifully, diligently and professionally, while obeying all lawful orders from the respondents as a result of which, the 3rd respondent commended him for his performance.
 - iii. Barely a month after the commendation, on the February 11, 2021, the applicant was suspended for a period of ninety (90) days pending investigations into his alleged gross misconduct and was barred from carrying out any official duties or attending to the respondent's work place.
 - iv. He avers that the notice of February 11, 2021 did not contain any grounds for his suspension, neither was the applicant given particulars of the alleged gross violation of the respondent's rules. Further that despite the letter being marked as "confidential", it was copied to all county executive committee members and all chief officers of the Nakuru county government, which was against existing employee - employer confidentiality rules thus violating the very confidentiality it purported to possess and further causing him severe embarrassment among his colleagues and peers.
 - v. Nevertheless, that the applicant complied with the said notice and proceeded for compulsory leave effective from February 11, 2021 as directed thereof and has remained on compulsory leave up to date.
 - vi. He states that the ninety (90) days suspension lapsed on May 11, 2021 by which time the applicant had not received any information and/or update from the respondent and when he sought to report back to work he was denied access and instead told to collect a show cause letter from the office of the county secretary.



- vii. It is the applicant's case that he tried on several occasions to collect the show-cause letter to no avail, informing his decision of asking for the same through his advocates. His advocates by a letter of June 2, 2021, requested for the show cause and were served on the same day though the show cause letter was backdated to May 24, 2021.
- viii. In the show cause letter, the applicant was accused of having engaged in acts of gross misconduct amounting to serious breach of office on the following grounds: that he failed to sign some supposedly awarded contracts in the month of June, 2019 which as a result were not implemented, failing to prepare some pre-requisite documents to enable completion of some works when the details were not supplied to the complainant despite request for the same, In any case, that most draft procurement documents are prepared by other units, more so the procurement unit, awarding and executing some contracts without following proper procurement process but details of the alleged improper processes were not supplied, being rude or derogatory to the current acting chief officer but no details have been provided either.
- ix. According to the applicant, the grounds raised in the said letter of June 2, 2021 did not warrant the indefinite suspension of the applicant and/or any disciplinary action being carried against him because; the allegation of failing to sign some contracts is a misnomer in itself as he was the person mandated to verify approve and generally enter into all lawful contracts on behalf of the respondents in the said department. Consequently, any document that, were improper were send back to the markers for rectification and re-tendering.
- x. He states that some contract documents that the applicant is accused of failing to execute were not executable for one reason or another and hence returned to the relevant persons for correction and/or retendering. Further, delays, if any, in completing some of the works were not attributable to him but were mostly historical, occasioned by increased backlog resulting from, *inter alia*; initial payment and procurement freeze introduced by the respondents soon after transition into the second county government in August, 2017 ostensibly to carry out financial and energy audits, incessant onslaught on the department by the county assembly of Nakuru which led to the eventual impeachment of the county executive committee member for roads, transport and public works, in July of 2019, whom he was answerable to, lack of support adequate support from the deputy governor who was appointed acting CECM for roads, transport and as he was too busy with his official duties deputizing the governor, constant interference of the departmental procurement process by the county's political office; incompetence and sabotage from the new procurement who would delay in submitting relevant reports and/or fail to work on documents submitted to him on time with the sole intention of frustrating the performance of the applicant's duties and the emergence of covid-19 pandemic which led to closure of places of work and also the heavy rainfall received between the months of September 2019 and March, 2020 which slowed the physical infrastructural development unlike any other period.
- xi. That from the foregoing, the applicant contends that the disciplinary process against him is unjustified and he is merely being faulted for conducting his duties diligently and professionally and for refusing to be used as a mere rubber-stamp to allow all manner of tenders to pass through without his scrutiny.
- xii. He further stated that at the time of the said suspension, the applicant had already been transferred from the roads docket to the public works after he had been transferred were an afterthought, ill conceived, merely calculated to unfairly push the applicant out of employment.



- xiii. He states that the Notice to show cause received on June 2, 2021, indicated that his response to allegations stipulated therein should reach the respondents by June 2, 2021. His advocates then sought for more time vide the letter of June 4, 2021 and requested to be supplied with relevant documentation to substantiate the allegations leveled against him which letter went unanswered to date.
 - xiv. A response to the show cause letter was served upon the respondents on the June 30, 2021, which response did not elicit any invitation to disciplinary hearing or otherwise. Numerous correspondence ensued, requesting for an update on the progress of the disciplinary process to no avail.
 - xv. On March 30, 2022, the applicants advocates were served with a letter dated December 8, 2021 but indicating that the applicant did not provide sufficient reasons to absolve him from the allegations made and that the matter had been forwarded to the relevant human resource committee for further consideration.
 - xvi. He states that he has been on suspension for over 16 months now contrary to the law which provides for disciplinary process to be concluded within 6 months. Additionally, that the applicant's suspension from employment for an indefinite period of time is unlawful, inhumane and contrary to the applicant's terms and conditions of service and the Public Service Commission, Discipline Manual for the Public Service, 2016.
 - xvii. It is stated that while the claimant is on suspension, he was replaced by a person who was not properly vetted and approved by the county assembly as per the law and hence his continued holding of the said position is illegal and unconstitutional.
 - xviii. That the respondents herein have clearly demonstrated that they are unwilling to work with any person who is incorruptible and independent-minded and have been improperly sending senior officers on compulsory leave, including but not limited to the director of finance, Nakuru county government who has since been reinstated to employment by this honourable court, and replacing them with persons they deem more agreeable with the sole intention of compromising the procurement and financial processes for their own selfish interests.
 - xix. He contends that, the said actions complained of clearly offend the express provisions of the law and therefore an indictment to the rule of law, fair administrative actions, rights to fair hearing and principles of natural justice and if allowed to stand the applicant herein will suffer irreparably as the indefinite suspension amounts to constructive dismissal and the applicant will therefore have been terminated from employment wrongfully and unfairly if this court does not intervene and grant the orders sought.
3. In response to the application, the respondents, through the honourable Attorney General raised preliminary objection dated July 1, 2022, which came out as follows;
- a) That the said application and the entire cause in itself is in contravention of the provisions set out in the Constitution of Kenya and specifically article 234(i) of the said Constitution.
 - b) That the said application and indeed the entire cause is in contravention of section 77 of the County Government Act that provides for an elaborate procedure of appeals. The cause is prematurely filed.
 - c) That the said application and indeed the entire suit flies in the face of the express provisions of section 74 of the Public Service Commission Act.



- d) That the claim and application are not ripe on the grounds that the applicant has not pursued the procedure laid down in the Constitution and the Public Service Commission Act and therefore their cause is premature as being in contravention of the exhaustion rule.
 - e) That the said application and the entire cause are premature, ill-advised, and bad in law.
 - f) Other grounds to be adduced at the hearing of the said application.
4. Directions were taken for the application to be heard by way of written submission. The applicant filed on the July 22, 2022, however no submissions were filed for the respondents at the time of writing this ruling.

Applicant's Submissions.

5. The applicant submitted that the main issue for determination is whether the applicant should have filed an appeal with Public Service Commission (PSC) in accordance with section 77 of the County Government Act, before instituting this suit. He argued that a person can only appeal to the PSC after a decision has been made by the County Public Service Board (CPSB), which is in the contrary herein as the CPSB has failed to make a decision on his employment status leaving him in limbo as he cannot appeal an inaction by the respondents.
6. It was submitted that, the suspension letter and the notice to show cause emanated from the office of the governor, communicated through the secretary in the office of the governor contrary to express provisions of the section 44 and section 59 which creates the powers and functions of the governor and the CPSB respectively, whose functions are distinct from each other. He argued further that any disciplinary process ought to have been carried out by the County Public Service Board and communicated through the secretary of the Board as envisaged under clause A 15 of the County Public Service Human Resource Manual, 2013. To support his case, the applicant cited the case of Kisumu County Public Service Board and another v Samuel Okuro & 7 others [2018] eKLR where the court held that;

“coming back to the facts before us, an examination of the respondents’ letters of appointment, confirmation, compulsory leave and notice of termination reveal a common pattern. The appointment letters were all signed by the county secretary and copied to the governor and deputy governor. The letters of confirmation were signed by the county secretary and copied to the secretary County Public Service Board. The governor signed the letters for compulsory leave, and the acting county secretary signed the notices for termination of contract.[36] Under section 44 of the CGA a county secretary is the head of the county public service and is also responsible for conveying the decisions of the county executive committee to appropriate persons and authorities. A county secretary is not a member of the County Public Service Board, which has its own secretary. In the notices of termination, which were signed by the acting county secretary, it is not stated when or how the decision to terminate the Respondents’ contract of service was made nor is it clear whether the county board or the county assembly were involved in making the decision... We have come to the conclusion that the governor initiated the removal of the respondent without following the appropriate machinery. The respondents being county public officers, the governor could not terminate their services without involving the county board and the county assembly. In sending the respondents on compulsory leave and terminating the respondents’ contract, the governor usurped the role of the county board. This denied the respondents their rights under section 77 of the CGA that allows any county public officer that is dissatisfied with the decision of the county



board in a disciplinary process to appeal to the Public Service Commission. Further, the respondents' constitutional fundamental rights were violated. [49] In the circumstances, the learned judge acted within her constitutional jurisdiction in reviewing the appellant's actions and granting the orders of *certiorari* to protect the respondents' from violation of their fundamental rights and to prevent the appellants from acting in a manner that contravenes the Constitution and the statute."

7. On the preliminary objection raised, the applicant submitted that the PO raises matter of fact that will need this court to call for evidence to ascertain, contrary to the holding in *Mukbisa Biscuit* case and the case of *James Orre v Office of the Governor, County Government of Marsabit and another* [2021] eklr where the court held that;

"In the instant applications, the preliminary objections must fail. This is because, like is submitted by the petitioner, the objections do not satisfy the test in the authority of *Mukbisa Biscuits*, supra. This would require an analysis of evidence to support their preliminary objection. The objections therefore do not stand out as points of law which would not require the application of evidence to prove. Again, the petition is outside the limits of section 77 of the County Government Act, 2012 in that it seeks to test the constitutionality and legality of the termination of the employment of the petitioner. These are weighty issues touching on the validity of the actions of the respondents in a manner advanced so as to oust the jurisdiction of the Public Service Commission as an arbiter of the issues in dispute in the circumstances. Here, as duly submitted and amplified by the petitioner/respondent, the doctrine of exhaustion is surpassed by the circumstances and subject matter of this individual case. I therefore find in favour of the petitioner/respondent. The preliminary objections must fall by the way side and pave way for the hearing and determination of the petition."

8. On whether the Public service commission have jurisdiction to hear and determine the applicant's grievances, it was argued that firstly, that the boards has not made any decision towards suspension of the claimant or his employment contract, since the suspension and the show cause letter was issued by an office without authority being the office of the governor, secondly that the applicant cannot appeal inaction by the respondent but only a decision as provided for under section 77(2)(g) of the County Government Act. Besides, that the appeal to the commission has to be carried out within ninety (90) days, which was not possible in this case as the applicant is still on suspension for over a year later. To support his case, the applicant relied on the case of *Abdikadir Suleiman v County Government of Isiolo and another* 2015] eklr where the court held that; -

"In considering the constitutional and statutory provisions that empower the commission to hear and determine appeals in respect of county governments' public service, the subject matter is set out in section 77 of the Act but the decisions the commission may make are not set out in the Act or the Constitution. It is this court's opinion and holding that in appeals to the commission, the commission can only make decisions that the county public service board or relevant lawful authority could have made or vary such decision by simply setting it aside or making a decision that was in the board's or the other relevant lawful authority's jurisdiction to make. The court has guided itself that on appeal the appellate authority applies the same substantive law and facts as applied by the primary authority that made the decision appealed against and generally considers facts as they were presented before the primary authority so that an appellate authority, in absence of anything else, may only set aside the decision appealed against or substitute the decision with any of the remedies



that the primary authority was empowered to make. In other words, the appeal process deals with the merits or substance of the case and not procedural or legal propriety of the case... n the present case the claimant has alleged that the oral dismissal was illegal, unlawful and unconstitutional. It is the holding of the court that the jurisdiction to entertain that allegation and to make a primary conclusive finding thereon is vested in the court and the commission does not enjoy constitutional or statutory jurisdiction to determine that issue and to make appropriate remedy as is prayed for by the claimant in this case. The court considers that the line is thin but clearly sets apart the matters that can go to the commission as of necessity in the first instance and those that may be urged before the court as of first instance without having to go through the commission by reason of exhausting the prescribed alternative and statutory procedure and remedy. It is clear that legitimacy or lawfulness of the decisions is not one of the listed appealable subject matter under section 77 of the Act and it has not been shown that such would be a matter in the constitutional or statutory competence of the commission to decide.”

9. Similarly, that even if the applicant was to be subjected to appeal at the public service commission, his case will be time barred, due to the inaction by the respondent of failing to determine the disciplinary process within the statutory limited of 60 days.
10. On whether the prayers sought should be granted, the applicant submitted that he has demonstrated his case on a balance of probability and urged this court to allow the application as prayed.
11. I have examined the averments and submissions of the parties herein. The respondents have raised a preliminary objection to the effect that the application has been filed prematurely without following the requisite appeal process.
12. However I note that there was nothing appellable at this stage as the applicant has been on suspension for a long time awaiting the conclusion of the disciplinary process which has never been concluded.
13. The respondents have not explained why it has taken them over 16 months to proceed and conclude the disciplinary process.
14. As submitted by the applicant herein the applicant could only have appealed to the PSC after a decision had been made by the respondents which is not the case in this case.
15. Having considered the submissions and averments herein, I find the application by the applicants is merited award as follows;
 - a) That this honorable court is hereby pleased to make an order directing the 1st, 2nd and 3rd respondents to forthwith and unconditionally lift the suspension of the claimant/applicant from employment and order for his immediate reinstatement to his duties and place of work pending the hearing and final determination of the main claim.
 - b) That this honorable court hereby makes an order of injunction restraining the 1st, 2nd and 3rd respondents either by themselves, their employees, servants and/or agents from terminating, suspending, demoting and/or in any other manner interfering with the employment of the claimant/ applicant pending the hearing and final determination of the main claim.
 - c) Costs of this application to be in the cause.

RULING DELIVERED VIRTUALLY THIS 22ND DAY OF SEPTEMBER, 2022.

**HON. LADY JUSTICE HELLEN WASILWA
JUDGE**



In the presence of:-

Mwaniki for Claimant/Applicant – present

Kihoro for respondents – present

Court Assistant – Fred

