



Nyambane v County Government of Nyamira & 4 others (Petition E017 of 2022) [2022] KEELRC 12942 (KLR) (26 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12942 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E017 OF 2022**

S RADIDO, J

OCTOBER 26, 2022

IN THE MATTER OF THE ENFORCEMENT OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 162(2)(A), 258 AND 259(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF THE RIGHTS AND FREEDOMS IN ARTICLES 25, 27, 28, 33, 35, 41, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

AND

IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE EMPLOYMENT ACT NO. 11 OF 2007

BETWEEN

EVANS ATUNGA NYAMBANE PETITIONER

AND

COUNTY GOVERNMENT OF NYAMIRA 1ST RESPONDENT

GOVERNOR NYAMIRA COUNTY 2ND RESPONDENT

COUNTY SECRETARY, NYAMIRA COUNTY 3RD RESPONDENT

CHAIRPERSON, NYAMIRA COUNTY PUBLIC SERVICE BOARD 4TH RESPONDENT



JUDGMENT

1. On or around 24 March 2022 and 25 March 2022, the County Public Service Board, Nyamira (the Board), advertised and re-advertised for several positions within the county public service. The deadline for receipt of applications was 6 April 2022.
2. The Petitioner felt the recruitment process was not lawful, and he lodged a Petition with the Court on 20 April 2022, seeking a myriad of declarations and orders.
3. Filed with the Petition was a Motion under a certificate of urgency. The Petitioner prayed in the Motion for orders interdicting the recruitment (process).
4. The Court gave directions on the Petition and Motion on 5 May 2022. The directions requested the parties to submit on a jurisdictional question arising from the provisions of Article 234(2)(i) of *the Constitution* as read with section 77 of the *County Governments Act* and sections 85, 86 and 87 of the *Public Service Commission Act*.
5. Consequently, the Board caused to be filed on 21 June 2022, a replying affidavit sworn by its chairperson and submissions to be filed on 21 June 2022. The Petitioner filed his submissions on 22 June 2022.

Petitioner's arguments on jurisdiction

6. The Petitioner contended in his submissions that because of the nature of the reliefs sought, the Public Service Commission did not have jurisdiction over the dispute.
7. The Petitioner also urged that the Petition raised novel and weighty constitutional questions which could only be determined by the Court.
8. The Petitioner cited case law.

Respondents' rejoinder

9. The Respondents took the view that the Court did not have jurisdiction since section 77(1) and (2) of the *County Governments Act* and section 87(2) of the *Public Service Commission Act* had provided for an appellate process in disputes arising from decisions of a county public service board.
10. The Respondents also cited case law.

Evaluation

11. Article 234(2)(i) of *the Constitution* has given the Public Service Commission the function of hearing and determining appeals in respect of disputes arising from county governments' public service.
12. The provision has been contextualised in the *County Governments Act* and the *Public Service Commission Act* 2017.
13. In this respect, section 77(2) of the *County Governments Act* mandates the Public Service Commission to consider or entertain appeals arising from the recruitment, selection, appointment, and qualifications attached to a county government public office.



14. Section 77(2) of the *County Governments Act* is mirrored in section 85(a) of the *Public Service Commission Act*, 2017.
15. On its part, section 86 of the *Public Service Commission Act* gives locus to any person who feels affected by a decision by a county public service board on recruitment or appointment within the county public service to appeal to the Commission. The Commission has been clothed with the power to set aside such recruitment or appointment after hearing the appeal.
16. Before the appellate procedure is exhausted, section 87(2) of the *Public Service Commission Act* bars any person from instituting legal proceedings before the Court.
17. Doubtless, *the Constitution* and statutory law envisage the exhaustion of the appellate process in disputes emanating from the recruitment process within the county public service.
18. Where alternative dispute resolution mechanisms have been provided for, the Courts have declined to assume jurisdiction before those processes have been exhausted.
19. In the case of the *Speaker of the National Assembly v James Njenga Karume*, Civil Application No. Nai. 92 of 1992, the Court of Appeal stated the law as follows:

In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the *Civil Procedure Rules* cannot oust clear constitutional and statutory provisions.

20. The same reasoning was followed by the *Court of Appeal in Secretary, County Public Service Board & Ar v Hulbbhai Gedi Abdille* (2017) eKLR, wherein it was addressing its mind to section 77 of the *County Governments Act*:

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..... Her contention that she disregarded the appeal because it could not afford her 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.

21. These decisions are binding on this Court.

Conclusion and Orders

22. The Petitioner herein did not exhaust the appellate procedures set out in law in challenging the recruitment process.
23. The Court's jurisdiction being a deferred jurisdiction, the Court must put down its pen.
24. The Petition and Motion are struck out with costs.

DELIVERED VIRTUALLY FROM VOI, DATED AND SIGNED ON THIS 26TH DAY OF OCTOBER 2022.



Radido Stephen, MCI Arb

Judge

Appearances

For Petitioner Sam N. Mainga & Co. Advocates

For Respondents R. Nyambane, Advocate, County Law Office

Court Assistant Chrispo Aura

