



Situma v Bungoma County Assembly Service Board (CASB) & 2 others (Cause E003 of 2021) [2022] KEELRC 13285 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELRC 13285 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE E003 OF 2021
JW KELI, J
NOVEMBER 24, 2022**

BETWEEN

MARTIN ADANS WAMUKOTA SITUMA CLAIMANT

AND

**BUNGOMA COUNTY ASSEMBLY SERVICE BOARD (CASB) 1ST
RESPONDENT**

SPEAKER/CHAIRMAN OF CASB 2ND RESPONDENT

CLERK/SECRETARY OF BUNGOMA CASB 3RD RESPONDENT

RULING

On the Respondents' Notice of Preliminary Objection Dated 23rd August 2022

1. The Claimant vide statement of claim dated April 7, 2021 and amended on the December 25, 2021 brought a suit against the respondent seeking various reliefs including declaration of violation of employment rights following demotion and later summary dismissal which he alleged was unfair and for unconditional reinstatement, unpaid wages, general damages among other many reliefs.
2. The Respondent through John Ongwae Mosongo, Secretary of the 1st Respondent filed a replying affidavit dated February 3, 2022 in opposition to the claim. The Claimant did swear further affidavit on April 12, 2022 in reply.
3. The Respondent later filed in court a notice of preliminary objection dated August 23, 2022 on points of law to wit: -
 - a. The entire petition runs counter to the provisions of section 77(1) and (2) of the County Government Act No. 17 of 2013.
 - b. The entire petition offends the provisions of Articles 234(2) of the Constitution of Kenya .



- c. The entire petition runs counter to the provisions of section 85(a)-(g) and section 87(2) of the [Public Service Commission Act, 2017](#)
 - d. The entire offends the spirit of the provisions of section 8(1) and (2) and section 9 of the Public Service Commission (County Appeals Procedures) Regulations.
 - e. That consequently therefore the court lacks jurisdiction to hear and determine the entire petition.
4. The court directed that the preliminary objection be canvassed by way of written submissions. The parties complied.

Determination

Issues for determination.

- 5. Both parties in their written submissions addressed the issue of jurisdiction of the court to hear and determine the claim.
- 6. The court finds that the issue for its determination under the Notice of Preliminary Objection is as addressed by the parties which it frames as follows: -Whether the court has jurisdiction to hear and determine the claim

The Respondent's case

7. The Respondent submits that the claim runs counter to the provision of section 77(1) and (2) of the County Government Assembly Act. section 77 of the [County Governments Act](#) reads:-
- “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 control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the “Commission”) against the decision.
 - (2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of— (a) recruitment, selection, appointment and qualifications attached to any office;
 - (b) remuneration and terms and conditions of service;
 - (c) disciplinary control;
 - (d) national values and principles of governance, under Article 10, and values and principles of public service under Article 232 of [the Constitution](#);
 - (e)) retirement and other removal from service;
 - (f) pension benefits, gratuity and any other terminal benefits; or
 - (g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.”



8. The Respondent submits that the petition (sic. It is a claim) offends the provisions of Article 234(2) of *the Constitution* of Kenya 2010 to wit : ‘Functions and powers of the Public Service Commission Article 234(1) the functions and powers of the commission are set out in this article.
- (2) the commission shall-
- a. Subject to this Constitution and legislation-.
 - b. Hear and determine appeals in respect of County Governments Public Service; and
 - c. Perform any other functions and exercise any other powers conferred by national legislation.”
9. The Respondent submits that petition(sic) the instant suit is a claim, runs counter to the provisions of section 85 a-g and section 87(2) of the *Public Service Commission Act* 2017.
10. That the entire petition (sic) offends the spirit of the provisions of section 8(1) and (2) and section 9 of the Public Service Commission (County Appeals Procedures) Regulations.
11. In support of their preliminary objection the respondent relied on the decision of the court of appeal in *Secretary, County Public Service Board & another v Hulbbhai Gedi Abdille [2017] eKLR* paragraph 2 pages 6 to 9 where the Court of Appeal held:- ‘Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime. In the case of *Speaker of the National Assembly v James Njenga Karume [1992] eKLR*, this Court emphasized:- “...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 observed without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions....” the court further stated:- “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. In terms of *Republic v National Environment Management Authority exparte Sound Equipment Ltd, [2011] eKLR*, we discern no exceptional circumstances in this appeal that would have warranted the bypassing of the statutory appellate process by the respondent.”
12. The Respondents submit that the Claimant was supposed to appeal to the County Public Service Board first.

The Claimant’s submissions.

13. The Claimant submits that he was not heard before the illegal demotion, that on the date scheduled for disciplinary hearing the claimant informed the employer he was unwell vide email but was not accorded another opportunity for hearing hence could not appeal to the PSC having not been heard. That the claimant is seeking for compensation for infringement of labour rights.
14. That the Respondent has not brought the preliminary objection with clean hands having not raised the issue in their defence of 18th December 2013(sic^{*1}). The Claimant to buttress this submission relies on the decision in *Patrick Kariithi Wabome & 114 others v County Government of Laikipia & Another ; Transitional Authority & another (interested parties)2020 e KLR* where the court held that,

¹ (content missing)



‘Fundamentally all preliminary objections ought to be addressed with the court instantly. A party who files defence, sits back for 6 years and when called to give defence sways with objections and counter application to avoid(sic) urging such defence comes to court with unclean hands.’ The Claimant further relies on Owners of Motor vessel ‘ Lillian S’ v Caltex Oil Kenya Limited (1989) KLR1 to the effect that a question of jurisdiction ought to be raised at the earliest opportunity. That the objection is not brought in good faith.

15. That contemporary jurisprudence is for discretion to be exercised in a manner to promote determination of suits on merit and refrain from draconian way of striking out suits unless fatally defective and no other way of salvaging the same. That the courts have accentuated the need to examine legal matters on merit especially where infringement to constitutional rights is raised and relied on the decision in Disney Insurance Brokers Ltd V Joho and 4 others Petition 37 of 2020.
16. The Claimant submits that the PSC does not have jurisdiction over the 1st and 2nd Respondents. That the Claimant was not an employee of the County Public Service Board but the County Assembly Service Board which bodies are separate and distinct legal entities.
17. That the County Public Service Board is an arm of the county government and not in any way associated with the County Assembly Service Board and linking the two to mean one is undermining the doctrine of separation of powers at the county government level. The claimant cites several decisions of the court to extent that the process under section 77 of County Government Act did not oust court jurisdiction. The court finds no agreement by the court on jurisdiction under section 77.
18. The Claimant submits that having raised constitutional grievances the PSC had no jurisdiction over his claim and relied on the decision of the court in Johnson Takur suing on behalf of the Ogiek /Ndorobo Council of Elders v County Government of Bungoma & 3 others (2021)eKLR where Justice Riech held, ‘Having scrutinized the petition and the rival submissions on the issue, I am satisfied that the petitioner’s claim is based on a constitutional matter falling under the Article 27 of [the constitution](#). I find that the petition is properly instituted before this court.’

Decision

19. The question of jurisdiction is cardinal in the determination of disputes as was held in the landmark decision of Nyarangi JA (as he then was) in the case of the Owners of Motor vessel ‘ Lillian S’ v Caltex Oil Kenya Limited (1989) KLR1 to the extent that jurisdiction is everything and without it the court has no power to make one step and must down its tools.
20. The court is guided by the Supreme court in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR where in paragraph 68 it held that jurisdiction flows from either [the Constitution](#) or legislation or both. The Court further held that the issue of whether the court had jurisdiction to entertain a matter before it is not a matter of procedural technicality but goes to the very heart of the matter and without jurisdiction the court cannot entertain the proceedings.
21. The court is further guided by the landmark decision of the defunct Court of Appeal for East Africa decision of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 676-701 where it was stated that a Preliminary Objection should be in the nature of what used to be demurrer and should be raising a pure point of law in the open eye of the court that can dispose of the suit in limine. The court finds the instant preliminary objection based on points of law on ground of jurisdiction properly raised.
22. The court in the instant case agrees with the claimant that the issue of lack of jurisdiction by the court ought to be raised in the defence and in the first instance. The court in the instant case found the



defence did not raise the issue of jurisdiction. However the preliminary objection was raised within 8 months of filing amended claim hence timely. There was no delay like of 6 years as stated in the decision relied on by the claimant in Patrick Kariithi Wahome & 114 others v County Government of Laikipia & Another ; Transitional Authority & another (interested parties) 2020 e KLR.

23. The Respondent relies on the following provisions of the law:-
24. Article 234(2)(i) of *the Constitution* to wit:- ‘Functions and powers of the Public Service Commission article 234(1) the functions and powers of the commission are set out in this article.
- (2) the commission shall-
 - a. Subject to this Constitution and legislation-.
 - b. Hear and determine appeals in respect of County Governments Public Service; and
 - c. Perform any other functions and exercise any other powers conferred by national legislation.”
25. Section 77 of the *County Governments Act* reads:-
- “ 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 control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the “Commission”) against the decision. (2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of— (a) recruitment, selection, appointment and qualifications attached to any office;
 - (b) remuneration and terms and conditions of service;
 - (c) disciplinary control;
 - (d) national values and principles of governance, under Article 10, and values and principles of public service under Article 232 of *the Constitution*.”
26. Related to the foregoing laws cited by the Respondent are the following provisions of the law under the *Public Service Commission Act*:-
27. Section 85 of the *Public Service Commission Act* of 2017 which reads:-
- ‘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 —
- (a) recruitment, selection, appointment and qualifications attached to any office;
 - (b) remuneration and terms and conditions of service;
 - (c) disciplinary control;
 - (d) national values and principles of governance, under Article 10 and values and principles of public service under Article 232 of *the Constitution*.”



28. Section 87 (2) of the [Public Service Commission Act](#) which reads:-
- “A person shall not file any legal proceedings in any Court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from county government public service unless the procedure provided for under this Part has been exhausted.”
29. The Respondent submits the first port of call for the claimant aggrieved with the decision Respondent was the appeal County Public Service Board. The respondents hinged their submissions on the decision of the Court of Appeal in Secretary County Public Service Board and Another -vs- Hulbhai Gedi Abdille (2017) eKLR (Makhandia, Ouko & M’Inoti JJA) where the court allowed the appeal on basis that the Respondent had failed to utilize the process under Section 77 of the County Government Act as follows:-“ 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 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.”
30. The court agrees with the submissions by the claimant that the respondents are mistaken as to the employment of the claimant. The claimant in his claim stated that the 1st respondent, the Bungoma County Assembly Service Board was his employer. Consequently the submissions that he ought to appealed to the County Public Service Board is mistaken. Consequently, the court finds that as the Court of Appeal in Secretary County Public Service Board and Another -vs- Hulbhai Gedi Abdille (2017) Eklr dealt with claim by employee of the County Public Service Board, then the said decision is not relevant to the jurisdiction of the court in the instant suit.
31. Article 234 (2) of [the constitution](#) states:- “The commission shall-
- a. Subject to this Constitution and legislation-
 - b. Hear and determine appeals in respect of County Governments Public Service; and
 - c. Perform any other functions and exercise any other powers conferred by national legislation”.(emphasis given.)
32. Section 77 (1) of the County Government Act reads:- ‘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 control against any county public officer may appeal to the Public Service Commission’(emphasis given)
33. Section 87(2) of the [Public Service Commission Act](#) ousts the jurisdiction of the court in matter of recruitment of any person to county government by providing as follows: “A person shall not file any legal proceedings in any Court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from County Government Public Service unless the procedure provided for under this Part has been exhausted.”(Emphasis given)
34. Applying the Supreme Court decision in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR where at paragraph 68 it held that jurisdiction flows from either [the constitution](#) or legislation or both then the court finds and determines that neither [the Constitution](#)



or the legislation being the [County Governments Act](#) and the [Public Service Commission Act](#) gave the Public Service Commission jurisdiction to handle employment claims emanating from employees of the County Assembly Service Boards.

35. The court agrees with the claimant that the Public Service Commission is limited to county governments and that to deal with employees of the County Assembly Service Boards would be undermining the doctrine of separation of powers. There is need to draw parallel with the national government(executive), Judiciary and the National Assembly. PSC only deals with employees of the national government (the executive) respecting the doctrine of separation of powers. Under Article 6 of [the Constitution](#) of Kenya 2010, we have two distinct levels of governments in Kenya, the National and County Government. The doctrine of separation of powers applies with equal measure to both levels of government.
36. The court perused the [County Governments Act](#) and found that unlike the County Public Service Boards, there is no clear redress mechanism provided for appeals from decisions of the County Assembly Service Boards for employees' claims as envisaged under the decision of the Court of Appeal in Speaker of the National Assembly v James Njenga Karume [1992] Eklr where the court held: '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.'" Further applying the Speaker of National Assembly decision the court finds and determines that any regulations by PSC purporting to give it jurisdiction over the County Assembly Service Boards decisions would be illegal as regulations cannot oust clear constitutional and legislative provisions. The court did not find such regulations cited by any of the parties.
37. In the upshot the court finds and determines that it has original jurisdiction to hear and determine claims by employees who allege services were terminated unfairly or for other grievance by employees against the County Assembly Service Boards as no clear procedure for the redress of such grievance prescribed by [the Constitution](#) or an Act of Parliament exists as held in the Speaker of the National Assembly v James Njenga Karume [1992] Eklr. The right of appeal under section 15 of the County Government Act as held in Bungoma ELRC E007 OF 2021 Francis Simiyu Tome and Another vs Bungoma County Assembly service Board and others would not qualify as a clear redress procedure for claims on decisions against employees.

Conclusion and disposition

38. The court determines that it has original jurisdiction to hear and determine claims by employees who allege their services were terminated unfairly or for constitutional violations against the County Assembly Service Boards' decisions. The notice of preliminary objection dated 23rd August 2022 is dismissed for lack of merit with costs to the claimant in the cause.
39. It is so ordered.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 24th NOVEMBER 2022.

J.W. KELI,

JUDGE.

In The Presence Of:-

Court Assistant: Brenda Wesonga



For Claimant: Kongani holding brief for Kipngeno Advocate

For Respondent: Were holding brief for Bw'Onchiri .

Court Order: Pretrial direction on 19th January, 2023.

J. W KELI,

JUDGE.

