



Biwott & another v County Government of Uasin Gishu (Cause E024 of 2021) [2022] KEELRC 13415 (KLR) (21 November 2022) (Ruling)

Neutral citation: [2022] KEELRC 13415 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE E024 OF 2021
NJ ABUODHA, J
NOVEMBER 21, 2022**

BETWEEN

JUDITH JEPKOGEI BIWOTT 1ST CLAIMANT

BENARD KIPKORIR CHELIMO 2ND CLAIMANT

AND

COUNTY GOVERNMENT OF UASIN GISHU RESPONDENT

RULING

1. By a motion dated June 28, 2021, the applicant sought orders *inter alia*:
 - a) That the suspension (s) of the claimants from exercising the duties of their offices as Roads Engineer and Plant Operator-Excavator respectively as communicated in the letters dated the May 24, 2021 and the ½ salary decision be set aside and the claimants do resume normal duties with full pay from the respondent pending the hearing and determination of this motion in the first instance and thereafter pending the hearing of the claim.
 - b) That an interlocutory injunction do issue against the respondent to restrain it from continuing any intended investigations or continuing with the same as against the claimants as communicated in the letter dated May 24, 2021 pending the hearing and determination of this application in the first instance and thereafter pending the hearing and determination of the claim.
2. The court on June 30, 2021 certified the motion urgent and ordered that the same be served on the respondent to file a response within 14 days. The respondent in addition to their response filed a preliminary objection on August 24, 2021. The nature of the objection was that:
 - a) The suit filed is fatally and incurably defective in law as it offends the provisions of section 77 (2) of the [County Governments Act](#) and section 74 (1) of the [Public Service Commission Act](#)



for being premature as the claimants have not exhausted the dispute resolution mechanism provided for under the said provisions.

- b) The issues raised in the suit are incompetent as the claimants have another avenue to determine the dispute being the Public Service Commission established under article 233 of the [Constitution of Kenya](#).
3. The applicant further on October 13, 2021 filed a motion under the [Fair Administrative Action Act](#). The motion sought orders *inter alia*:
 - a) That the respondent be restrained from proceeding with the disciplinary proceedings of the claimants pending the hearing of this application in the first instance and thereafter pending the hearing of the claim.
4. The court certified the motion urgent and granted interim orders as prayed and ordered the motion served on the respondent
5. Mr Mwangi in his submissions in support of the preliminary objection submitted that there was no dispute that the applicants never lodged an appeal against the decision of the respondent to suspend them or commence disciplinary proceedings against them. If that be the case, the court is bound by the Court of Appeal's decisions and the provisions of the law and the suit together with the applications should be dismissed for failure to utilize mandatory avenues in the first instance before approaching the court.
6. Regarding application for injunctions, counsel submitted that the applicants were enjoined to show that they had a prima facie case with probability of success. The applicants from the onset had not established a prima facie case with probability of success. The respondent, according to counsel had the authority to exercise disciplinary control over its officers. This authority was provided for under article 176(1) and 235 of the [Constitution](#) and further under section 55 of the [County Governments Act](#).
7. Counsel further submitted that clause D.28(1) of the respondent's Human Resource Manual was emphatic that the powers of the disciplinary control and removal of a County Public Officers was vested on the County Public Service Board or authorized officers as specified in the [County Government Act](#).
8. From the foregoing provisions of the [Constitution](#) and statutes, counsel submitted that the inevitable conclusion was that the respondent had authority to exercise disciplinary control over county public officers. The applicants were subject to disciplinary control of the respondent pursuant to its mandate under the law.
9. Mr Mwangi further submitted that 1st applicant failed to provide supervision as roads engineer when the plant equipment KBZ 374 had fuel siphoned from it at Sergoit Quarry. The applicant further failed to give a report on the progress of debt clearance to allow the excavator to be released from the quarry where it was detained by the owners of the quarry when the respondent failed to clear a debt of Kshs 464,000 and the equipment was used to excavate marram from private contractors to clear the debt.
10. The 2nd applicant too was indicted over the general conduct and work performance as a plant operator when it was noted from the fleet management information system that for the past three months 96.26 liters of fuel was siphoned from the excavator KBZ 324D.
11. As a consequence, both applicants were suspended from the exercise of duties of their office pending the finalization of their case. The purpose of the suspension was to facilitate investigation over the alleged misconduct. There was therefore justifiable reasons for the suspension.



12. Mr Mwangi further submitted that the suspension was administrative and not punitive. It was intended to allow the respondent carry out investigations. Clause D32 (2) of the respondents Human Resource Manual bestowed power on the respondent to suspend. Counsel further submitted that the suspension was not a termination hence there was no need to hear the applicants before they were suspended.
13. Mr Mugambi on his part submitted that the constitutional and statutory jurisdiction of the court cannot be removed and conferred to a tribunal or other quasi judicial body. According to counsel where a claim relates to employment and labour relations the original forum for adjudication is with the court unless the parties opt to apply the provisions of section 15 of the [*Employment and Labour Relations Court Act*](#) and make reference to alternative disputes resolution mechanism. In this regard counsel relied on the case of [*Patrick Wahome & 114 others v County Government of Laikipia & anor*](#) [2020] eKLR
14. According to counsel the diction employed in section 77 of the [*County Governments Act, 2012*](#) was not intended to lay down a mandatory requirement for appeal to Public Service Commission. As Such the claimants were at liberty to choose the forum they intended to pursue their claim against the respondent. In this respect counsel relied on the case of [*Robert Khamala Situma & 8 others v Acting Clerk of Nairobi City County Assembly*](#) [2022] eKLR.
15. Mr. Mogambi further submitted that the appeal to the Public Service Commission would have been nugatory as the Commission was devoid of jurisdiction to grant the interlocutory relief sought by the claimants pending the determination of their appeals.
16. On the merit of the application counsel submitted that the respondents' failed to accord the claimant's an opportunity to be heard prior to placing them on suspension. This was an outright violation of section D.29(1)(i) of the County Public Service Human Resource Manual which provided that a person affected by a decision must be given an opportunity to be heard. Counsel further submitted that the respondent exercised the disciplinary action against the applicants in a biased manner since other employees with similar incidents reported were never suspended. Based on the above the claimants had a prima facie case with probability of success and that they stood to suffer irreparable loss unless the injunction order sought is issued.
17. Regarding the motion dated October 13, 2021 counsel submitted that the respondent issued the applicants with an invitation to appear before the disciplinary committee for a hearing scheduled for September 13, 2021 through a letter that limited the claimant's right to legal representation. Counsel objected to this fact but the respondent refused and or ignored to accord the applicants a chance to be represented by counsel.
18. Mr Mogambi therefore submitted that the refusal to allow the applicant's legal representation violated section 4 of the [*Fair Administrative Action Act*](#). This was because the invitation to the disciplinary proceedings issued by the respondent limited the claimants right to representation.
19. The respondent urged this court by way of preliminary objection to strike out this suit for failure to comply with section 77(2) of the [*County Governments Act*](#) and section 74(1) of the [*Public Service Commission Act*](#). The gist of the objection was that the suit was premature as the claimant's had not exhausted the dispute resolution mechanisms and that the issues raised in the suit were incompetent as the claimants had another avenue to determine the dispute being the Public Service Commission.



20. Section 77(1) of the *County Governments Act* provide as follows:
- “ Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in execution or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission against the decision” (underlining mine)
21. Section 74(1) of the *Public Service Commission Act* (PSC Act) is couched in more or less similar terms as section 77(1) of the *County Governments Act* (CGA).
22. The court of Appeal in the case of *Secretary, County Public Service Board & another v Hulbhai Gedi Abdille* [2017] eKLR stated in part that:
- “The section (section 77 of (GA) 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 the needs such as respondents. 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 (underling mine)
23. The court of appeal further went on and stated as follows:
- “in terms of Republic v National Environmental Management Authority we discern no exceptional circumstances in this appeal that would have warranted the bypassing of the statutory appellate process by the respondent.”
24. From the above it would seem to me that the provisions of section 77 of the *CGA* read together with section 74 of the *PSC Act* do not oust the constitutional jurisdiction of the Employment and Labour Relation Court. The court retains the original and appellate jurisdiction to entertain employment and labour relations disputes. The court retains the original and appellate jurisdiction to entertain employment and labour relations disputes generally, however with regard to employment and labour relations dispute’s emanating from *County Governments Act* and or *Public Service Commission Act* parties are required to exhaust the internal dispute resolution mechanism provided for in the Act before invoking the jurisdiction of the court unless there are exceptional circumstance.
25. This court (Ndolo, J) in the case of *Zena Achieng Mohammed v County Public Service Board, Kilifi & 6 others* [2021] eKLR observed as follows:
- “I do not think the court can lock out a party seeking interim relief on the basis of exhaustion principle provided under the *County Governments Act* and *Public Service Commission Act*. I say so because, if the subject of appeal before the Public Service Commission dissipates, then the ultimate decision by the commission could well be an exercise in futility.... I did not see any provision for interim relief pending determination of appeals lodged with the commissions. The effect of the subject matter of appeals before the commission could become entrenched and irreversible. In such event the resultant injustice to the appellants would be great and the court cannot ignore this exposure.”
26. I cannot agree more with the sentiments expressed by the learned Judge. As observed earlier, this court has the constitutional and statutory jurisdiction over employment and labour relation matters however such jurisdiction where a statute, letter of contract, collective bargaining agreement requires initial



resort to internal dispute resolution process, the crystallization of the court’s jurisdiction will only occur after the exhaustion of such internal dispute resolution process unless it can be demonstrated that the issue over which the courts’ jurisdiction is being invoked is exceptional such as the need to preserve the subject matter in dispute through an interlocutory injunction or conservatory orders. The court in such a case would be seized of jurisdiction but reserves the discretion in each case to either entertain the matter to conclusion or preserve the subject matter in dispute through an interlocutory order but stay the claim pending the outcome of the internal appeal process.

27. From the foregoing the court finds and holds that the omission on the part of the applicants to exhaust the internal appeal process before invoking the jurisdiction of the court is not fatal to the claim.
28. The second issue is whether the applicants have demonstrated a prima facie case with probability of success to warrant an interlocutory injunction and whether if successful damages would not be adequate.
29. The claimants in their statement of claim filed with the claim pleaded for the following orders:
 - a. A declaration that the rights and freedoms from discrimination, to fair labour practices, fair administrative action and the safeguard on subjecting a public officer to a disciplinary process with due process as enshrined in article 27, 41, 47, and 236 (b) of the [*Constitution of Kenya, 2010*](#) respectively have been breached by the actions of the respondent to place the claimants on suspension and the intended investigations are a nullity.
 - b. An order of *certiorari* to remove into this court and quash the decision placing them on suspension and the decision sanctioning investigations against them as communicated in respective letters dated the May 24, 2021 together with any consequential acts of investigations so undertaken pursuant thereto.
 - c. An award of damages for the breach of articles 27, 41, and 47 of the [*Constitution of Kenya, 2010*](#).
 - d. An order that they be restored to the normal discharge of the duties of their respective offices, resumption of full pay and payment of ½ of the withheld salary from the month of May, 2021 until the time of resumption of normal work duties.
30. Apart from prayer number 4 of the claim, the orders sought are constitutional remedies. From a perusal of the motion, supporting affidavit and documents in support of the claim, the courts is of the preliminary view that this is an ordinary employment dispute. The claimants have been accused of certain transgressions and suspended to pave way for investigations. They have further been called upon to show cause why disciplinary action should not be taken against them. They have responded. They have further been invited for disciplinary hearing but have not participated because they insist on being represented by counsel. These issues in the courts view do not require invoking constitutional remedies. The [*Employment Act*](#) contains sufficient provisions to address the claimant’s grievance.
31. The Court of Appeal in the case of [*Royal Media Services Limited v The Attorney General*](#) Civil Appeal No 45 of 2012 stated thus:

“In our view the judge cannot be faulted for holding that a constitutional petition procedure adopted by the appellant in ventilating its claim was ill-suited for the kind of claim it had laid before the trial court... we had occasion in the past to bemoan the current trend of filing constitutional petitions and references on matters or claims that have no iota or scintilla of any constitutional bearing.”



32. The matter before me though not brought as a constitutional petition contain prayers which can only be embodied in a constitutional petition yet the *Employment Act* and the individual contract issued to the applicants contain sufficient remedies including an order for restatement if appropriate in the circumstances. In my view if the matter is proceeds to full trial, counsel could well be advised to consider amending the prayers in the claim to align with the remedies available under the *Employment Act*.
33. Counsel for the applicants raised the issue of legal representation of his clients before the disciplinary panel. To this extent counsel cited the case of *Dennis Nyangaka Ratemo v Kenya Film Commission & another* [2014] eKLR. This case sufficiently discusses the pros and cons of allowing legal representation in internal disciplinary hearing. One of the logics behind not allowing legal representation is the avoidance of turning typical employment disputes to full blown legal dispute at that level. The court further observed that the respondent's Human Resource Policies and Procedures Manual do not allow or bar legal representation of an employee in a disciplinary hearing the *Employment Act* under section 41 suggests only a co-employer of the accused employee or his shop floor Trade Union representative to be present at the forum where the accused employer is being heard.
34. The Latin expression "*expressio unius est exclusio alterius*" means, to express or include one thing implies the exclusion of the other, or of the alternative. The possible mischief that would arise if lawyers were to be allowed in each and every disciplinary hearing is not heard to fathom. The court of course acknowledges that employment relationship in certain cases are very complex and contracts drawn with a lot of legal jargon which might require legal representation at the disciplinary hearing. However, in the absence of clear statutory provision, legal representation can only be allowed if the parties to the contract so agree or is expressly provided for in the contract of employment or human resource and policy documents.
35. In conclusion the court dismisses the preliminary objection for reasons stated earlier in the ruling and at the same time discharges the earlier interlocutory orders issued herein as the applicants have not demonstrated that they have a prima-facie case with probability of success and that damages would not be adequate if they become successful.
36. The costs will be in the cause.
37. It is so ordered

DATED AND DELIVERED AT ELDORET THIS 21ST DAY OF NOVEMBER, 2022

ABUODHA NELSON JORUM

JUDGE ELRC

