



**Orwa v County Government of Kakamega & another (Cause
20A of 2022) [2022] KEELRC 13056 (KLR) (1 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13056 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 20A OF 2022
JW KELI, J
NOVEMBER 1, 2022**

BETWEEN

BENJAMIN MUDIMO ORWA CLAIMANT

AND

COUNTY GOVERNMENT OF KAKAMEGA 1ST RESPONDENT

KAKAMEGA COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

RULING

1. The Claimant upon retirement from the Respondent on 8th June 2018 filed the instant suit as amended on 26 February 2021 seeking the following orders:-
 - a. A declaration that the Respondent subjected the Claimant to unfair labour practice and discrimination, demotion, underpayment by failing to consider Claimant's rights to equal work for equal pay as well as career progression contrary to Article 232, 235 and 236 of *the Constitution* of Kenya 2010 and Section 57 of the *Urban Areas and Cities Act* 2011.
 - b. A declaration that the Claimant's demotion and underpayment was contrary to Section 68 (2) (3) and Section 138 of the County Government Act, the Salaries and Remuneration Commission Circulars Number SRC/TSCGGOVT/316, SRC/TS/TA/3/10986) dated 19/11/2014, and SRC/TS/JC/CG/3/6VOL11(135), The *transition to Devolved Government Act*, (Transition Staff) Guidelines, 2014 and the Transition Authority Advisory dated 18/12/2013.
 - c. General and pecuniary damages for emotional torture, frustrations, stagnation and embarrassment that the Respondents subjected the Claimant.
 - d. Payment of Kshs.3,611,237 being underpayment form May 2013 to May 2018.
 - e. Costs of the suit plus interests.



2. The Respondent filed a Notice of Preliminary Objection dated 10th May, 2012 challenging the jurisdiction of the court to hear and determine the suit under Section 77 of the County Government Act among other grounds and seeking for the suit to be struck off.

3. The Court directed for Preliminary Objection to be canvassed by way of written submissions. The parties complied.

Determination

4. The Applicant /Objector submits that issues for determination to be: -

a. Whether the Claimant was employee of the Respondents at time of filing claim hence entitled to file claim.

b. Whether the claim ought to be pursued under provisions of County Government Act 2012 Section 77 which ousts jurisdiction of the court.

5. The Respondent/Claimant submits on the same issues. The decision will be on the issues identified by the parties:-

a. Employer employee relationship.

6. The Objector submits that by dint of operation of Article 162 (2) (a) of the Constitution Parliament was mandated to establish a High Court with specific jurisdiction to deal with matters relating to employment and labour relations. In pursuance thereof Parliament enacted the Employment and Relations Court Act No. 20 of 2011. That Section 12 (1) (a) of the Act grants right of audience over disputes involving the employer and employee. That Section 2 of the Act defines employee as a person employed for wages or salary. That the definition of employee does not cover a person who is no longer an employee and the claim having been filed in September 2019 long after Claimant had ceased being an employer of the Respondents, the court has no jurisdiction to deal with the claim which fail under ordinary courts the Claimant being no longer an employee.

7. The Claimant on this issue submits that if the submissions by the Respondent were the case, employees whose employment is terminated for material reasons would have recourse to the court for the reason that the employer employee relationship as defined under Section 2 of the Employment Court would have ceased to exist.

8. The Claimant submits that having been an employee of the Respondent the cause of action covers period of employment 5th May 2013 to 8th June 2018.

Decision

9. The Court agrees with the Claimant that the submissions of the Respondent would lock out all employees whose employment has been terminated which would be an absurd interpretation of the law defeating the justification of the very existence of the court.

10. The Court finds that in the instant case the cause of action arose from the employer employee relationship between the Respondents and the Claimant. That issue is dismissed.

Whether the claim ought to be pursued under the provisions of the County Governments Act.



11. Section 77 of the [County Government Act](#) provides as follows: “Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise of disciplinary control against any County Public Office may appeal to the Public Service Commission”.
12. The Objector submits the claim is on underpayment hence claim is that the Respondents made a decision to underpay him. That the claim is premised on alleged failure by the Respondent not pay the Claimant his benefits in accordance with the law or in breach of terms of employment with the Respondent hence the route under Section 77 of the [County Government Act](#) applies. That this claim by the Claimant would only lie while in service and not after retirement. To buttress their position the Objector relies on the response to the Claimant’s demand letter dated 31st July 2017 (BMO11) by the County Secretary making it clear the claims had no basis and that if he had any issue he should pursue them with the County Public Service Board. That at the time the Claimant was still in service but failed to follow the advise on appeals.
13. That the letter dated 31st July, 2017 by the 1st Respondent’s County Secretary was a communication by 1st Respondent of decline to deceive the demand letter claims. The Objector relies on the decision of Court of Appeal in *County Public Service Board & Another v Wajir County Government & Another* (sic) C Makhandia , Ouko and Minoti JJA) (2017) eKLR. should read:- Secretary County Public Service Board & Another v Hulbhai Gedi Abdille(2017) eKLR where the appeal was upheld on ground of failure by the Claimant to invoke mechanism under Section 77 and instead filed Judicial Review. The Court of Appeal in the case addressed the doctrine of exhaustion of alternative remedies and upheld decision in Nairobi Civil Appeal No. 92 of 1992 Speaker of the National Assembly v James Njenga Karume (199) eKLR where the court of Appeal held that:- “ in our view there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievances prescribed by [the Constitution](#) or an Act of Parliament that procedure should be strictly followed”.
14. The Objector submits that the court of Appeal decision in Hulbhai Gedi Abdille case was upheld by the court in Kisumu ELRC Case NO. 46 of 2018 [Elizabeth Ominde & 5 Others v Kakamega County Government & Another](#) where the court made similar findings and struck out the Claimant’s suit for being premature and for not following the procedure provided under Section 77 of the [County Governments Act](#).
15. The Objector submits that though the Claimant cited provisions of Articles 232, 235 and 256 of [the Constitution](#) he did not provide particulars of the infringement. That seeking declaratory orders cannot form basis of getting redress from court and relies on the decision of the High Court.
16. The Claimant submits that Section 77 of the [County Government Act](#) states the Public Officer “May” appeal to the Public Service Commission. That by use of word “May”, it means it is not mandatory requirement for the Claimant to first appeal to the Public Service Commission and relies on the decision in Kenya Wildlife Service v Joseph Musyoki Kalonzo (2017) eKLR where Court of Appeal in Godfrey Paul Okutoyi (suing on his own behalf and on behalf of the representatives and for the benefit of all past and present customers of banking Institutions in Kenya v Habil Olaka, the Executive Director (Secretary of the Kenya Bankers) and Central Bank of Kenya where Justice Mativo observed:- “It is time to became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute of or in ordinary suit as provided for by procedure. It is not every failure to act in accordance with a statutory provision or where an action is taken in breach of a statutory provisions that should give rise to a constitutional Petition. A party should only file a Constitutional Petition for redress of a breach of Constitution or denial, violation or infringement of, or threat to a rights or fundamental



freedom, Any other claim should be filed in the appropriate forum and in the manner allowed by the applicable law and procedure”.

17. That the Claimant did not demonstrate the nexus of his facts with Articles 232,235,236 of *the Constitution*. The Court of Appeal in interpreting the impact of word “may” in Section 25 (10 of *Wildlife Conservation Act* held as follows:- In our view, even from a literal interpretation, this provision does not oust the jurisdiction of the High Court to hear any matters raised under that Act. If the Act meant to remove those matters from the realm of the High Court or the other courts, then it would have expressly then stated so. It gives an aggrieved party an option to go to the committee as a first option. This in our view was meant to ease matters from the poor people whose crops and domestic animals are ravaged by wild animals occasionally, and which people may be far removed from the structured judicial systems. We do note that most of the areas that are prone to wildlife/human conflict are in areas that are outside urban areas where courts are situated. The act in our view meant to make it easier for such people to access justice that is more easily accessible in terms of not travelling long distances and also in terms of simplicity in lodging their claims. It could not have been meant to shut out everybody else who would prefer to pursue their claims before the conventional courts. That would explain the use of the word “may” and the absence of any provision expressly limiting or ousting the jurisdiction of the High Court”.
18. The Claimant relied on several decisions of the court to extent that Section 77 was not worded in mandatory terms being *Loosenge David England v Governor of Samburu County & 2 Others* (20210 eKLR, *Philomen Mobyra Kadhika v County Public Service Board of Taita Taveta & Another* 2016, *Scholastica Okwaro v Taita Taveta County Government* (2016) Eklr.
19. On whether there was a decision to prefer appeal, the Claimant submits there was no decision to render appeal. That the Respondent vide letter dated 17th December 2018 requested for more time. To buttress its submission the Claimant relies on the decision of court in *Robert Khamala Situma & 8 others v Acting Clerk of the Nairobi County Assembly* (2022) where court held the claim did not fall under purview of the Public Service Commission as there was no decision of the board capable of being presented as an appeal to the Public Service Commission. The Claimant further relies on the decision of court in *County Government Workers Union -v-s Nairobi County Government & Another* (2021) eKLR where the court held the requirement to exhaust internal disciplinary mechanism is not cast in stone and that the court had residual powers to exempt the applicant from exhausting the said requirements stating it was not in Public interest to refer the Claimant back to the mechanism when 3 years down the line nothing has changed since the decision was made.

Decision of the Court.

20. Section 77 of the *County Government Act* provides for appeal in first instance to the Public Service Commission on decision by the County Public Service Board. The Claimant submits no decision was made. The Claim is that of underpayment by the Respondents. The Court finds that is a decision capable of appeal to the Public Service Commission. The Claimant cited and relied on several authorities of the court to the extent that exhaustion of the mechanism under Section 47 of the Act are not mandatory. The Respondent pointed to the court the Court of Appeal decision in *Secretary County Public Service Board & Another v Hulbhai Gedi Abdille* which decision is binding on this court and in which the court held as follows:-“ there is no doubt that the Respondent initiated the judicial review proceedings in utter disregard of the dispute resolution mechanism availed by Section 77 of the Act . 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 Judicial process in the first instance. Section 77 placed no fetter to the jurisdiction of Public Service Commission. There is no requirement



for instance that reasons for the decision be availed to an aggrieved party before he can prosecute an appeal before it.

21. In the instant case the Claimant submits that by use of the word “ May “ in Section 77 meant the process was not mandatory and relied on authority of the Court of Appeal on interpretation of word “May”. The Court finds it is bound by the decision of the Court of Appeal in the case of Hulbhai Gedi Abdille which has already pronounced itself on the interpretation of Section 77 of the County Government Act. The Court upholds the decision of the Court of Appeal in Civil Appeal No. 92 of 1992 *Speaker of National Assembly v James Njenga Karume* (1992) Eklr . That where there is clear alternative procedure of redress the same ought to be strictly complied and exhausted which decision was upheld in the Hulbhai Gedi Abdille decision (supra).
22. Applying the said Court of Appeal decision Hubhai Gedi Abdille which is binding on me, I find the suit to be premature and improperly filed. I uphold the decision of the court in *Elizabeth Ominde & 5 others v Kakamega County Government & Another* (2020) Eklr and The Past And Present Customers of Banking Institutions decision by Mativo Judge (supra) to the extent that the Claim is purely claim for under employment Law and not Constitutional. Those disputes can be resolved by the court under the *Employment Act* or the Public Service Commission under the *Public Service Commission Act* and Section 77 of the *County Governments Act*.
23. The Preliminary Objection dated 10th May, 2022 is upheld on basis of lack of jurisdiction at first instance pursuant to provisions of Section 77 of County Government Act and for being premature for failure to exhaust clear procedures of appeal under Section 77 of the County Government Act. The suit dated and amended on 20th February 2021 is struck off.
24. In order to temper justice with mercy the court orders each party to bear own costs.
25. It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA IN OPEN COURT THIS 1ST DAY OF NOVEMBER, 2022.

J.W KELI,

JUDGE.

In the presence of :-

Court Assistant: Brenda Wesonga

Claimant : Absent

Respondent : Absent

