



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.695 OF 2019

ISSACK MOHAMED ALIO.....CLAIMANT

VERSUS

MANDERA COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

COUNTY SECRETARY MANDERA COUNTY GOVERNMENT.....3RD RESPONDENT

MANDERA COUNTY GOVERNMENT.....4TH RESPONDENT

RULING

The claimant filed application and Notice of Motion dated 16th December, 2020 and seeking for orders that;

1. Spent.
2. Spent.
3. This court be pleased to grant the claimant leave to lodge its appeal with the Public Service Commission out of time.
4. this court be pleased to stay the proceedings ... pending the hearing and determination of the Appeal lodged with the Public Service Commission, which determination shall be made within sixty (60) days from the date of lodging the Appeal.
5. The costs of this application be provided for.

The application is supported by the affidavit of the claimant and on the grounds that on 10th July, 2014 the 1st respondent employed the claimant as County Communication Officer and on 19th September, 2017 stopped the payment of his salary without any reasonable cause. The 1st respondent formed a task force committee for staff audit and suitability in the absence of the claimant while he was on his annual leave.

Other grounds are that the task force discontinued the claimant's salary and suspended him from employment on the grounds that he had been absent from work and whereupon he filed the instant suit on the unfair termination of employment the suit was filed before lodging an appeal with the Public Service Commission, the 2nd respondent within the stipulated time required under section 86 of the Public Service Commission Act.

The mistake of failing to file an appeal before filing suit with the court was by the advocates and should not be visited against the claimant. Failure to lodge the appeal was unintended, inadvertent and excusable. The appeal has high chances of success to bring this claim into a conclusive determination.

In response, the respondents filed Grounds of Opposition and that;

- a) The instant application is instituted in abuse of the court process and has no merit and is based on a misconception of the law.

b) *The instant application is meant to circumvent statutory timelines within which appeals to the Public Service Commission are to be made as stipulated under section 77 (3) of the County Government Act and section 86 (2) of the Public Service Commission Act.*

c) *The claimant has not demonstrated with precision the circumstances to warrant an appeal out of time before the 2nd respondent.*

d) *This application is made after an inordinate, unexplained and inexcusable delay of about 3 years since the applicant's salary and allowances was stopped on 19th September, 2017. Equity aids the vigilant and not the indolent. It follows that this application must fail.*

e) *In the case of Savings & Loans Ltd v Susan Wanjiru Muritu (Nairobi)*

HCCC No.397 of 2002. ...

f) *The claimant can still safeguard his employment rights by canvassing the main claim and the application should be dismissed with costs.*

Both parties attended court and made oral submissions.

Determination

The substratum of the claimant's application is to seek leave to file an appeal to the 2nd respondent out of time and to allow the same be heard the proceedings herein be stayed.

Whereas this is the claimant's case and where he requires stay of proceedings such should be allowed for good reason, such reason is that he obtains leave to file his appeal with the 2nd respondent out of time.

Section 86 of the Public Service Act allow for appeals procedures from the decisions with respect of a County Government public service.

86. (1) Any person who is dissatisfied or affected by a decision made by any authority or person in respect of a County Government public service may appeal to the Commission against the decision.

(2)An appeal under subsection (1) shall be in writing and made within ninety days from the date of the decision:

Provided that the Commission may consider an appeal out of time if, in the opinion of the Commission, the circumstances warrant it.

(3)...

Appeals to the 2nd respondent should have been filed within 90 days from the date the challenged decision was made. In this regard, the claimant is challenging the decision of the 1st respondent on 19th September, 2017.

The 2nd respondent is a constitutional commission and regulated under the provisions of the Public Service Commission. The constitution and the law have no provisions allowing this court jurisdiction over a constitutional commission to extend time and its mandate to allow an appeal out of time. In any event, the claimant has not submitted any matter that there was an effort to engage the 2nd respondent with regard to his case and that such was denied.

The orders sought, which relates to the mandate of a constitutional commission and the 2nd respondent to extend time to appeal out of time is denied of this court. Such mandate does not exist in law or under the constitution.

Accordingly, application dated 16th December, 2010 is hereby dismissed.

Costs to the respondents.

Delivered in open court at Nairobi this 18th day of February, 2021.

M. MBAR?

JUDGE

In the presence of:

Court Assistant: Okodoi