



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 17 OF 2020

IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 19, 20, 22, 29, 40, 43, 47,

50, 159, 160, 234(2)(i), 236 and 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTIONS 5, 43, 44 AND 45 OF THE EMPLOYMENT ACT,

SECTIONS 75 AND 76 OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012(Rev 2013)

AND

IN THE MATTER OF: AN ILLEGAL, IRREGULAR AND/OR UNJUST

DECISION, RECOMMENDATION AND/OR RESOLUTION OF THE

RESPONDENTS TO WITHOUT FAIRNESS, DUE PROCESS AND/OR PROCEDURE

THE PETITIONER FROM EMPLOYMENT AS A LIVESTOCK PRODUCTION OFFICER

BETWEEN

HENRY SHADRACK ANJILA.....PETITIONER

v

VIHIGA COUNTY PUBLIC SERVICE BOARD.....1st RESPONDENT

COUNTY GOVERNMENT OF VIHIGA.....2nd RESPONDENT

COUNTY SECRETARY, COUNTY GOVERNMENT OF VIHIGA.....3rd RESPONDENT

RULING

1. Because of the conclusion and orders issued herein, the Court has prepared a Ruling instead of a Judgment.

2. Henry Shadrack Anjila (the Petitioner) was offered employment as a Livestock Production officer by the Public Service Commission through a letter dated 27 March 2000 (the appointment was backdated to 25 March 1997). The Petitioner was confirmed and promoted through a letter dated 17 May 2001 from the Permanent Secretary, Ministry of Agriculture and Rural Development.

3. On 29 January 2009, the Petitioner was appointed to the grade of Chief Livestock Production Officer and on 17 April 2012, he was promoted to Principal Livestock Production Officer.

4. Upon the coming into effect of the Constitution of Kenya, 2010, the agriculture and livestock production functions were devolved to the county governments. At the time, the Petitioner was based in Garissa and was therefore deployed to the County Government of Garissa.

5. On or around 4 March 2019, the Petitioner applied to the office of the County Secretary, Vihiga (the County Secretary) for the transfer of his services from Garissa to Vihiga.
6. The Petitioner applied to the County Government of Garissa to be transferred from Garissa to the County Government of Vihiga, and on 13 May 2019, the Chief Officer, Livestock, Garissa informed the Chairperson of the County Public Service, Garissa that the request had been accepted.
7. On 14 May 2019, the County Government of Garissa gave a no objection letter to the transfer and on 20 June 2019, the County Public Service Board, Vihiga (the Board) approved the absorption of the Petitioner.
8. The County Secretary, Vihiga (the County Secretary) then wrote to the County Secretary, Garissa to release the Petitioner and also requested for certain records.
9. Upon request from the County Executive Committee member for Agriculture, the County Executive Committee member for Public Service advised the County Executive Committee member Agriculture through a Memorandum dated 18 September 2019 that because there was no legal framework for inter-county transfer of human resources, the purported transfer of the Petitioner from Garissa to Vihiga was irregular and had been reversed.
10. The Director of Legal Affairs gave his own advisory through a letter dated 16 October 2019 to the Chief Officer Agriculture reiterating that the transfer of the Petitioner was irregular and not procedural and the appointment should be revoked.
11. The Petitioner appealed to the Board through letters dated 31 October 2019 and 2 December 2019, and he was invited to appear before the Board on 20 February 2020.
12. Through a letter dated 18 March 2020, the Board informed the Petitioner that his transfer and absorption was *ultra vires* and that it considered any contractual relationship at an end. The Petitioner was advised to appeal to the Public Service Commission, as contemplated by section 77 of the County Governments Act.
13. The *to and fro* led to the salary of the Petitioner being stopped in September 2019 prompting the Petitioner to make a complaint to the Commission on Administrative Justice on 16 January 2020. The Commission wrote to the County Government on 20 January 2020 to respond to the complaints.
14. The Petitioner appeared before the Board as scheduled, and he followed it up with a letter dated 24 February 2020 and seeing no resolution, sought legal advice culminating in a formal demand and the institution of this Petition on 7 May 2020.
15. The Petitioner alleged violations of several rights and illegality, irregularity, malice and bad faith on the part of the Respondents.
16. Filed together with the Petition was a Motion under a certificate of urgency seeking conservatory orders.
17. When the Motion was placed before the Court *ex-parte* on 8 May 2020, it issued a conservatory order staying the decision of 18 March 2020, that the transfer and absorption of the Petitioner were irregular and *ultra vires*.
18. While giving the order, the Court directed the parties to file and exchange affidavits and submissions within set timelines ahead of a Ruling on notice.
19. The County Government and the County Secretary filed a joint replying affidavit sworn by the Chief Officer, Agriculture on 16 September 2020.
20. At the same time, they filed a Notice of Preliminary Objection contending
 1. THAT the application violates the express provisions of sections 77 of the County Governments Act and 85 and 87(2) of the Public Service Commission Act.
 2. THAT the Honourable Court does not have jurisdiction to entertain the suit as canvassed or grant the prayers sought by the application and the Petition.
 3. The Petition as canvassed before the Honourable Court is incompetent, fatally defective in law, incurable and cannot stand in law and therefore ought to be struck out.
21. Section 77 of the County Governments Act, No. 17 of 2012 provides:
 - (1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in the exercise or purported exercise of disciplinary control against any public officer may appeal to the public service commission.
 - (3) An Appeal to the public service commission shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if in the opinion of the Commission, the circumstances warrant it.

22. Section 87(2) of the Public Service Act, No. 10 of 2017, on the other hand, provides that:

A person shall not file any legal proceedings in any court of law with respect to matters within the jurisdiction of the Public Service Commission to hear and determine appeals from county government public service unless the procedure provided for under this part has been exhausted.

23. When the Petition was placed before this Court on 16 November 2020 and being informed that there was a Preliminary Objection on record, the Court directed that the Motion, the Preliminary Objection and the Petition be taken together.

24. The Court consequently gave elaborate directions on the filing and exchange of affidavits and submissions with Judgment reserved to 10 February 2021.

25. Instead of complying with the directions, the County Attorney, Vihiga filed an application on 10 December 2020 seeking to be enjoined to the proceedings.

26. The Court noting that the Board was already a party to the proceedings directed that the Motion be served upon the other parties and that the parties file and exchange affidavits and submissions and that the issues raised would be addressed in this Judgment.

27. The directions were not complied with.

The Preliminary Objection

28. This Court, differently constituted have reached inconsistent positions on the effect of section 77 of the County Governments Act on court proceedings filed before an appeal is preferred to the Public Service Commission.

29. In *Abdikadir Suleiman v County Government of Isiolo & Ar* (2015) eKLR, the Court while addressing an objection on jurisdiction predicated on section 77 of the County Governments Act declared

..... the Court returns that the provisions of section 77 of the County Governments Act, 2012 did not oust or restrict the jurisdiction of the Court for want of exhaustion of the procedure and remedies envisaged under the section.

30. The Court in *Thuranira Salesio Mutuma v County Public Service Board & 2 Ors* (2019) eKLR endorsed the exposition of the law in the *Abdikadir Suleiman* case.

31. In the view of this Court section 77 of the County Governments Act gives an option by the use of the term *may appeal*.

32. However, in *Martin Kabubii Mwangi v County Government of Laikipia* (2019) eKLR, the Court rendered itself thus

The exhaustion principle enunciated in precedents such as the case of *Secretary, County Public Service & Ar v Hulbhai Gedi Abdille* (*supra*) does not permit an election as to the parts of a statute that one should rely on. Put another way, it removes discretion on the part of a litigant from choosing whether to follow the provision or not. In this case, the suit was filed before the exhaustion of the remedy under the law, namely the provisions of Section 77 of the County Governments Act. The Claimant ought to have appealed against his removal to the Public Service Commission before moving the Court. The suit did not fall in the category of suits that can be entertained by the Court. As he did not appeal as provided for in law, the suit is a non-starter and is accordingly struck out with no order as to costs.

33. It now appears that the Court of Appeal has now settled the interpretation to be given to the provision.

34. In the case of *Secretary, County Public Service Board and Ar vs Hulbhan Gedi Abdille* (2017) eKLR, the Court of Appeal allowed the Appeal on the basis that the Respondent had failed to utilize the process provided by Section 77 of the County Governments 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 the only 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.

35. But the holding by the Court of Appeal creates some limitation law concerns if it were to be applied mechanically.

36. Mechanically, because this Court is also alive to and aware of the opinion of the Court of Appeal in *Daniel Ngugi Waweru v Attorney General & Ar* (2017) eKLR wherein at paragraph 21 it had this to say

We may ask the same question about the appellant in this case: when did he become entitled to complain or obtain a remedy in damages from his employer through the civil court. Was it at the time he received the letter of dismissal on 29th April, 2004 or at the time he received the letter converting the dismissal to termination in public interest on 13th July, 2006 or after the decision of the JR court on 17th June, 2009. The answer, we think, is 29th April, 2004. For it bears no logic for a cause of action to accrue and then, instead of proceeding to Court, the aggrieved party pursues an appellate disciplinary process that would take him outside the clearly stated statutory limitation periods. The detour to the JR Court was a calculated risk since, as stated in the *Boniface Inondi Otieno* case (*supra*) time did not stop running.

37. In light of the binding holding(s) by the Court of Appeal and concerns on limitation law which goes to jurisdiction, this Court is of the view that the most appropriate order in this type of circumstances is not to strike out a Cause but to stay the proceedings pending determination of any internal appeal by the Public Service Commission.

38. The Court notes that the Public Service Commission has the power to admit an appeal filed outside the 90 days prescribed.

Conclusion and Orders

39. From the foregoing, the Court hereby stays the Petition pending the Petitioner exercising, if at all, the right given by section 77 of the County Governments Act and section 87 of the Public Service Commission Act.

40. No order on costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 10th day of February 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Petitioner Nyikuli, Shifwoka & Co. Advocates

For 1st Respondent did not participate

For 2nd and 3rd Respondents Stella Amisi Orengo, Director, Legal Affairs, County Government of Vihiga

Court Assistant Chrispo Aura