



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

MISC CIVIL APPLICATION NO. 17 OF 2019

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, NO. 17 OF 2012 (SECTIONS 57, 59, 60, 63, 64, 65, 66, 69, 70, 71, 72, 74, 75 AND 76)

AND

IN THE MATTER OF ARTICLES 41(1),(2), (4) & (5) AND 232(1)(d),(g) & (i), 235 AND 236 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE EMPLOYMENT ACT

BETWEEN

REPUBLIC.....APPLICANT

LAWRENCE OMUHAKA, Ag COUNTY

CHIEF OFFICER, PUBLIC SERVICE COUNTY

GOVERNMENT OF KAKAMEGA.....1st RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER,

PUBLIC SERVICE & ADMINISTRATION.....2nd RESPONDENT

GOVERNOR, COUNTY OF KAKAMEGA.....3rd RESPONDENT

COUNTY GOVERNMENT OF KAKAMEGA.....4th RESPONDENT

COUNTY PUBLIC SERVICE BOARD,KAKAMEGA.....5th RESPONDENT

Ex-parte KENYA COUNTY GOVERNMENT WORKERS UNION

RULING

1. On 22 November 2019, the Kenya County Government Workers Union (the Union) filed a Summons seeking leave to commence judicial review proceedings against the Respondents. The Respondents had suspended some members of the Union.
2. The Court granted leave on 29 November 2019 and further directed that the leave do operate as a stay of the suspensions pending the filing and determination of Notice of Motion seeking the substantive judicial review orders.
3. The Union filed the Motion on 16 December 2019, and the Court directed that it be served ahead of *an inter-partes* hearing on 20 February

2020.

4. On 20 February 2020, the Respondents sought and got more time to respond to the Motion. The Court directed the Respondents to file and serve responses within 21 days. The parties were also directed to file and serve their submissions ahead of highlighting on 29 April 2020.

5. The Respondents only filed a replying affidavit to the Motion on 13 May 2020.

6. On 11 March 2020, the Union filed an application seeking to cite the Respondents for contempt of court.

7. The Court certified the Motion urgent, directed that it be served and that it be heard on 30 March 2020. The Respondents filed a replying affidavit in opposition to the contempt application on 11 May 2020.

8. On 11 May 2020, the Respondents filed a Notice of Preliminary Objection to the judicial review Motion.

9. The Respondents contended in the Objection:

(i) THAT the applicant ought to but failed to adhere to the stipulated appeal procedures provided under Article 234(2)(i) of the Constitution of Kenya, section 77 of the County Governments Act and section 85 of the Public Service Commission Act, which stipulates that a person dissatisfied or affected by a decision made by the County Public Service Board should appeal to the Public Service Commission. The applicant, however, filed the Chamber Summons application for leave to file the main motion, the main motion and the consequential application thereto without following the required appeal mechanisms, therefore, rendering the said applications null and void *ab initio*.

(ii) THAT the applicant ought to but failed to prove that indeed the affected revenue officers are its members and/or that there exists a collective bargaining agreement between the subject County and itself as insinuated in the applications or at all and does not, therefore, have the *locus standi* to bring the application for leave, the main motion and/or any consequential applications herein or otherwise in the absence of such proof.

(iii) THAT the entire claim and reliefs sought by the applicant are akin to asking the Court to aid the applicant and its purported members in circumventing the disciplinary procedures provided for under the law and are, therefore, premature for inter alia, the reasons that the Court ought not to interfere with statutory disciplinary procedures. The applicant ought to move the Court after the entire process has been exhausted, and a final decision on the same has been reached one way or the other, which is not the case herein.

(iv) THAT the applicant has not demonstrated membership of and authority by the revenue officers, it purports to represent to initiate and prosecute the current proceedings.

(v) In light of the above, the application for leave, main motion and the application for contempt or any other proceedings contemplated by the applicant, consequential or otherwise, are untenable, bad in law and unsustainable as against the Respondents. Accordingly, we humbly pray that the said applications be struck out forthwith as against the Respondents with costs.

10. On 15 July 2020, before the determination of the 2 Motions already on record, the Union filed another Motion seeking orders suspending dismissal letters that had been issued to its members.

11. The Court certified the Motion urgent and directed that it be served and that the parties file and exchange affidavits and submissions and a mention date be set to schedule a Ruling date.

12. The Respondents filed a replying affidavit in opposition to this new Motion on 1 September 2020 (and the Union filed its submissions on 3 December 2020).

13. The Respondents filed their submissions in respect to the Preliminary Objection on 7 September 2020, while the Union filed its submissions on 10 February 2021.

14. It is regrettable that the Court was barely allowed sufficient time to determine the earlier applications.

15. This Ruling is in respect of the contempt application and objections on jurisdiction on the ground that the Union had not exhausted dispute resolution mechanisms outlined in the law.

The contempt application and jurisdiction

16. It is not disputed that the persons on behalf of whom the Union moved the Court (the Grievants) are employees of the County Government of Kakamega.

17. The record shows that the Chief Officer, Public Service suspended the Grievants under authority delegated to him in writing by the County Public Service Board on 23 August 2019.

18. Under section 77 of the County Governments Act, the Grievants and the Union, if dissatisfied with the suspensions, should have preferred an appeal to the Public Service Commission of Kenya. They did not take such a course of action.

19. Although the aforesaid provision appears permissive or optional, section 87 of the Public Service Commission Act has made it mandatory that a person dissatisfied with a decision of a county public service board cannot commence legal proceedings to challenge the decision of the Board unless and until an appeal has been processed through the Public Service Commission.

20. The Court of Appeal had an opportunity to address its mind to the doctrine of exhaustion of other statutorily ordained dispute resolution mechanisms and the import of section 77 of the County Governments Act in *Secretary, County Public Service Board & AR v Hulbhai Gedi Abdille* (2017) eKLR.

21. After reviewing the competing arguments, the Court stated:

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 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 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.

22. Despite the Court of Appeal not discussing the nexus between section 77 of the County Governments Act and section 87 of the Public Service Commission Act, there is a strong case to conclude that in respect of county public service board disciplinary decisions, the first port of call for the county public service officer is the Public Service Commission.

23. The Court, therefore, agrees with the Respondents that the proceedings herein were premature as other statutorily anchored dispute resolution mechanisms had been bypassed by the Union.

24. Before concluding, the Court wishes to state that the objection on the *locus standi* of the Union has no merit on the basis of the decision of the Court of Appeal in Mombasa Civil Appeal No. 37 of 2019 *Modern Soap Factory v Kenya Shoe & Leather Workers Union* that a recognition agreement cannot be the basis upon which a trade union gets the mandate to represent its members in Court.

Conclusion and Orders

25. From the foregoing, the Court finds that the proceedings herein were premature and thus it lacks jurisdiction.

26. The proceedings are terminated with no order on costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 24TH DAY OF MARCH 2021.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Union Mr Yogo instructed by Otieno, Yogo, Ojuro & Co. Advocates

For Respondents Ms Katana instructed by Nyachae & Ashitiva Advocates

Court Assistant Chrispo Aura