



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

PETITION NO.19 OF 2020

(Before D.K.N.Marete)

JAMES ORRE.....PETITIONER

VERSUS

OFFICE OF THE GOVERNOR,

COUNTY GOVERNMENT OF MARSABIT.....1ST RESPONDENT

MARSABIT COUNTY PUBLIC SERVICE BOARD.....2ND RESPONDENT

RULING

In issue, we have two applications by way of preliminary objections dated 17th September, 2020 and 21st September, 2021 filed by the 2nd and 1st Respondents respectively. The one dated 17th September, 2020 comes out as follows;

1. That this Honourable Court lacks the requisite jurisdiction to entertain this petition reason being that the Petitioner has failed to exhaust all dispute resolution mechanisms by way of preferring an appeal to the Public Service Commission in respect of his alleged termination of employment contrary to Section 77 of the County Governments Act.

The one for 21st September, 2020 comes out thus;

2. That the Petitioner has not exhausted all the dispute resolution mechanisms specifically provided for under Section 77 of the County Government Act No.17 of 2012.

3. That as such, this Honourable Court does not have jurisdiction to hear the Petition since the first port of call for the Petitioner would have been to lodge an appeal before the Public Service Commission.

These, the parties admit and submit, resemble in several aspects, including the subject matter.

The 1st Respondent in her written submissions dated 27th January, 2021 opines and submits that the Petition before court is premature and akin to putting the cart before the horse and ought to struck out with costs to herself. This is as follows;

*9. We are fortified by the position of the Court of Appeal on this matter in **Civil Appeal No. NA 192 of 1992 Speaker of the National Assembly vs The Hon.James Njenga Karume** where the court stated that;*

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act or Parliament, that procedure should be strictly followed.”

11. Section 77 prescribes the recourse to follow and it does set out a clear procedure for redress being an appeal to the Public Service Commission. The Claimant is yet to exhaust the existing dispute resolution mechanisms set out under Section 77, and has not placed any evidence before this court as to the unsuitability of such mechanisms to handle his grievances/claim.

In further buoyance of her case, she relies on the authority of **Martin Kabubii Mwangi v County Government of Laikipia (2019) eklr** where the court observed thus;

“The exhaustion principle enunciated in precedents such as the case of Secretary, County Public Service & Another 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.”

Further, in **High Court Civil Cause No.283 of 2014, James Tinai Murete & Others vs County Government of Kajiado and others**, the court held that the law did not give an option to a party to choose whether or not to file grievances with the Public Service Commission. The court stated;

“(24) There is a lot of case law on due process and this court is guided by the court of appeal case of speaker of the National Assembly vs The Hon. James Njenga Karume Civil Appl No.NA 192 of 1992 where Kwach, Cocker and Muli JJA stated;

“...that where there is clear procedure for the redress of any particular grievance prescribed by constitution or an Act of parliament that procedure should be strictly followed...”

The Judge went on to say-

“...Aside from the views expressed in the two decisions set out above I take this view for the two additional reasons. First, it is my view that the Legislature could not have intended to establish a dispute resolution mechanism, and then render it redundant immediately by giving parties the option to choose whether to follow it or not. Read as a whole, the provisions of section 77 of the County Government Act evince an intention to have all disputes arising out of appointment, by County Service Boards dealt with by the Public Service Commission, hence its grant to the commission of the mandate in mandatory terms by providing that the commission ‘shall entertain appeals in respect of recruitments, selection, appointment and qualifications attached to any office’. There is no option given to a party to choose whether or not to file grievances with the commission...”

The 2nd Respondent, in her written submissions dated 29th December, 2020 denies knowledge of the events resulting in this suit until the same was served upon him. Inasmuch, she is the authority vested with power to deal on the issues raised in this suit.

The 2nd Respondent further acknowledges and owns the provisions of Section 59 of the County Government Act which clothes her with power of action as follows;

Section 59 of the County Governments Act provides as follows;

59. Functions and powers of a County Public Service Board

(1) The functions of the County Public Service Board shall be, on behalf of the county government, to-

a. Establish and abolish offices in the county public service;

b. Appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments;

c. Exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under this part; (emphasis ours)

The 2nd Respondent filed its Notice of Appointment of Advocates together with a Notice of Preliminary Objection both dated 17th September 2020 which notice of preliminary objection seeks to challenge the jurisdiction of this Court to entertain this petition in its entirety in light of the provisions of Section 77 of the County Governments Act.

The Petitioner, in opposition to the Respondents preliminary objection’s filed his written submissions dated 8th December, 2020 and prays that the same be dismissed with costs to him.

He supports his case by a highlight of the relief sought in the petition as follows;

Reliefs sought by the Petitioner

The Petitioner seeks the following reliefs in regards to the said petition are as follows;

a) A declaration do issue that the purported dismissal of the petitioner’s employment vide the letter dated 22nd July 2020 as well as the entire process heading up to the same was in breach of the Law and the Constitutional principles enshrined in Article 41 and 47 (1) and (2) of the Constitution as read together with section 45 and 59(1) (c) of the County Governments Act and Section 44 of the Employment Act and therefore void ab ignition.

b) An order of Certiorari do issue to bring into this court for purposes of being quashed the termination letter dated 22nd July 2020,

as well as the entire process and proceedings up to the same for being in violation of Section 45 of the County Governments Act and Section 44 of the Employment Act as read together with the letter and spirit of Articles 41 and 47 (1) and (2) of the Constitution.

c) That costs of the petition be awarded to the Petitioner.

d) Spent.

To him, this is beyond the jurisdiction provided for by Section 77 of the County Governments Act, 2012.

The Petitioner's opener submission is that the matter before court is originated by the 1st Respondents letter dated 22nd July, 2020. To him, the decision is illegal and made in contravention of the Constitution and Statute. This has tainted these preliminary objections and the Petitioner shall counter the issue of lack of jurisdiction for this court accordingly, in time and space.

It is the Petitioner's case that both preliminary objections are grounded on the court's lack of jurisdiction in that the Petitioner has failed to exhaust all dispute resolution mechanism provided under Section 77 of the County Government Act, 2012.

Section 77 (1)

Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this part referred to as the "Commission") against the decision.

The Petitioner further faults the preliminary objections for not passing the test of **Mukhisa Biscuits Manufacturing Company Ltd Vs West End Distributors Limited (1969) EA 696**, which provides thus;

"...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose off the suit..."

Further,

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

Further,

8.1. *The 2nd Respondent's preliminary objection talks of the Petitioner have "alleged termination of employment". It is evident therefore, that the 2nd Respondent invites the court to ascertain the facts on the issue of the effect of the letter of the 1st Respondent dated 22nd July, 2020.*

8.2. *The issue whether the County Governor was purporting to exercise disciplinary control of a county public service officer has to be ascertained for the reasons that:-*

8.2.1 *The governor in the letter dated 22nd July, 2020, was not necessarily purporting to be exercising disciplinary control under Section 59 of the County Government Act, but rather he was purporting to exercise his general powers under Section 51 of the Interpretation and General Provisions Act as the appointing authority to dismiss an individual allegedly appointed by the governor.*

8.2.2 *Whether the Petitioner is an appointee of the County Governor and whether his employment can be terminated under Section 51 of the Interpretation and General Provisions Act.*

8.2.3. *The letters dated 17th April 2020, and 22nd July 2020, from the 1st Respondent were not copied to the 2nd Respondent and as such the court shall have to ascertain the extent of the engagement of the 2nd Respondent in the alleged disciplinary control in order to determine the preliminary objections.*

13. *The European Court of Human Rights in the case of Shkalla vs Albania observed that it is incumbent on the party alleging non-exhaustion to satisfy the court that the remedy is an effective one available in theory and in practice at the relevant time, which is to say that it was accessible and capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success.*

The Petitioner in further support of his case submits that the actions of the county governor falls outside the meaning of disciplinary control as provided in Section 77 of the County Government Act. This comes out thus;

16. *It is our submission that the doctrine of exhaustion is based on the presumption that the parties agree that the alternative forum has jurisdiction and can grant the remedies sought by the Petitioner. In this case, the Petitioner contests the jurisdiction of the Public Service Commission with regards to decisions made by the County Governor and not the County Public Service Board.*

18. *In the Court of Appeal case of Kisumu County Public Service Board v Samuel Okuro & 7 Others (2018) eKLR, the court held as*

follows;

“We have come to the conclusion that the Governor initiated the removal of the respondent without following the appropriate machinery. The respondents being county public officers, the Governor could not terminate their services without involving the County Board and the county assembly. In sending the respondents on compulsory leave and terminating the respondents’ contract, the Governor usurped the role of the County Board. This denied the respondents their rights under section 77 of the County Government Act that allows any county public officer that is dissatisfied with the decision of the County Board in a disciplinary process to appeal to the Public Service Commission. Further, the respondents’ constitutional fundamental rights were violated.”

16. In the case of *Republic v Independent Election and Boundaries Commission ex parte National Super Alliance (NASA) Kenya & 6 Others (2017)eKLR*, the 3 judge bench considered at length the doctrine of exhaustion and observed as follow;

“The second principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the Court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wished to advance in a suit. This situation arises where, as here, the right to approach the statutory forum created (in this case the Review Board) is limited to certain parties who are aggrieved in a particular manner defined by the statutory scheme and where the particular party seeking to bring the suit does not fit into any of the categories defined by the Statute.”

Further, the petitioner submitted thus on the issues of legality and constitutionality available to courts;

22. A finding that an administrative decision is illegal makes it void. The Petitioner alleges that the decision of the 1st Respondent is illegal. By filing a preliminary objection, the Respondents do not contest the allegation. It is our submission that the Public Service Commission, assuming it has jurisdiction, has the mandate of hearing an appeal of a decision on its merits. One can make an argument that on the issue of merit, it is suitable and has jurisdiction. But as courts have observed in cases regarding the doctrine of exhaustion of administrative remedies, the High Court has jurisdiction to determine questions of legality and constitutionality.

To distinguish the twin issues of merits of a decision versus connecting defects in the decision, the petitioner came out thus;

24. In the same case, Justice Korir made the following observations;

“What I only need to state is that where judicial review is the most efficacious remedy, an applicant need not exhaust the statutory process or file an appeal. This reasoning receives support from H.W.R Wade and C.F.Forsyth the authors of Administrative Law, 9th Edition, 2008 at page 703 where they state that;

“In principle there ought to be no categorical rule requiring the exhaustion of administrative remedies before judicial review can be granted. A vital aspect of the rule of law is that illegal administrative action can be challenged in the court as soon as it is taken or threatened. There should be no need first to pursue any administrative procedure or appeal to see whether the action will in the end be taken or not. An administrative appeal on merits of the case is something quite different from judicial determination of the legality of the whole matter. This is merely to restate the essential difference between review and appeal which has already been emphasized. The only qualification is that there may occasionally be special reasons which induce the court to withhold discretionary remedies where the more suitable procedure is appeal.”

In the instant applications, the preliminary objections must fail. This is because, like is submitted by the petitioner, the objections do not satisfy the test in the authority of **Mukhisa Biscuits**, supra. This would require an analysis of evidence to support their preliminary objection. The objections therefore do not stand out as points of law which would not require the application of evidence to prove.

Again, the petition is outside the limits of Section 77 of the County Government Act, 2012 in that it seeks to test the constitutionality and legality of the termination of the employment of the petitioner. These are weighty issues touching on the validity of the actions of the Respondents in a manner advanced so as to oust the jurisdiction of the Public Service Commission as an arbiter of the issues in dispute in the circumstances. Here, as duly submitted and amplified by the Petitioner/Respondent, the doctrine of exhaustion is surpassed by the circumstances and subject matter of this individual case.

I therefore find in favour of the Petitioner/Respondent. The preliminary objections must fall by the way side and pave way for the hearing and determination of the petition.

I am therefore inclined to disallow the preliminary objections with costs to the Petitioner/Respondent.

DATED AND DELIVERED AT NYERI THIS 23RD DAY OF MARCH, 2021.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr.Adana holding brief for Mr.Wachira instructed by Njoroge Wachira & Co.Advocates for the Petitioner.
2. Mr.Munishi holding brief for Mr.Weru instructed by Sagana, Biriq & Co.Advocates for the 2nd Respondent.
3. Mr.Moindi holding brief for Mr.Sagana, Biriq & Co.Advocates for the 1st Respondent.