



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 17 OF 2019

NICODEMUS AKUMU NYANGERI.....1ST CLAIMANT
BENSON GETENGA GETURI.....2ND CLAIMANT
ALLOYS OCHAKO TINEGA.....3RD CLAIMANT
RICHARD BUTI MAGEMBE.....4TH CLAIMANT
WILLIAM NYAKENYWA MARAGIA.....5TH CLAIMANT
MESHACK OMWOYO OKARI.....6TH CLAIMANT
SAMSON M. MOMANYI.....7TH CLAIMANT
GEKONGE MOBAGI OGARO.....8TH CLAIMANT

VERSUS

THE COUNTY GOVERNMENT OF KISIL.....1ST RESPONDENT
THE CHAIRMAN, KISHI COUNTY, PUBLIC SERVICE BOARD.....2ND RESPONDENT

RULING

1. The claimants filed suit against respondents on 22/2/2019.
2. The respondent filed a Notice of Preliminary Objection to the suit on 11/4/2019 on 26/4/2019 to wit:-
3. That the suit be struck out with costs on the following grounds:-

(i) Pursuant to Section 87(2) of the Public Service Act, No. 10 of 2017, read together with Section 77 of the County Government Act, No. 17 of 2012, a person shall not file any legal proceedings in a Court of law with respect to matters within the jurisdiction of the Public Service Commission to hear and determine appeals from the County Public Service unless the appeal procedure provided under Section 87(2) has been exhausted. Since the claimant has not exhausted the appeal procedure, this Honourable Court lacks jurisdiction to determine this Claim as it was filed prematurely.

(ii) This claim is also time barred pursuant to Section 90 of the Employment Act, 2007.

4. The parties have filed written submissions on the Preliminary Objection and the issue for determination is whether the Court has jurisdiction to hear and determine the suit.
5. In terms of the decision of the Court of Appeal in Owner's of the Motor Vessel "Lilians" –vs- Caltex Oil Kenya Limited (1989) eKLR, Nyarangi J.A. stated as follows: -

“By jurisdiction is meant, the authority which a Court has to decide matters that are before it or take cognizance of matters presented

in a formal way for its decision. The limbs of this authority are imposed by statute, charter, or commission under which the Court is constituted and may be extended or restricted by the like means: -

Where the Court takes it upon itself to exercise a jurisdiction which it does not possess its decision amounts to nothing. Jurisdiction must be acquired before judgment is given..... jurisdiction is everything. Without it a Court has no power to make one more step. Where a Court has no jurisdiction there would be no basis for a confirmation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

6. Section 77 of the County Government Act, No. 17 of 2012 provides:-

Appeals to the Public Service Commission-

(i) 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 County Public Officer may appeal to the Public Service Commission (*in this part referred to as the “commission”*) against the decision.

(ii) The Commission shall entertain appeals on any decision relating to employment of a person in a County Government including a decision in respect of:-

(a) Recruitment, selection, appointment and qualifications attached to any office;

7. Article 234 (2) (i) of the Constitution of Kenya, 2010 provides: -

“Functions of the Public Service Commission.

The Commission shall hear and determine appeals in respect of County Government’s Public Service.”

8. In the case of **Secretary County Public Service Board and Another – vs- Hulshani 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 by filing a judicial Review application to the High Court and stated 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. 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.”

9. A perusal of the Statement of Claim at the first instance depicted that the claimants are aggrieved by the decision of the County Government of Kisii and the Chairman, Kisii County Public Service Board in that the Respondents secretly advertised the teaching positions of the Youth Polytechnic, where the claimants had hitherto been teaching and asked the claimants to appear before the 2nd respondent for vetting on 19/9/2016, which results of the vetting have never been communicated to the 5th and 6th claimants who were shortlisted but were never absorbed, nor paid their salary to date.

10. The claimants further aver that despite having attended the vetting before the 2nd respondent on 19/9/2016, the Respondent, have never communicated to the claimants and only went ahead to employ new staff contrary to the provisions and direction of the Transitional Authority that the function of Vocational Training Science and Technology be transferred to County Government vide Gazette notice NO. 116 of February, 2013 and Gazette Supplement No. 116 of 9/8/2013.

11. The claimants prays for the following reliefs:

(a) The claimants 1-5 who have attained their retirement age limit of 60years be paid their salary arrears from June, 2014 up to the date of their retirement together with their benefits.

(b) That claimants 6-8 who have not been paid their salary arrears since June, 2014 nor have they been absorbed as Youth Polytechnic Instructors be absorbed by the respondent and be paid all their salary arrears and benefits from June, 2014 to date.

12. The claimants did not appeal the decision of the Kisii County Public Service Board before which they appeared on 19/9/2016 but instead filed this suit about two (2) years and five (5) months from that date.

13. This Court is bound by the decision of the Court of Appeal in Hulshani Gedi Abdille Case (*supra*) not to entertain a claim by persons aggrieved by a decision of the County Public Service Board in exercise of its powers not recruit, select, absorb and/or appoint the claimants as instructors in the vocations Training Science and Technology Institutes situated in Kisii County.

14. The Court therefore lacks jurisdiction to entertain this matter, downs its tools and strikes out the suit for want of jurisdiction.

15. The matter was filed less than three (3) years from the date of the decision not to absorb the claimants was taken by the respondents on 19/9/2016 and therefore, the objection on the basis of statute bar is not upheld.

16. The Courts deems this an appropriate matter for the parties to bear their own costs of the suit, the respondents being organs of devolved County governments.

Dated and delivered Nairobi this 11th day of March, 2021

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MATHEWS N. NDUMA

JUDGE

Appearances

M/s Baabu for Respondents/objector

Mr. Onyado for Claimants

Chrispo: Court clerk