



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

MISCELLANEOUS APPLICATION JR NO. 001 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY

FOR JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF

CERTIORARI AND MANDAMUS

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

IN THE MATTER OF THE COUNTY ASSEMBLY SERVICES ACT

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT 2012

IN THE MATTER OF COLLECTIVE BARGAINING AGREEMENT

BETWEEN COUNTY GOVERNMENT OF TAITA TAVETA AND

KENYA MEDICAL PRACTITIONERS PHARMACISTS

ABD DENTISTS' UNION

AND

**IN THE MATTER OF MINISTRY OF MEDICAL SERVICES AND MINISTRY OF
PUBLIC HEALTH AND SANITATION TRAINING PROCEDURE GUIDELINES, 2011**

IN THE MATTER OF THE SRC CIRCULAR 2014

AND

IN THE MATTER OF REMUNERATION OF DOCTORS ON STUDY LEAVE

-BETWEEN-

KENYA MEDICAL PRACTITIONERS PHARMACISTS AND DENTISTS' UNION.....APPLICANT

- VERSUS -

THE COUNTY SECRETARY, TAITA TAVETA COUNTY GOVERNMENT.....1ST RESPONDENT

THE SECRETARY, COUNTY PUBLIC SERVICE BOARD,

TAITA TAVETA COUNTY GOVERNMENT.....2ND RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER OF HEALTH,

(Before Hon. Justice Byram Ongaya on Friday 21st May, 2021)

RULING

The applicant filed on 19.03.2020 an application by way of a notice of motion through Mboku & Company Advocates. The applicant prays for:

- a) An order of certiorari to issue removing to the Court and quashing the circular dated 18.11.2019 on allowance payable to county staff.
- b) An order of mandamus to issue compelling the respondents to:
 - i. Implement the collective bargaining agreement between County Government of Taita Taveta and Kenya Medical Practitioners' Pharmacists and Dentists' Union in total for all Doctors under the County.
 - ii. Adjust the house allowances as per SRC circular 2014 to correspond to the town the doctors are undertaking their studies.
 - iii. Pay call and risk allowances deducted from November 2019, December 2019, January 2020 and February 2020 salaries of the listed 16 Doctors on study leave.
- c) An order of prohibition to issue against the respondents prohibiting them from deducting call and risk allowances from salaries of the listed 16 Doctors on study leave.
- d) That costs of the application be provided for.

The application is based on the filed statutory statement and verifying affidavit of Dr. Ouma Oluga, the Secretary General of the Applicant Union, and exhibits thereto. The grounds are that the parties are bound by a collective bargaining agreement (CBA) which at clause (iii) E (6) it is provided that employees released on paid study leave shall continue to enjoy their terms of employment in line with existing policies. On 18.11.2019 the acting County Secretary, the County Public Service Board communicated the Board's decision thus, "**any officer who is on study leave will only be entitled to basic salary and house allowance to support the family. Risk allowance, call allowance, extraneous allowance and all other allowances facilitating performance of duties will not be payable to officers while on study leave.**" The applicant's case is that the circular breached the said clause (iii) E (6) of the CBA and the listed 16 Doctors on study leave have been adversely affected by the impugned circular. The applicant has raised the grievance by letter dated 29.11.2019 addressed to the 2nd respondent but no response has been received. The applicant has therefore filed the present judicial review application to enforce the CBA and to resist the unlawful and unilateral change of the terms of service by the respondent.

The respondents filed on 16.02.2021 the notice of preliminary objection through John Bwire & Associates. It is stated that the application should be struck out upon the following grounds:

- 1) The Honourable Court does not have jurisdiction to hear and determine the application by reason of Article 234(2)(i) of the Constitution of Kenya, section 77 of the County Government Act, and section 85 of the Public Service Commission Act.
- 2) The suit is premature by virtue of clause F of the CBA signed on 06.07.2017.
- 3) The suit is defective and untenable for failure to exhaust the alternative dispute resolution mechanisms provided in 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 and, clause K.10 of the Public Service Commission Human Resource Policies and Procedures Manual for the public service.
- 4) The suit against the 1st, 3rd, and 4th respondents is defective and bad in law in view of section 57 and 59 of the County Government Act.
- 5) The prayers sought cannot issue in an interlocutory stage.

Parties filed their respective submissions on the preliminary objection. The Court has considered the parties' respective positions and makes findings on the preliminary objection as follows.

First, the provisions as cited for the respondents are as follows. Article 234(2)(i) of the Constitution of Kenya provides one of the powers and functions of Public Service Commission thus, "**i) hear and determine appeals in respect of county governments' public service.**" Section 77 (1) and (2) (b) of the County Governments Act provides to the effect:

- 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 Commission against the decision.

2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of, inter alia, remuneration and terms and conditions of service.

Section 85 (2) (b) of the Public Service Commission Act, 2017 provides that the Commission, in order to discharge its mandate under Article 234 (2) (i) of the Constitution, hear and determine appeals in respect of any decision relating to engagement of any person in a county government, including a decision in respect of, inter alia, remuneration and terms and conditions of service.

Thus it was submitted that the applicant ought to have exhausted the prescribed constitutional and statutory appeal procedure to the Commission prior to moving the Court. The respondents submit that on the basis of the holding of the Court of Appeal in Secretary County Public Service Board & Another –Versus- Hulbhai Gedi Abdille [2016] eKLR the applicant ought to exhaust the appeal jurisdiction before the Commission as provided in section 77 of the County Governments Act and Article 234(2) (i) of the Constitution. Further, the respondents urge that the petitioners ought to exhaust the review jurisdiction before the Commission as per section 88 of the Public Service Commission Act and as was held by Rika J in Kenya County Government Workers Union –Versus- County Government of Tana and Another [2018]eKLR. The respondents also cite Mumbi Ngugi J in James Tinai Murete & Another –Versus- County Government of Kajiado and Others, HCC No. 283 of 2014 invoking Speaker of the National Assembly –Versus- Hon. James Njenga Karume Civil Appeal No. NA 192 of 1992 (Kwach, Cocker and Muli JJ.A) where it was held that where there is clear procedure for redress of any particular grievance prescribed by the Constitution or Act of Parliament that procedure should be strictly followed. It was submitted that as held by Mumbi Ngugi J, section 77 of the County Governments Act by using “shall” prescribes a mandatory procedure and there is no option given to a party to choose whether or not to file grievances with the Commission. The respondents cited Alfred Sifa Dena –Versus- Benjamin Kai Chilumo [2020] eKLR where Ndolo J held that a party should not be allowed to bypass the statutory appellate process provided under the County Governments Act and the Public Service Commission Act. The respondents also cited Ismael Noo Onyango & Another –Versus- Siaya County Public Service Board and Another [2018]eKLR where Nduma J held that where the appeal procedure to the Commission had not been exhausted, the petition before Court was premature and it was dismissed with costs.

It was further submitted for the respondents that section 9(2) of the Fair Administrative Action Act provides that the High Court or a subordinate Court under subsection (1) shall not review an administrative action or decision under the Act unless the mechanism including internal mechanisms for appeal or review and all remedies available under any other law are first exhausted. Further, there must exist exceptional circumstances outside the ordinary requiring immediate intervention by the Court rather than resorting to the prescribed internal procedure as was held in Republic –Versus-Kenya Revenue Authority Ex-Parte Style Industries Limited [2019]eKLR. It was submitted for the respondents that such exceptional circumstances had not been established in the instant case. Further, it was submitted that in Republic –Versus- Nelson Andayi Havi and Others, HCJR Application No. E1146 of 2020 at Nairobi Nyamweya J held that the ex-parte applicant’s notice of motion was incompetently filed in Court and was struck out and the dispute therein regarding the procedure for convening of the general meetings of the Law Society of Kenya by its President, the 1st respondent therein, was referred to arbitration in accordance with the provisions of regulation 96 of the Law Society of Kenya (General) Regulations.

It was therefore submitted for the respondents that the preliminary objection be upheld.

For the applicant it was submitted that the Court has jurisdiction to hear and determine the dispute in view of section 12 of the Employment and Labour Relations Court Act, 2011 because the applicant seeks to implement the provisions of a collective agreement. It was submitted for the applicant that the Court should follow Abdikadir Suleiman –Versus- County Government of Isiolo & Another [2015]eKLR where the Court held that the Commission does not deal with the issues of procedural or legal propriety which would legitimately fall in the Court’s jurisdiction. In that case the Court held thus, “**The court has considered the submissions made for the parties. Article 234(2) (i) of the Constitution provides that the Public Service Commission is vested with the function and power to hear and determine appeals in respect of county governments’ public service. Article 262 defines “public service” to mean the collectivity of all individuals, other than state officers, performing a function within a state organ. Accordingly, and firstly, the court holds that the power of the Commission to hear and determine appeals in respect of county governments’ public service constitutionally applies only to public officers, and not state officers, in the service of the county governments or any other state organ. Secondly, the court holds that section 77 of the County Governments Act, 2012 amplifies and brings into operation Article 234(2) (i) of the Constitution.**

In considering the constitutional and statutory provisions that empower the Commission to hear and determine appeals in respect of county governments’ public service, the subject matter is set out in section 77 of the Act but the decisions the Commission may make are not set out in the Act or the Constitution. It is this court’s opinion and holding that in appeals to the Commission, the Commission can only make decisions that the County Public Service Board or relevant lawful authority could have made or vary such decision by simply setting it aside or making a decision that was in the Board’s or the other relevant lawful authority’s jurisdiction to make. The court has guided itself that on appeal the appellate authority applies the same substantive law and facts as applied by the primary authority that made the decision appealed against and generally considers facts as they were presented before the primary authority so that an appellate authority, in absence of anything else, may only set aside the decision appealed against or substitute the decision with any of the remedies that the primary authority was empowered to make. In other words, the appeal process deals with the merits or substance of the case and not procedural or legal propriety of the case.” Thus, in that case the Court held that the prescribed appeal to the Commission would not operate to oust or extinguish or adjourn the Court’s jurisdiction to hear and determine a dispute about the legality or the manner of exercise of the constitutional or statutory powers and functions by the relevant person, public body or authority as may have been vested in the person, public body or authority under the Constitution or statute. The Court considers that such alleged illegality, procedural impropriety or unconstitutionality or breach of rights and fundamental freedoms would amount to exceptional circumstances justifying the Court’s intervention despite prescribed internal procedure or alternative dispute resolution as was envisaged in Republic –Versus-Kenya Revenue Authority Ex-Parte Style Industries Limited [2019]Eklr and per submissions made for the respondents and where Mativo J held thus, “**....The High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.**” The idea of exceptional circumstance justifying a bypass of otherwise prescribed or agreed dispute resolution procedure appears to be founded upon subsection 9(4) of the Fair Administrative Action Act which provide that notwithstanding subsection 9 (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the Court considers such exemption to be in the interest of justice.

Turning to the present case, the Court has considered the parties’ submissions. The Court finds as follows:

a) The Court finds that in the instant case the applicant is questioning the decision by the County Public Service Board conveyed by the circular dated 18.11.2019 withdrawing allowances otherwise payable to the listed 16 Doctors who at material time are on study leave and as provided for in the Human Resource Policy 2016, respective CBA, and Salaries and Remuneration Commission (SRC) Circulars. The Court finds that the substance of the dispute being withdrawal of the payable allowances, it would appear to fall within remuneration, terms and conditions of service; a matter which would fall within appeal powers and functions of the Public Service Commission per cited constitutional and statutory provisions.

b) The applicant's case is that on the face of it the allowances are granted to the listed 16 Doctors under the Human Resource Policy 2016, respective CBA, and Salaries and Remuneration Commission (SRC) Circulars and which the respondents admit in their circular dated 18.11.2019 but nevertheless, have proceeded to unilaterally withdraw the payment and the listed 16 Doctors are already in serious adverse and stressful financial circumstance. To that extent the applicant appears to raise an exceptional circumstance of illegality, namely breach of contract and unilateral variation of terms and conditions of service, and therefore appearing to justify by-passing the appeal process for immediate Court's intervention for enforcement of the CBA and the otherwise policy to pay the allowances.

c) However, the Court finds that the nature of the applicant's grievance appears to require an in-depth fact finding on the merits of the impugned decision such as whether the respondents have authority to vary remuneration and allowances otherwise agreed upon in CBA and given by SRC and prevailing policies, and, justification for and against the impugned decision. To that extent the Court finds that the judicial review application as filed would not be the appropriate manner to expeditiously consider and completely determine the actual applicant's grievance. As was held by Mativo J in the cited **Republic –Versus-Kenya Revenue Authority Ex-Parte Style Industries Limited [2019]eKLR**, judicial review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue. The Court finds that the alleged breach as manifested in the impugned decision goes directly into the merits of the decision and not merely procedural impropriety. Whereas the Court is alert that the emergent jurisprudence is that merit judicial review may be available such as on account of illegality, unconstitutionality and unreasonableness, the merit considerations of the impugned decision herein and further findings to be made by the Court in this ruling operate in solidarity as amounting to a bar to the suitability of the present judicial review application.

d) In particular, the Court has considered that parties have concluded a CBA and it is trite that they are bound by their own agreement. The validity and legitimacy of the CBA flows from Article 41 of the Constitution as implemented by the enabling statute, the Labour Relations Act, 2007. The exhibited CBA was signed on 06.07.2017. Article VII of the CBA provides for grievances. For individual grievances, the employee raising a grievance raises the grievance with immediate supervisor, failing settlement, the employee appeals to higher levels of management as soon possible in accordance with established procedures; and in that process the employee is accompanied by an accredited union representative. By that agreement in the CBA on individual grievances, the Court returns that the internal procedures will apply and the procedure includes the appeals to Public Service Commission as prescribed in the constitutional and statutory provisions cited for the respondents.

e) For collective claims, Article VII of the CBA provides that they mean claims for alteration to terms of service regarding matters specified in clause 2(b) of the CBA which may affect all employees of any group of the County Government of Taita Taveta. Such claims shall be raised in writing with the employer by the Union's General Secretary or his authorised representative one month before the expiry of the current CBA within which period the parties will endeavour to reach a settlement and, all agreements jointly reached shall be committed in writing and signed by both parties. Further, in event of failure to reach a settlement of the dispute within the period, the dispute shall be processed in accordance with the provisions of the Labour Relations Act and the Constitution of Kenya.

f) For collective grievances, Article VII of the CBA provides that they are grievances arising from breach, real or alleged, of existing terms of service in the matters specified in clause 2(b) of the CBA which may affect all employees of any group of employees of the County Government of Taita Taveta and, such grievances shall be raised by the members' representatives with the immediate supervisor in the first instance and in the event such grievance cannot be satisfactorily resolved, they then may immediately be referred by the union's Secretary General or his representative to the higher levels of management in writing. In event of failure to settle the matter, provisions of the Labour Relations Act, 2007 and the Constitution of Kenya shall apply.

g) The Court finds that the impugned decision herein amounted to a collective grievance and if parties failed to resolve it after the union Secretary General or his representatives referred it to the respondents, then the legitimate procedure was to invoke the conciliation procedure under the Labour Relations Act, 2007. Further, if parties failed to reach an amicable settlement after the conciliation, the matter would be referred to the Employment and Labour Relations Court as provided under the Act and the Employment and Labour Relations Court (Procedure) Rules, 2016. The Court therefore finds that the judicial review application herein amounted to an abuse of Court process to the extent that its filing was inconsistent with the provisions parties' CBA on handling of the collective grievances. The present judicial review proceedings are therefore liable to striking out for want of compliance with the collective grievance procedure in the CBA and which is clearly legitimate as recognised by Article 41 of the Constitution on the right to fair labour practices, and, as operationalised under the Labour Relations Act, 2007. Further, as already found, the Court holds that between the parties as per the CBA it is the individual grievances that will be subject to appeal to the Public Service Commission and not the collective grievances like in the impugned circular in the present case.

h) While citing clause F of the CBA in the notice of preliminary objection, the respondents made no submissions in that regard. The clause provides for dispute resolution and it states, **"In the event the parties to this agreement fail to resolve the dispute in the interpretation, application or execution of the CBA, the dispute shall be reported to the Ministry responsible for labour relations in line with the labour laws."** Once again, the Court returns that in view of that provision, parties are clear that in event of collective disputes about the CBA, the agreed procedure is conciliation under the Labour Relations Act, 2007 and failing settlement, reference to the Employment and Labour Relations Court under the Act.

i) The Court finds that the parties were entitled to institute the dispute resolution mechanisms under the Labour Relations Act, 2007 (as opposed to appeals to the Commission) in view of Article 159 (2) (c) that guides the judiciary that alternative forms of dispute

resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3) thereunder (prescribing the limitations to traditional dispute resolution mechanisms). The Labour Relations Act, 2007 prescribes conciliation as an alternative dispute resolution mechanism in collective bargaining in labour relations disputes and the parties properly agreed upon that path for collective grievances – leaving individual grievances to respondents’ internal procedures including appealing to the Commission per the constitutional and statutory provisions cited for the respondents.

j) The Court finds that the judicial review application was misconceived and an abuse of court process because the impugned decision amounted to a collective grievance subject to the collective grievance dispute resolution procedure as provided under the CBA and to that extent is liable to striking out for want of compliance with that agreed procedure.

k) As no submissions were made for the respondents on the other grounds in the notice of preliminary objection not decided upon by the Court in this ruling, the same are deemed abandoned.

l) The Court has considered the findings upon which the final determination has been arrived at, the emergent jurisprudence around the Constitution of Kenya, 2010, and that parties are in recognition and collective agreements. Accordingly, each party shall bear own costs of the proceedings herein.

In conclusion, the preliminary objection is hereby determined with orders:

1) The judicial review proceedings herein commenced by way of the notice of motion dated and filed on 19.03.2020 is hereby struck out in view of the collective grievance dispute resolution procedure in the prevailing CBA on record herein.

2) Parties at liberty to invoke the collective grievance dispute resolution procedure in the prevailing CBA and in view of the impugned circular dated 18.11.2019 signed by C.S Rachel W. Mwandame, Ag, Secretary and CEO, Taita Taveta County Public Service Board.

3) Each party to bear own costs of the proceedings.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 21ST MAY, 2021.

BYRAM ONGAYA

JUDGE