



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 65 OF 2020

NAMENYA DANIEL NABURI.....CLAIMANT

v

COUNTY ASSEMBLY SERVICE BOARD,

BUSIA COUNTY.....1st RESPONDENT

PUBLIC SERVICE COMMISSION.....2nd RESPONDENT

RULING

1. Namenya Daniel Naburi (the applicant) instituted these legal proceedings against the County Assembly Service Board (the Board) and the Public Service Commission (the Commission) on 11 September 2020, and he stated the Issue in Dispute as:

Unfair and unprocedural termination of employment, unfair and un-procedural disciplinary hearing, wrongful dismissal from employment for unproven reasons, wrongful withholding of salaries and dues due and owing, failure to remit statutory deductions of the Claimant and failure to issue the Claimant with a certificate of service.

2. The Board filed a Response on 21 October 2020 in which it contended that the Cause was *sub judice* because the applicant's appeal against termination of employment was pending before the Commission.

3. The Board also asserted that the action was *res judicata* as the Issues raised by the applicant had been determined by this Court differently constituted in Petition No. 23 of 2017, *Daniel Namenya Naburi & 9 Ors v County Assembly Service Board, Busia & Ar* (consolidated with Petition No. 42 of 2017, *Daniel Namenya Naburi & 9 Ors v County Assembly Service Board & Ar*).

4. The applicant filed a Reply to the Response on 5 November 2020.

5. On 4 December 2020, the Board filed a Motion raising the plea of *res judicata* and *sub judice* on the grounds that the applicant had filed an appeal to the Commission against his dismissal on 30 September 2020 and that the applicant and others had filed Petition No. 23 of 2017, *Daniel Namenya Naburi & 9 Ors v County Assembly Service Board, Busia & Ar* (consolidated with Petition No. 42 of 2017, *Daniel Namenya Naburi & 9 Ors v County Assembly Service Board & Ar*) and which consolidated Petitions had been dismissed on 23 May 2019.

6. When the Motion came up for hearing on 28 January 2021, the Court stayed the proceedings pending the determination of the applicant's appeal before the Commission (the applicant did not attend the Court on this date despite knowledge of the hearing).

7. On 17 February 2021, the applicant filed another Motion seeking orders:

(i) ...

(ii) THAT this Honourable Court be pleased to review and set aside its orders made on the 28th day of January 2021, specifically the part of the order that stayed proceedings pending the outcome of the appeal before the 2nd Respondent.

(iii) THAT this Honourable Court be pleased to admit the replying affidavit and submissions filed on the 15th day of February 2021.

(iv) THAT the costs of this application be in the cause.

8. In support of the application, the applicant deposed that despite filing an appeal against his dismissal with the Commission and several

reminders, more than 4-months had lapsed without the Commission hearing the appeal contrary to Regulation 20 of the Public Service Commission (County Government Public Services Appeals Procedures) Regulations, 2016.

9. On the admission of the replying affidavit, which had been filed late, the applicant deposed that due to a *misdiarisation* by a secretary in the advocates' office, the affidavit had not been filed in due time.

10. In opposition to the Motion, the Board caused its advocate on record to file a replying affidavit on 15 March 2021.

11. The Board took the position in the affidavit that the applicant had not met the test for review because the applicant was aware of the court appearances fixed for 28 January 2021, the Court had not given timelines for filing of affidavits, failure to diarise a hearing date was not a sufficient ground for review and that the applicant had been casual in his case.

12. The applicant filed submissions on 9 April 2021, and the Board filed its submissions on 7 May 2021.

13. The Court has considered the Motion, affidavits and submissions.

14. The applicant admitted that he appealed to the Commission against the decision to dismiss him from employment.

15. The Commission has not determined that appeal. It was on the basis of the pending appeal that the Court stayed further proceedings in the instant Cause.

16. It would therefore be premature for this Court to actively keep this Cause running while the appeal is still alive before the Commission.

17. The order of stay was meant to facilitate the exhaustion of alternative dispute resolution mechanisms, which are recognised not only in Article 159 of the Constitution but section 15 of this Court's constitutive Act.

18. In its appellate role, the Public Service Commission is subject to this Court's supervisory jurisdiction, and if the applicant feels that it has delayed in determining his appeal one way or the other, he should invoke the Court's jurisdiction to issue an order compelling it to carry out its legally ordained appellate role within a reasonable time.

19. The Court, therefore, declines to review and/or set aside the order staying the instant Cause.

Affidavit(s) and submissions filed (late)

20. The applicant also sought an order to admit a replying affidavit and submissions in respect to an application filed by the Board on 4 December 2020.

21. The substance of the Board's application is still pending, and the Court will admit the applicant's replying affidavit and submissions.

22. In conclusion, the Court orders:

(i) The order to review and or set aside the order staying the Cause issued on 28 January 2021 is declined.

(ii) The applicant's replying affidavit and submissions in response to the Board's application filed on 4 December 2020 are allowed.

23. For purposes of clarity, the Cause and any pending application will remain stayed until the Public Service Commission determines the applicant's appeal or further Court directions. Costs in the cause.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 16TH DAY OF JUNE 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For applicant Oundo, Muriuki & Co. Advocates

For the 1st Respondent J.O. Juma & Co. Advocates

For 2nd Respondent did not participate

Court Assistant Chrispo Aura