



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO.E013 OF 2020**

***(Before D.K.N.Marete)***

**ROBA ABDUBA QANCHORA.....CLAIMANT**

**VERSUS**

**COUNTY GOVERNMENT OF ISIOLO.....1ST RESPONDENT**

**COUNTY PUBLIC SERVICE BOARD COUNTY OF ISIOLO....2ND RESPONDENT**

**RULING**

This is an application by way of a Preliminary Objection dated 15th December, 2020. It comes out thus;

a) *That the court lacks jurisdiction to entertain this claim courtesy of Section 77 of the County Governments Act.*

The Respondent in her written submissions dated 18th December, 2020 submits that the Claimant is challenging the decision of the Respondents to re-deploy him. This, they argue should have been firstly referred to the internal dispute resolutions mechanism established under Section 77 of the County Governments Act, 2012. This provides as follows;

*“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 public officer may appeal to the public service commission (in this part referred to as the “commission”) against the decision.”*

The Respondents further seeks to rely on the authorities of **Republic vs National Management Authority Ex-parte Sound Equipment Ltd (2011)eKLR** where the court observed thus;

*“where there was an alternative remedy and especially where parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was real issue to be determined and whether the statutory appeal procedure was suitable to determine it...”*

Further, the Respondents relies on Court of Appeal, **Civil Appeal No.202/2015 Secretary County Public Service Board vs Hulbhai Gedi Abdille (2017)eKLR** where the court held thus;

*“Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum.”*

The Claimant in response and rebuttal to the preliminary objection submits that the operative word of Section 77 is *may appeal* and this does not in itself divest this courts jurisdiction on disputes coming before it.

On this he seeks to rely on the authority of **Abdikadir Suleiman v County Government of Isiolo & Another ELRC at Nyeri cause Number 76 of 2015, 2015,eKLR**, where the court held as follows;

*“the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions rests with the court as vested with the appropriate jurisdiction under Article 162(2) (a) as read with Article 165(5) and (6) of the Constitution; Article 22(1) and*

section 12 of the Employment and Labour Relations Act, 2011.

*In the present case the claimant has alleged that the oral dismissal was illegal, unlawful and unconstitutional it is the holding of the court that the jurisdiction to entertain that allegation and to make a primary conclusive finding thereon is vested in the court and the commission does not enjoy constitutional or statutory jurisdiction to determine that issue and to make appropriate remedy as is prayed for by the claimant in this case. The court considers that the line is thin but clearly sets apart the matters that can go to the commission as of necessity in the first instance and those that may be urged before the court as of first instance without having to go through the commission by reason of exhausting the prescribed alternative and statutory procedure and remedy. It is clear that legitimacy or lawfulness of the decisions is not one of the listed appealable subject matter under section 77 of the Act and it has not been shown that such would be a matter in the constitutional or statutory competence of the commission to decide.”*

It is his case that this action seeks to challenge the substantive and procedural flows in the decisions of the Respondents to re-designate him without involvement and therefore the cause of action arises in this court and not the Public Service Commission.

I agree.

I am therefore inclined to dismiss the preliminary objection with orders that each party bears the costs of the application.

**Dated and delivered at Nyeri this 16th day of June, 2021.**

**D.K.Njagi Marete**

**JUDGE**

**Appearances**

- 1. Mr.Muriuki instructed by Mbogo & Muriuki Advocates for the Respondents/Objectors**
- 2. Mr.Kimunya instructed by Kimunya & Company Advocates for the Petitioner/Respondent.**