



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU

PETITION NO. E016 OF 2020

EVANS MUSWAHILI LADTEMA.....PETITIONER

VERSUS

VIHIGA COUNTY PUBLIC SERVICE BOARD.....RESPONDENT

AND

LIAISON OFFICER, EMUHAYA SUB COUNTY.....1st INTERESTED PARTY

LIASON OFFICER, LUANDA SUB COUNTY.....2nd INTERESTED PARTY

LIASON OFFICER, SABATIA SUB COUNTY.....3rd INTERESTED PARTY

LIAISON OFFICER, VIHIGA SUB COUNTY.....4th INTERESTED PARTY

LIAISON OFFICER, HAMISI SUB COUNTY.....5th INTERESTED PARTY

YOUTH LIAISON OFFICER.....6th INTERESTED PARTY

GENDER LIAISON OFFICER.....7th INTERESTED PARTY

COUNTY ASSEMBLY OF VIHIGA.....8th INTERESTED PARTY

JUDGMENT

1. This Petition once again implicates the significance of Article 234(2)(i) of the Constitution, section 77 of the County Governments Act and sections 74, 75 and 87 of the Public Service Commission Act.

2. The Court must note that the sections are increasingly being relied on by County Public Service Boards to resist the first instance jurisdiction of the Courts in disputes arising from the exercise of disciplinary and recruitment powers by the Boards.

3. Evans Muswahili Ladtema (the Petitioner) filed a Petition with the Court on 16 December 2020 alleging that the County Public Service Board, Vihiga (the Board), had appointed the Interested Parties to non-existing offices or positions contrary to the requirements of section 60 of the County Governments Act and the values and principles of the Constitution.

4. The Petitioner sought the following remedies:

(i) A declaration that the appointment of the 1st to 6th Interested Parties to the impugned offices or positions by the Respondent is unconstitutional and therefore illegal, null and void.

(ii) An order of certiorari do issue quashing the appointments of the 1st to 6th Interested Parties as Liaison Officers by the Respondent.

(iii) An order directed at the County Government of Vihiga to surcharge the Chairperson and member of the Respondent for all the

public funds spent on the 1st to 6th Interested Parties in terms of salaries and other allowances in terms of Article 226 of the Constitution.

(iv) Any other relief that the Court may deem fit and necessary in upholding the Constitution and the rule of law.

5. Filed with the Petition was a Motion under a certificate of urgency. The Court directed that the Petition and Motion be served.

6. Upon service, the Board filed a Notice of Preliminary Objection contending that:

(i) The Petition solely concerns the exercise of powers of appointment of personnel in the county public service by the County Public Service Board (the Respondent), which falls outside the jurisdiction of the Honourable Court.

(ii) There are no or no valid Constitutional issues raised in the Petition to warrant the intervention of this Honourable Court in the exercise of the power to interpret alleged violation of the Constitution in the manner sought or at all.

(iii) The issues raised in the Petition falls within the exclusive appellate powers of the Public Service Commission under Article 234(7) (sic) of the Constitution and section 77 of the County Governments Act.

(iv) The Petition violates the express provisions of sections 74 and 75 of the Public Service Commission Act and other relevant provisions of the law.

(v) The Petition amounts to gross abuse of the process of the court and public interest litigation principle.

7. On 1 March 2021, the Court directed that the Preliminary Objection and the Petition be urged together. The parties were also directed to file and exchange submissions.

8. The Board had filed its submissions on 29 January 2021, while the Petitioner filed his submissions on 1 March 2021.

9. The Court has considered the Motion, Petition and Preliminary Objection.

10. Article 234(2)(i) of the Constitution vests the Public Service Commission of Kenya with the function of hearing and determining appeals from certain decisions of county public service boards.

11. Section 77 of the County Governments Act provides: 77 Appeals to the Public Service Commission

(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.

(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 —

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

(b) remuneration and terms and conditions of service;

(c) disciplinary control;

(d) national values and principles of governance, under Article 10, and values and principles of public service under Article 232 of the Constitution;

(e) retirement and other removal from service;

(f)

(g)

(3) An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of the Commission, the circumstances warrant it.

(4)

(5) Any person dissatisfied or affected by a decision made by the Commission on appeal in a decision made in a disciplinary case may apply for review, and the Commission may admit the application if—

(a) the Commission is satisfied that there appear in the application new and material facts which might have affected its earlier

decision, and if adequate reasons for the non-disclosure of such facts at an earlier date are given; or

(b) there is an error apparent on the record of either decision.

(6)

12. Section 77 of the County Governments Act is mirrored in section 85 of the Public Service Commission Act, 2017, which is in the following terms:

85 Appeal from County Government public service The Commission shall, 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 —

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

(b) remuneration and terms and conditions of service;

(c) ...

(d) national values and principles of governance, under Article 10 and values and principles of public service under Article 232 of the Constitution;

(e) retirement and other forms of removal from the public service;

.....

13. The Petitioner was challenging the purported establishment, recruitment and appointment of the Interested Parties to the positions of Liaison Officers contrary to section 60 of the County Governments Act.

14. Section 77(2) of the County Governments Act and section 85 of the Public Service Commission Act, therefore, become implicated.

15. In terms of those sections, the Petitioner should have made an appeal in the first instance to the Public Service Commission.

16. Instead of appealing, the Petitioner moved the Court, and the issue of jurisdiction and exhaustion of the legal appellate process arises.

17. Of more interest in answering the question in section 87(2) of the Public Service Commission Act, which provides that:

87. (2) A person shall not file any legal proceedings in any Court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from county government public service unless the procedure provided for under this Part has been exhausted.

18. In the view of this Court, the logical interpretation to be given to section 77 of the County Governments Act as buttressed by sections 85 and 87(2) of the Public Service Commission Act, 2017, is that the first port of call to challenge to the establishment of, recruitment to and removal from an office in the county public service an appeal to the Public Service Commission.

19. The appellate jurisdiction of the Public Service Commission under such circumstances is ordained by Article 234(2)(i) of the Constitution.

20. The application of section 77 of the County Governments Act was the subject of opinion by the Court of Appeal in *Secretary, County Public Service Board v Hulbhai Gedi Abdille* (2017) eKLR where the Court held:

There is no doubt that the Respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by Section 77 of the Act. The Section provides not the only 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.

21. The endorsement by the Court of Appeal of the applicability and interpretation to be given to section 77 of the County Governments Act is binding on this Court.

22. This Court is, therefore, of the view and finds that the Petition was premature for failure to exhaust the statutorily prescribed dispute resolution mechanisms at the first instance by the Petitioner.

23. Before concluding, the Court wishes to observe that it would still have dismissed the Petition on the merits because the Petitioner did not disclose any details or evidence to demonstrate that the Board had appointed the 1st to 6th Interested Parties to any positions within the county public service.

24. Even the names of the persons allegedly appointed were not disclosed, nor were the dates of appointment revealed.

Conclusion and Orders

25. From the foregoing, the Court will uphold the Notice of Preliminary Objection and dismiss the Petition and Motion for failure to exhaust the appellate process established under section 77 of the County Governments Act as read with section 87(2) of the Public Service Commission Act as well as lacking in merit.

26. The Petitioner to meet the costs of the Board.

Delivered through Microsoft teams, dated and signed in Kisumu on this 2nd day of June 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Petitioner Mr Malenya instructed by Ngigi Njuguna & Co. Advocates

For Respondent Esther Andisi, Principal Legal Officer, Office of the County Attorney

Court Assistant Chrispo Aura