



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

PETITION NO.E005 OF 2020

(Before D.K.N.Marete)

PATRICIA WAIRIMU MUNENECLAIMANT

VERSUS

COUNTY PUBLIC SERVICE BOARD,

KIRINYAGA COUNTY.....1ST RESPONDENT

COUNTY GOVERNMENT OF KIRINYAGA.....2nd RESPONDENT

RULING

This application is originated by way of a preliminary objection dated 15th January, 2021. It comes out thus;

- 1. That this Honourable Court lacks jurisdiction to entertain the Application for orders sought as the Applicant has not exhausted all the dispute resolution mechanisms provided by law, specifically section 77 of the County Government Act, prior to the filing of this suit.*
- 2. That the suit offends the mandatory provisions of Section 9 (2) of the Fair Administrative Act, No.4 of 2015.*
- 3. That the orders sought are not available to a party where an alternative remedy provided by law has not been exhausted.*
- 4. That the proceedings herein are frivolous, premature; an abuse of the due process of this court.*

The Respondents prays that the Applications and the Petitions be struck out with costs.

The Petitioner in her written submissions dated 5th February, 2021 faults the preliminary objection for being misconceived and prays that the same be dismissed with costs.

The Respondents in their written submission dated 15th January, 2021 submit that the application and petition were filed in opposition to the Respondents decision in a letter dated 28th March, 2019 redesigning their appointments. It is her wish that this be struck out on the basis of the issued raised in the preliminary objection.

The Respondent's in opening deny the jurisdiction of the court in this matter and seek to rely on the locus classicus case of Owners of **Motor Vessel "Lilian S" Caltex Oil (Kenya) Ltd (1989) KLR 1** where the court observed thus;

"Jurisdiction is everything. Without it, a court has no power to make one more step. 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.

The Respondent further backs the jurisdiction conundrum on the provisions of S.77 of the County Government Act, 2012 at sub-section (1) 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 against any county public officer may appeal to the Public Service Commission (in this part referred

to as the “Commission”) against the decision”

This mandates the Petitioner to appeal to the commission before they seek redress in court. It comes out as follows;

12. In *Speaker of the National Assembly v James Njenga Karume (1992) ECLR* the Court of Appeal held that;

“... in our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed...”

21. *Fair Administrative Act, No.4 of 2015* which is an Act of Parliament enacted pursuant to Article 47 of the Constitution. Section 9(2), (3) and (4) thereof provides:

(2) *The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.*

(3) *The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).*

22. In *International Centre for policy and 5 others vs The Hon Attorney –General & 4 others (2013) eCLR* the court recognized the need to let relevant statutory bodies deal with matter within their mandate fully before interfering in manner sought in these proceedings by holding that a Court of Law:

“...must first give an opportunity to the relevant constitutional bodies or state organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act... where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted...”

The Petitioner in rebuttal seeks to rely on the celebrated authority of **Mukhisa Biscuits Co.Ltd.vs West End Distributors Ltd (1969) E.A. 696**, where it was observed as follows;

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

It is their submission that the preliminary objection fails for its requisition for evidence and facts to establish whether an appeal was indeed filed in the appropriate forum.

The Petitioner’s further submission is a distinction between constitutional and statutory jurisdiction as in the circumstances of this case. They submit that this court does and possesses a constitutional mandate engraved under Article 162 (2) (a) as read with S.12 (1) of the Employment and Labour Relations Court Act, 2014.

The Petitioner further submits on the two schools of thought have formed out of section 77 of the County Governments Act, 2012- *the pro and against it*. One school upholds and backs the provision and allows applications to this extent while the other one dismisses them.

She seeks to illustrate this by relying in the authority of **Abdikadir Suleiman vs County Government of Isiolo & Another (2015) eCLR**, where Ongaya, J, dismissed a preliminary objection based on section 77 of the County Government Act N.17 of 2012. The court expressed itself as follows;

“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 by the claimant in this case.”

She further sought to rely on the authority of **Thuranira Salesio vs County Public Service Board & 2 others (2019)eCLR**, where the court observed thus;

“The law is clear in as far as appeals to the PSC lie. These are discretionary. In this case the petitioner has moved to court instead of moving to the PSC and that is within the remit of the law as there are notable constitutional imperatives only this court and the superior courts... can enforce”.

The Petitioner further submits a case of a conflict between S.77 and the CBA and S.87 Employment Act, 2007. It is their submission that a plain or any other reading of S.87, Employment Act, 2007 places all materials of dispute between an employer and employee to the jurisdiction of this court and plainly so. There is no more.

A strict construction of Section 77 therefore brings out a case of conflict in the application of statute. Section 77 must therefore give way to the clear provisions of the Constitution and the Employment Act, 2007.

I agree. This is a situation that has persisted for a while now and would be resolved by the development of the law on the subject.

The constitutional basis of its construction is Article 259. This calls for a broad and purposive interpretation of the same. It would not be fair to confer constitutional construction to narrowness and undue limitation. The constitution is a living document. It is self-preserving and propelling. One would not afford to delimit it in favour of any lower standards of law and on procedure. We must uphold its place and power. This is the more why the submissions of the Petitioner sound agreeable in the circumstances.

The Petitioner further submits that S.77 of the CBA is dead and obstructs access to justice. The process so provided denies parties to access justice their style and taste. It only allows for review by the Public Service Commission where the decision of the same Public Service Commission is not satisfactory.

It is her further submission that this attempt is on affront to the rule of law and access to justice. It offends S.9 (2) of the Fair Administrative Action Act, No 4 of 2015 which provides as follows;

“1) subject to subsection (2), a person aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to article 22(3) of the constitution.

2) The high court or a subordinate court under subsection(1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted”

The preliminary objection fails.

This is because the petitioner’s case overwhelms that of the Respondent. It is self-telling. Section 77 as structured is self-defeating and couched in inadequacy. It is a fetter to progress in the administration of justice. It may require her re-consideration and or re-construction to come out clear on its intents and purposes.

Otherwise, a proper construction of the non-mandatory nature of the provision should abide to create sanity thereof. As we speak, it shall become an unnecessary cause of chaos on the issue of jurisdiction.

I am therefore inclined to disallow the preliminary objection with costs to the Petitioner/Respondent.

Dated and delivered at Nyeri this 26th day of July, 2021.

D.K.Njagi Marete

JUDGE

Appearances

- 1. Mr.Muiruri holding brief for Ronald & Kibet instructed by Waweru Gatonye & Company Advocates for the 1st Respondents.**
- 2. Mr.Waweru Macharia instructed by Waweru Macharia & Company Advocates for the Petitioner/Objector.**
- 3. No appearance for the 2nd and 3rd Respondents.**