REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO.E023 OF 2021

(Before D.K.N.Marete)

LOOSENGE DAVID ENGLAND..... .....CLAIMANT

VERSUS

THE GOVERNOR SAMBURU COUNTY

MOSES KASAINE LENONKUL….....1ST RESPONDENT

THE COUNTY GOVERNMENT OF SAMBURU.....2ND RESPONDENT

THE COUNTY PUBLIC SERVICE BOARD

SAMBURU COUNTY.....3RD RESPONDENT

RULING

This is an application by way of a preliminary objection dated 11th May, 2021 and comes out as follows;

1. *That the Honourable court lacks jurisdiction to entertain the suit by dint of provisions of Section 77 of The County Government Act.*

2. *That the Claimant's suit is premature, misconceived and an abuse of court process.*

The Claimant in a Response to the Preliminary Objection sworn on 20th May, 2021 denies the same as lacking in merit, misguided and a mis-interpretation of the law.

He further faults the Preliminary Objection thus;

- It is not premised on pure points on law.
- It raised factual raises that would require interrogation by court before actual determination.
- There is no decision of the Respondent to be treated under S.77 of the Collective Bargaining Agreement, 2012.
- That Section 77 refers to appeals against decisions of the County Public Service Board and not unilateral decisions of the County Governor or any other person on authority.
- Section 77 is not couched in mandatory terms.
- Section 77 does not oust the jurisdiction of this court as this is donated by the Constitution and Statute.

The Respondents in their written submissions dated 2nd June, 2021 seek to rely on Section 77 which provides thus;

> *"Any person dissatisfied or affected by a decision made by the county Public Service Board or a person in exercise or purported exercise of the disciplinary control against any public officer may appeal to the Public Service Commission against the decision."*

They further wish to rely in the authority of **Mukhisa Biscuit Manufacturing Co.Ltd v West End Distributors Ltd (1969) EA 696**, to wit,

> *a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.*

Again, they seek to rely on the very apt decision of Nzioki wa Makau, J, in **Martin Kabui Mwangi v County Government of Laikipia (2019) eKLR** which sheds light on the significance of section 77 and Article 234. Here the court held thus;

> *"The exhaustion principle enunciated in precedents such as the case of Secretary, County Public Service & Another v Hulbhai Gedi Abdille (supra) does not permit an election as to the parts of a statute that one should rely on. Put another way, it removes discretion on the part of a litigant from choosing whether to follow the provision or not. In this case the suit was filed before the exhaustion of the remedy under the law, namely the provisions of Section 77 of the County Governments Act. The Claimant ought to have appealed against his removal to the Public Service Commission before moving the court. The suit did not fall in the category of suits that can be entertained by the court. As he did not appeal as provided for in law, the suit is a non-starter and is accordingly struck out."*

The Respondent further wishes to rely in the authority of Secretary, **Wajir County Public Service Board v Hulbal Gedi Abdille (2017) eKLR**, where the court observed thus;

> *"It is thus without doubt that an appellate procedure has been provided for by statute to address grievances such as those raised by the respondent. The issue is whether, the appeal, as a dispute resolution mechanism should have been invoked and or exhausted before the respondent thought of approaching the High Court by way of judicial review….*
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> *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. Such party ought to seek redress under the other regime.……*
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> *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 only a 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. In terms of Republic v National Environment Management Authority (supra), we discern no exceptional circumstances in this appeal that would have warranted the bypassing of the statutory appellate process by the respondent. Her contention that she disregarded the appeal because it could not afford her an opportunity to question the procedure followed by the appellant is in our view, without basis because Section 77 has placed no fetter to the jurisdiction of the Public Service Commission."*

The Claimant/Respondent in opposition reverts to the authority of **Nguruman Limited v Jan Bonde Nielsen & 2 others (2014) eKLR**, where the court held thus;

> *"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:*
>
> *a) establish his case only at a prima facie level;*
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> *b) demonstrate irreparable injury if a temporary injunction is not granted;*
>
> *and*
>
> *c) allay any doubt as to (b) by showing that the balance of convenience is in his favour."*

He deems this as not satisfied in this case.

He further wishes to rely on the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (2003) eKLR**, where the court observed as follows;

> *"A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."*

I agree with the Claimant/Respondent's case.

The preliminary objection is not sustainable. This is because, firstly, of the nature of the provisions of S.77. It is not anchored in mandatory terms. Secondly, this is particularly applicable where the issues for determination do not take a constitutional form. This courts jurisdiction remains intact and is not necessarily limited or fettered by section 77. The bounder of the application of the two jurisdictions is dependent on

the subject matter and prevailing circumstances.

I am therefore inclined to dismiss the preliminary objection with costs to the Claimant/Respondent.

DATED AND DELIVERED AT NYERI THIS 19TH DAY OF JULY, 2021.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mr. Amor instructed by G.M.Gamma Advocates LLP for the 2nd and 3rd Respondents

2. Mr.J.M.Mwangi instructed by J.M.Mwangi & Company Advocates LLP for the 1st Respondent/Objector.

3. Mr.Sigei instructed by SMS Advocates LLP for the Claimant/Respondent