



IN THE REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC. CAUSE NO. E382 OF 2020

JOHN KARIUKI KAHIA1ST CLAIMANT

MARTIN REBO2ND CLAIMANT

VERSUS

KIAMBU COUNTY GOVERNMENT.....RESPONDENT

RULING

1. This Ruling relates to the Respondent's Preliminary Objection dated 1.2.2021 which stands on the following grounds:-

- (a) That the Respondent is established under Article 176 (1) of the Constitution of Kenya, 2010.
- (b) That the Respondent does not have the legal mandate and or capacity to employ or reinstate the Claimants or any other employee on a permanent or contractual basis, with the appurtenant salaries allowances and benefits.
- (c) That it is trite law that the Claimant's appointments were not undertaken in conformity and or strict compliance of the underlying provisions of Section (s) 37 and 39 of the Public Service Commission act no. 1 of 2017 and Section (s) 59,63,66 and 68 of the County Governments Act no. 17 of 2012.
- (d) That under the provisions of Part VII of the County Government Act, 2012, the mandate of appointment of persons to hold office or confirmation for the same is vested in the County Public Service Board which is a body corporate with perpetual succession, a seal and with the attendant power to sue and be sued in its own name.
- (e) That by dint of the fact that the aforesaid functions and power in relation to any appointments in public service do not fall anywhere near the mandate of the Respondent, this instant suit as against the Respondent is a non-starter.
- (f) That the Claimants have sued the wrong party in this case as the remedies they are seeking cannot lie against the Respondent.
- (g) That Claimant's case is to that extent incompetent, and bad in law, fatally defective and otherwise an abuse of the Court.

2. The Respondent contends that the Preliminary Objection raised a proper objection as defined in **Mukhisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd[1969]E.A. 696** in which the court explained that a Preliminary Objection must raise a pure point of law.

3. In the Respondent's view its preliminary objection raises two fundamental points of law namely:

- (a) The Claimant's appointments were not undertaken in conformity and or strict compliance of the underlying provision of section 37 and 39 of the Public Service Act and section 59, 63, 66 and 68 of the County Governments Act.
- (b) Under the provisions of Part VII of the County Governments Act, the mandate of appointment of person to hold office or confirmation of the same is vested in the County Public Service Board which is a body corporate with perpetual succession, a seal and the power to sue or be sued in its own name.

4. In addition it contends that it is wrongfully sued because by dint of section 59 of the County Government Act, the mandate to appoint persons and confirm them to hold offices in the County Public Service rests on the County Public Service Board and not itself. Accordingly, it contended that it cannot be held liable for acts or omission of the County Public Service Board.

5. On the other hand, the Claimants opposed the Preliminary Objection contending that it does not raise any pure point of law. In their view, the Preliminary Objection relates to the legality of their appointment in respect of the advertisement to their positions and the records of their applications which are all factual matters which require evidence to be tendered.

6. In addition they contended that the Respondent is a body corporate which has capacity to enter into valid contracts by dint of section 6 of the County Governments Act. Consequently, according to them the Respondent had capacity to employ them under contracts which binds the successor in government.

7. Again the Claimant urged that under Order 1 rule 9 of the Civil Procedure Rules, a suit cannot be defeated by misjoinder on non-joinder of parties.

ISSUES FOR DETERMINATION

8. Having considered the pleadings, the Preliminary Objection and the written submissions filed, the issues in dispute can be collapsed into two:-

(a) Whether the Respondent's Preliminary Objection meets the legal threshold of a proper Preliminary Objection.

(b) Whether the Preliminary Objection has merits.

THRESHOLD

9. The legal threshold of a proper Preliminary Objection was enunciated by the Court of Appeal in **Mukhisa Biscuits Case**, *supra* where Law, J.A held as follows:-

“So far as I am aware, 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. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”

10. In the same matter Newbold, P. held that:

“A Preliminary Objection is in the nature of what used to be a demurre. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.”

11. The Supreme Court in **Independent Electoral Boundaries Commission v. Jane Cheperenger & 2 Others [2015]eKLR** expressed itself as follows:-

“The first ground in the Preliminary Objection is that the orders sought have been overtaken by events. Prima facie, this is a factual issue, to be established by evidence from both parties. The court is unable to dispose of the question, without first evaluating evidence from the parties. It is relevant, at the same time, that this ground raised no pure point of law, on its own.”

12. Finally in **Nitin Properties Ltd v. Singh Kalsi & Another[1995]eKLR**, the Court held that:

“A Preliminary Objection raised 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.”

13. After careful consideration of the grounds upon which the Preliminary Objection stands herein, I am of the opinion that evidence will be required to establish the same. The circumstances under which the Claimants were employed and discharged are factual matters which cannot be determined by the Court without hearing evidence from the parties. It is immaterial what the law says regarding appointments of staff in the County Public Service, evidence is necessary to support the law and show whether or how the law was breached by the appointment of the Claimants.

14. In the end the Court finds that the Preliminary Objection raises factual points and not pure points of law. Consequently it does not meet the threshold of a proper Preliminary Objection and on that finding I dismiss the Preliminary Objection with costs.

15. In order to save on time I grant the Respondent ten days leave to file and serve defence.

Dated, Signed and delivered in Nairobi this 18th day of August, 2021.

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE