



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. E023 OF 2020

LUKALE MOSES SANDE.....CLAIMANT

v

COUNTY GOVERNMENT OF
KAKAMEGA.....1st RESPONDENT
GOVERNOR, COUNTY OF KAKAMEGA.....2nd RESPONDENT
COUNTY PUBLIC SERVICE BOARD,
KAKAMEGA.....3rd RESPONDENT
COUNTY EXECUTIVE COMMITTEE
MEMBER FOR PUBLIC SERVICE AND
ADMINISTRATION.....4th RESPONDENT

RULING NO. 2

1. In a Ruling delivered on 2 June 2021, the Court issued the following directions:

- (i) The Cause to be determined on the basis of *viva-voce* evidence.
- (ii) Before the Cause is scheduled for hearing, the parties to address the Court on the applicability and effect of Article 234(2)(i) of the Constitution, section 77 of the County Governments Act and sections 85, 86 and 87 of the Public Service Commission Act, 2017 on the cause of action herein.
- (iii) The Claimant to file and serve his submissions on or before 2 July 2021.
- (iv) The Respondents to file and serve their submissions on or before 2 August 2021.

2. The Claimant filed his submissions on 6 July 2021 (should have been filed and served on or before 2 July 2021), while the Respondents' submissions were filed on 30 July 2021.

Respondents arguments

3. The Respondents asserted in their submissions mainly that the County Public Service Board had not made any decision as contemplated by section 77 of the County Governments Act as read with Article 234(2)(i) of the Constitution and therefore the Public Service Commission's appellate jurisdiction could not be invoked by the Claimant.

4. According to the Respondents, the causes of action presented by the Claimant related to an:

attempt to mislead this Court for renewal of his contract of employment, which contract expired on the 31st day of August 2020;

the Claimant's selfish desire to enforce personal pursuits in the interpretation of the County Attorneys Act and

the requirements of Public Appointments (County Assembly Approval) Act No. 5 of 2017.

5. In essence, the Respondents defence was hinged on the assumption that the Claimant's contract expired by effluxion of time and, therefore, the Court, rather than the Public Service Commission, had jurisdiction.

Claimant's submissions

6. The Claimant also took the position that the Public Service Commission did not have first instance jurisdiction over the dispute.

7. In making the submission, the Claimant contended that the dispute before the Court did not emanate from a disciplinary decision by the County Public Service Board, Kakamega (the Board) and thus by dint of Article 234(2)(j) of the Constitution, the Public Service Commission was not clothed with jurisdiction.

8. The Claimant further asserted that at the material time, he being an appointee of the Governor, was not subject to the disciplinary control of the Board.

9. The primary facts as presented are not in dispute.

10. The Board advertised for the position of County Attorney sometime in 2014 and that the Claimant was one of the applicants.

11. Instead of offering the Claimant the position of County Attorney, the Board offered him the position of Legal Advisor and Head of Legal Services on a 3-year contract effective 1 September 2015.

12. The Claimant accepted the offer in writing on 1 September 2015 but still raised concerns on the designation as Legal Advisor and Head of Legal Services through a letter dated 15 September 2015.

13. When the contract expired, the Board wrote to the Claimant to notify him of the renewal of the contract for a further 2-years with effect from 1 September 2018. This latter contract was to lapse on 31 August 2020.

14. On 20 September 2019, the County Executive Committee member for Public Service cautioned the Claimant in writing against using the title of County Attorney on the ground that such an office did not legally exist as it had not been established by the Board.

15. In the meantime, the Office of the County Attorney Act commenced on 27 July 2020.

16. The Act established the office of the County Attorney and provided for the transition of staff who had been employed to perform the functions of County Attorney, County Solicitor or County Legal Counsel to hold the respective positions unless they did not meet the set qualifications.

17. The Act reserved to the Board the power to redeploy such staff who did not meet the set qualifications.

18. On 2 October 2020, the Chief Officer, Public Service notified the Claimant that his contract had expired on 31 August 2020, and therefore he was required to formally hand over (the Respondents had stopped payment of any remuneration to the Claimant by this time).

19. On 11 November 2020, the Board advertised for the position of County Attorney. Pending the filing of the position, the Governor had appointed an acting County Attorney on or around 6 November 2020.

20. The Claimant was occupying an office established under the County Governments Act and which office he accepted in writing. He became aggrieved by certain decisions made by the Respondents and more so removing him from office and or not appointing him through the transitional provisions of the Office of the County Attorney Act to the position of County Attorney.

21. Under section 4 of the Office of the County Attorney Act, the office of the County Attorney is an office in the county public service.

22. And by virtue of section 19 of the office of the County Attorney Act, the mandate to set the terms and conditions of service upon for the County Attorney is reserved the Board, in consultation with the Salaries and Remuneration Commission.

23. The Claimant's assertion, therefore that he is not subject to disciplinary or other control by the Board, is not legally correct.

24. The Claimant's main complaint was that he was not transitioned into the Office as envisaged under section 31 of the Office of the County Attorney Act.

25. The Respondents had, however, through a letter dated 2 October 2020, notified the Claimant that his contract had ended.

26. It is not in dispute that the Claimant had brought to the attention of the Respondents the coming into effect of the Office of the County Attorney Act through a letter dated 4 August 2020.

27. In the said letter, the Claimant sought a re-designation of his appointment to County Attorney as well as adjustment of the term of the contract.

28. On 2 October 2020, the Respondents informed the Claimant that the contract had lapsed.

29. In the Court's view, the Board/Respondents had made a decision implicating the terms and conditions of service upon which the Claimant served when it wrote to him on 2 October 2020, notifying him that the contract had lapsed, whether the notification was made without due consideration to the applicable provisions of the Office of the County Attorney Act.

30. Article 234(2)(i) of the Constitution has clothed the Public Service Commission of Kenya with the function and power to hear and determine appeals in respect to decisions made by or on behalf of a county governments' public service.

31. In terms of enabling legislation, section 77(2)(a),(e) and (g) of the County Governments Act requires persons dissatisfied with the exercise of the powers of *recruitment, appointment or qualifications or removal from office* by a County Public Service Board to appeal to the Public Service Commission.

32. In the same vein, section 87(2) of the Public Service Commission Act restricts the commencement of judicial proceedings in the Courts before the exhaustion of the appeal procedure outlined in Part XV of the Act.

33. The Court of Appeal has addressed its mind severally to the exhaustion of alternatively anchored dispute resolution processes.

34. In *Geoffrey Muthinja & Ar v Samuel Muguna Henry & 1756 Ors* (2015) eKLR, the Court held:

It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews... as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of Courts.

35. In *Secretary, County Public Service Board & Ar v Hulbhai Gedi Abdille* (2017) eKLR, the Court of Appeal said of the application of section 77 of the County Governments Act:

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..... 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.

36. These decisions are binding on this Court.

37. The Claimant did not exhaust the appeal procedures in respect to his removal or purported removal and or terms and conditions of service as contemplated by the Constitution, the County Governments Act and the Public Service Commission Act before moving this Court, and the Court, therefore, declines jurisdiction.

38. The Memorandum of Claim filed in Court on 26 November 2020 is struck out with no order on costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 17TH DAY OF NOVEMBER 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Malalah & Co. Advocates

For Respondents Mukele Moni & Co. Advocates

Court Assistant Chrispo Aura