



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 24 OF 2020

DAISY CHEPKOECH BII

CLAIMANT

v

GOVERNOR, COUNTY GOVERNMENT OF BOMET

1st RESPONDENT

COUNTY SECRETARY, COUNTY GOVERNMENT OF BOMET

2nd RESPONDENT

BOMET COUNTY PUBLIC SERVICE BOARD

3rd RESPONDENT

RULING

1. Daisy Chepkoech Bii (the Claimant) was appointed as Coordinator Business Development and Micro-Finance by the County Public Service Board, Bomet (the Board).
2. On or 17 November 2013, the Head of the County Public Service wrote to the Claimant informing her that the position had been upgraded to Director Co-operatives.
3. However, on or around 28 January 2020, the Head of the County Public Service notified the Claimant that the Board had disowned the upgrading, and thus she would revert to the position of Coordinator Business and Micro-Finance.
4. The Claimant disputed the new development through a letter dated 31 January 2020. She also alleged discrimination and called for investigations.
5. On 28 February 2020, the Claimant sued the Respondents alleging violation of her rights and seeking orders:
 - (a) A declaration that reversion of position of appointment from that of Director Cooperatives (J/G "R") to Coordinator, Business Development and Micro-Finance (Finance (J/G "P")) is illegal, null and void.
 - (b) An order reinstating the Claimant to her position of Director Co-Operatives.
 - (c) General damages.
 - (d) Costs for the suit together with interest thereon.
6. When served, the Respondents raised a Preliminary Objection contending:
 - (a) THAT the application and suit filed herein is in contravention of section 87(2) of the Public Service Commission Act, No. 10 of 2017 read together with section 77 of the County Governments Act No. 17 of 2012, which requires that a person shall not file any legal proceedings in a court of law with respect to matters within the jurisdiction of the Public Service Commission to hear and determine appeals from the county public service unless the appeal procedure provided under section 87(2) of the Public Service Commission Act, No. 10 of 2017 have been exhausted.
 - (b) THAT the application and suit filed herein offends the doctrine of exhaustion.
 - (c) THAT the application and accompanying suit are an abuse of court process and should be dismissed in *limine*.

7. On 21 June 2021, the Court directed the parties to file and exchange submissions on the Preliminary Objection.
8. The Board filed its submissions on 19 August 2021, while submissions by the other parties were not on record by the agreed timelines.
9. The Claimant's action and complaints revolve around terms and conditions of service and, more particularly, a purported attempt to alter and/or vary the terms of service.
10. Article 234(2)(i) of the Constitution mandates the Public Service Commission of Kenya to hear and determine appeals in respect of county governments' public service.
11. In terms of enabling legislation, section 77(2)(a) & (b) of the County Governments Act gives the Public Service Commission of Kenya the mandate to entertain appeals emanating from disputes regarding appointments and terms and conditions of service within the county public service(s).
12. In the same vein, section 87(2) of the Public Service Commission Act restricts the institution of judicial proceedings in the Courts before the exhaustion of the appeal procedures outlined in Part XV of the Act.
13. The Court of Appeal has addressed its mind severally to the exhaustion of alternatively anchored dispute resolution processes.
14. 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.

15. 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.

16. These decisions are binding on this Court.
17. The Claimant did not exhaust the appeal procedures as contemplated by the Constitution, the County Governments Act and the Public Service Commission Act before instituting the instant proceedings.
18. The Court, therefore, declines jurisdiction and strikes out the Memorandum of Claim filed on 28 February 2020.
19. The parties are in an ongoing employment relationship. Each party to bear own costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 15TH DAY OF DECEMBER 2021.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Claimant Mutai Kipkemoi Advocates

For 3rd Respondent Brian Otieno & Co. Advocates

Court Assistant Chrispo Aura