



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 7 OF 2020

BROUGHT UNDER ARTICLES 1, 2, 3, 10, 22, 23, 41, 47, 236 AND 251 OF THE CONSTITUTION OF KENYA, 2010, RULE 4 OF THE CONSTITUTION OF KENYA (PROTECTIN OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013 AND ALL OTHER RELEVANT PROVISIONS OF THE LAW

BETWEEN

JOHN SAUL NAVIAVA

PETITIONER

v

AMB FRANKLIN ESIPILA

1st RESPONDENT

VIHIGA COUNTY PUBLIC SERVICE BOARD

2nd RESPONDENT

AND

COUNTY GOVERNMENT OF VIHIGA

1st INTERESTED PARTY

HON VINCENT MMAITSI

2nd INTERESTED PARTY

JUDGMENT

1. On or around 31 March 2017, Hon Moses Akaranga (then Governor, County of Vihiga) informed John Saul Naviava (the Petitioner) of his appointment as the Secretary, County Public Service Board of Vihiga (the Board) for a term of 6 years. The appointment was gazetted on 4 April 2017.
2. On or around 8 October 2019, the County Executive Committee member for Public Administration issued a notice informing all concerned that the offices of the Board would be closed to facilitate the conclusion of investigations into the employment of staff in the Department of Health.
3. The Board followed up on the notice with a letter dated 24 February 2020, sending the Petitioner on a 60-days compulsory leave in order to give room for investigations in respect to alleged acts of omission and commission on his part.
4. The Petitioner was aggrieved and, on 27 February 2020, filed a Petition alleging that the decision to send him on compulsory leave was against the rules of natural justice, contrary to fair labour practices, made without jurisdiction and in violation of the Constitution.
5. Filed at the same time was a Motion under a certificate of urgency seeking interim conservatory orders.
6. The Motion was heard, and in a Ruling delivered on 16 April 2020, the Court granted conservatory orders pending the hearing and determination of the Petition.
7. On 8 December 2020, the Petitioner filed a Motion seeking leave to amend the Petition. The Court directed the Petitioner to serve the Motion before the giving of directions on 18 January 2021. The Petitioner did not attend the Court on 18 January 2021, and the Court postponed proceedings to 16 February 2021.
8. The Petitioner again failed to attend Court on this later day, and the Court directed that a Notice to Show Cause be issued with a return date of 23 March 2021.
9. When the Notice came up on 23 March 2021, the Petitioner sought leave to have the draft Amend Petition admitted, a prayer the Court

allowed.

10. The Court also directed the parties to file and exchange affidavits and submissions.

11. The Respondents did not file a response to the Amended Petition, and on 17 June 2021, the Court extended the time for them to comply and scheduled judgment to today.

12. Instead of filing a substantive response to the Amended Petition, the Respondents filed Grounds of Opposition and a Notice of Preliminary Objection (the Objections are the same as those in the Grounds of Opposition) on 14 July 2021, contending that:

(1) This Court is devoid of original jurisdiction to hear and determine this Petition as there is an appellate and review procedure prescribed under Article 234(2)(i) of the Constitution of Kenya 2010 As read with section 77 of the County Governments Act, 2012 and sections 85 and 87 of the Public Service Commission Act, 2017 which the Petitioner has not exhausted.

(2) The filing of legal proceedings in a Court of law with respect to matters within the jurisdiction of the Public Service Commission to hear appeals from the decisions of the 2nd Respondent are statutorily barred under section 87(2) of the Public Service Commission Act, 2017 as read with Article 234(2)(i) of the Constitution of Kenya, 2010 and section 77 of the County Governments Act, 2012 before the appellate and review procedures provided under the Public Service Commission Act, 2017 is exhausted.

13. The Petitioner filed his submissions on 16 July 2021, while the Respondents and 2nd Interested Party filed their submissions on 17 October 2021 (should have been filed and served on or before 20 August 2021).

14. The Court has considered the Petition, affidavits, Grounds of Opposition, Notice of Preliminary Objection and submissions.

15. At the core of the complaint by the Petitioner was the decision by the Chair of the Board to send him on compulsory leave, with a view to the facilitation of investigations on allegations of misconduct.

16. The Petitioner also challenged the decision of the Board to allegedly appoint an unqualified person to act in the office of Secretary to the Board.

17. The Petitioner further alleged breach of contract by making a prayer for payment of gratuity.

18. The decision to send the Petitioner on compulsory leave was made in a purported exercise of disciplinary powers by the Board. Section 77(2)(c) of the County Governments Act is therefore directly implicated.

19. On the issue of appointment of an unqualified person to the office of the Secretary of the Board, section 59 of the Act mandates the Board to make such appointments to the county public service.

20. 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 of county governments' public service.

21. In terms of enabling legislation, section 77(1) and (2)(c) of the County Governments Act requires persons dissatisfied with the exercise of disciplinary powers or who is aggrieved with an appointment by a County Public Service Board to appeal to the Public Service Commission.

22. 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.

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

24. 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.

25. 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.

26. The decisions are binding on this Court.

27. As already stated, the Petitioner was challenging the decision to send him on compulsory leave and the purported appointment of an unqualified person to the office of Secretary of the Board.

28. The Petitioner did not exhaust the appeal procedures as contemplated by the Constitution, the County Governments Act and the Public Service Commission Act before moving the Court.

29. The Court, therefore, upholds the Preliminary Objection/Grounds of Opposition and dismisses the Petition for lack of jurisdiction.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 8TH DAY OF DECEMBER 2021.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Petitioner Wafula Wawire & Co. Advocates

For Respondents/2nd Interested Party Migos Ogamba & Waudu Advocates

1st Interested Party did not participate

Court Assistant Chrispo Aura