



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 3 OF 2020

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21(1), 22(1), 23, 27,
35, 41, 47 AND 235 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION AND THREATENED VIOLATION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10, 19, 5, 27(1),
35(1), 41, 47 AND 236 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT

AND

IN THE MATTER OF THE FAIR ADMINISTRATION ACTIONS ACT, 2015

AND

IN THE MATTER OF THE EMPLOYMENT ACT

BETWEEN

CHRISPINUS LIKUYUNI LUMITL.....1ST PETITIONER

STEPHEN ANJECHE..... 2ND PETITIONER

VERSUS

COUNTY CHIEF OFFICER, PUBLIC SERVICE KAKAMEGA COUNTY.....1ST RESPONDENT

COUNTY SECRETARY, COUNTY GOVERNMENT OF KAKAMEGA.....2ND RESPONDENT

COUNTY PUBLIC SERVICE BOARD,

COUNTY GOVERNMENT OF KAKAMEGA.....3RD RESPONDENT

COUNTY GOVERNMENT OF KAKAMEGA.....4th RESPONDENT

RULING

1. On 30 October 2019, the County Public Service Board, Kakamega (the Board), suspended Chrispinus Likuyuni Lumiti and Stephen Anjeche (the Petitioners) pending disciplinary proceedings.
2. The Petitioners were aggrieved, and they moved the Court on 15 January 2020, contending that the intended disciplinary proceedings violated their constitutional rights.
3. On 3 June 2020, the Board met and resolved to dismiss the Petitioners summarily. The Petitioners were notified of the dismissals through letters dated 9 June 2020.
4. On 8 June 2020, the Petitioners filed a Motion under a certificate of urgency seeking orders lifting the suspension(s) and restoring them to the payroll.
5. The Court granted the orders (but the same were lifted on 11 March 2021 because the Court had not been informed of the *status quo* at the time of grant of the orders).
6. On the same day, the Court directed that the Petition be heard on a priority basis, and the parties were ordered to file and exchange affidavits and submissions.
7. The County Government of Kakamega (the County Government) filed a replying affidavit on 25 June 2020, and the Petitioners filed a further affidavit on 28 September 2020.
8. The Petitioners filed their submissions on 7 July 2020, while the County Government filed its submissions on 21 August 2020.
9. On 19 April 2021, the Petitioners filed a Motion seeking leave to amend the Petition, and the Court granted the leave on 31 May 2021 (Amended Petition was filed on 18 June 2021).
10. During the same session, the Court gave further directions, including that the parties file submissions on a jurisdictional question flowing from Article 234(2)(i) of the Constitution as read with section 77 of the County Governments Act and sections 85, 86 and 87 of the Public Service Commission Act, 2017.
11. The Petitioners filed their submissions on the jurisdictional question on 19 August 2021, while the County Government filed its submissions on 30 September 2021.
12. This Ruling relates to the jurisdictional question.
13. In their submissions, the Petitioners submitted that by the time they moved the Court, no decision capable of being appealed had been made by the Board and that the dismissal was only done during the pendency of the proceedings.
14. According to the Petitioners, the Public Service Commission had no mandate to issue declarations on alleged violation of constitutional rights.
15. On behalf of the County Government, it was contended that the disciplinary process had commenced against the Petitioners had commenced by the time they moved the Court by virtue of section 59 of the County Governments Act, and therefore the Petitioners were bound to comply with the mandatory appellate procedures outlined in Article 234(2)(i) of the Constitution as read with section 77 of the County Governments Act as well as section 87(2) of the Public Service Commission Act.

Legal framework

16. Article 234(2)(i) of the Constitution provides:

234(2) The Commission shall –

- (i) hear and determine appeals in respect of county governments' public service; and

17. To give context to the above constitutional norm and realise the function bestowed upon the Public Service Commission, Parliament put in place various statutory provisions in the County Governments Act and the Public Service Commission Act.

18. Section 77 of the County Governments Act provides:

77. (1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in the exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the "Commission") against the decision.

(2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government, including a decision in respect of—

- (c) disciplinary control;

(d)

(e) retirement and other removal from service;

(g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.

(3) An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of the Commission, the circumstances warrant it.

(4) The Commission shall not entertain an appeal more than once in respect to the same decision.

19. Section 87(2) of the Public Service Commission Act, on the other hand, buttresses section 77 of the County Governments Act. It provides:

A person shall not file any legal proceedings in any Court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from county government public service unless the procedure provided for under this Part has been exhausted.

20. Section 77 of the County Governments Act was the subject of examination by the Court of Appeal in *Secretary, County Public Service Board & Ar v Hulbhai Gedi Abdille* (2017) eKLR.

21. The Court of Appeal stated therein:

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 specialised 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.

Evaluation

22. At the core of the Petitioners' grouses herein were the exercise of disciplinary control powers by the Respondents culminating in their summary dismissal(s).

23. The disciplinary process started when the Respondents issued show-cause notices to the Petitioners and not at the point of dismissal.

24. In terms of the legal framework, the Petitioners' first port of call should have been an appeal to the Public Service Commission if they were aggrieved with the initiation of the disciplinary processes.

25. As a constitutional organ, the Public Service Commission is bound by the tenets set out by the Constitution, and these include interpretation of the Constitution.

26. The Petitioners did not demonstrate that they attempted to or exhausted the statutorily anchored dispute resolution mechanisms before moving the Court.

27. The Court, therefore, declines jurisdiction and strikes out the Petition with costs to the 4th Respondent being the only Respondent which participated in the proceedings.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 1ST DAY OF DECEMBER, 2021

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Petitioners J. O. Makali & Co. Advocates

For 4th Respondent Nyachae & Ashitiva Advocates

Court Assistant Chrispo Aura