



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

PETITION NO 1 OF 2020

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL

FREEDOMS UNDER ARTICLES 19, 20, 23, (25C), 47 AND 236 OF THE

CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012 (ACT NO. 17 OF 2012)

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015 (ACT NO. 4 OF

2015)

AND

IN THE MATTER OF THE INTERPRETATION OF ARTICLE 235 (1) (C)

OF THE CONSTITUTION OF KENYA, 2010 AND SECTION 59(1)

(C) OF THE COUNTY GOVERNMENTS ACT, 2012

BETWEEN

ALFRED SIFA DENA.....PETITIONER

VS

BENJAMIN KAI CHILUMO.....RESPONDENT

RULING

1. On 17th January 2020, the Petitioner, Alfred Sifa Dena filed a Petition together with a Notice of Motion under certificate of urgency seeking conservatory and final prerogative orders barring the Respondent, Benjamin Kai Chilumo from enforcing letter dated 9th January 2020 by which the Petitioner was suspended from exercising the duties of his office as Director, Revenue Management in the Department of Finance and Planning of the County Government of Kilifi.

2. Subsequently, the Respondent raised a Preliminary Objection by notice filed in court on 27th January 2020 and amended on 4th February

2020.

3. The substance of the Respondent's Objection is that this Court lacks jurisdiction to hear and determine the dispute pursuant to Section 85 of the Public Service Commission Act, 2017 and Section 77(1) & (2) of the County Government Act, 2012.

4. The Respondent cites the doctrine of exhaustion and states that because the Petitioner has not exhausted the dispute resolution mechanism provided under the Public Service Commission Act and the County Government Act which provide for an elaborate procedure for redress of any disputes arising from the county public service, then the Petition is bad in law.

5. The Respondent states that the dispute herein stems from a disciplinary process on allegations of abuse of office and pilferage of public funds; which process is yet to be determined thus the Court lacks jurisdiction to take away this prerogative from the Respondent.

6. The Respondent further states that the Petition as drawn and filed lacks particularity as required under the **Constitution of Kenya (Protection of Fundamental Rights and Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012.**

7. In response to the Respondent's Preliminary Objection, the Petitioner filed a Replying Affidavit sworn on 31st January 2020. He deposes that the disciplinary process as set out under the County Government Act, 2012 and Public Service Commission Act, 2017 is not in issue in this Petition.

8. Instead, the Petitioner contests the legitimacy of the commencement of the process, his rights under Article 47 of the Constitution and the duty of any person exercising disciplinary powers to do so in strict adherence to the principles of natural justice in terms of Sections 76(1) and (2) of the County Government Act.

9. The Petitioner further deposes that his Petition also contests the action of the Respondent to suspend him in terms of the provisions of the Fair Administrative Action Act, 2015, particularly Sections 3 and 4.

10. The Petitioner states that despite there being an elaborate process to discipline, the same must be done within the law that provides for that elaborate process. He maintains that if any party departs from that law, the Court must immediately acquire jurisdiction to entertain the dispute.

11. The Petitioner adds that the Respondent failed to comply with Section 4.1(b) of the *Discipline Manual for Public Service, 2016, for public officers in Job Group 'Q' and above.* Having been in Job Group 'R' the Petitioner contends that he ought to have been subjected to this procedure.

12. The Petitioner also makes reference to Section 4.3 of the *Discipline Manual for Public Service, 2016* which provides that suspension should only follow after the steps in Section 4.1 have been completed and the officer has been found culpable of gross misconduct or has been convicted by a competent court of law.

13. The Petitioner further makes reference to Section K of the *Human Resource Policies and Procedures Manual for the Public Service* which makes similar provisions.

14. The Petitioner concludes that the absence of an investigation report or conviction by a court of law to warrant suspension renders the process illegitimate and rules out the doctrine of exhaustion as cited in the Preliminary Objection.

15. The Respondent bases his Preliminary Objection on Section 77 (1) and (2) of the County Governments Act which provides as follows:

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

(a).....

(b).....

(c) **disciplinary control;**

16. The Respondent further relies on Section 85 of the Public Service Commission Act which states:

85. The Commission shall, in order to discharge its mandate under Article 234(2)(i) of the Constitution, hear and determine appeals in respect of any decision relating to engagement of any person in a County Government, including a decision in respect of –

(a).....

(b).....

(c) **disciplinary control;**

17. Article 234(2)(i)(b) of the Constitution of Kenya, 2010 empowers the Public Service Commission to exercise disciplinary control over persons holding offices in the public service generally.

18. The Respondent's contention is that the Petitioner is improperly before the Court because he has not exhausted the dispute resolution mechanism provided under Section 77 of the County Governments Act and Section 85 of the Public Service Commission Act.

19. On his part, the Petitioner states that the disciplinary process set out under the County Governments Act and the Public Service Commission Act is not the issue in his Petition. Rather, the issue is the legitimacy of the commencement of the process, his rights under Article 47 of the Constitution and the duty of any person exercising disciplinary powers to do so in strict adherence to the principles of natural justice in terms of Sections 76(1) and (2) of the County Government Act.

20. The Court was referred to the decisions in **Republic v National Environment Authority Ex Parte Sound Equipment Ltd [2011] eKLR** and **Secretary, County Public Service Board (Wajir County) & another v Hulbhai Gedi Abdille [2017] eKLR** where the Court of Appeal held that a party should not be allowed to bypass the statutory appellate process provided under the County Governments Act and the Public Service Commission Act, save in exceptional circumstances.

21. The Petitioner states that his case falls outside the exhaustion principle because in taking the impugned action, the Respondent failed to follow the disciplinary procedure provided under Section 76(1) and (2) of the County Governments Act.

22. The Court did not find any legal backing for the position taken by the Petitioner in this regard. My reading of Section 77 of the County Governments Act and Section 85 of the Public Service Commission Act does not reveal any restriction on the appellate powers given to the Public Service Commission.

23. It seems to me that in exercising these powers, the Commission is free to inquire into any aspect of the decision and action complained of, including the legitimacy of the process adopted in effecting the decision.

24. In light of these findings, I agree with the Respondent that the present Petition is prematurely before the Court. I therefore decline to assume jurisdiction in the matter.

25. The result is that the Respondent's Preliminary Objection is upheld and the Petitioner's pleadings are struck out in their entirety.

26. Each party will bear their own costs.

27. Orders accordingly.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 9TH DAY OF APRIL 2020

LINNET NDOLO

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 March 2020, this ruling has been delivered to the parties electronically, with their consent. The parties have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes. Further, in view of the ensuing disruption of the court diary, this ruling has

been delivered during the court recess.

LINNET NDOLO

JUDGE Appearance:

Mr. Atyang for the Petitioner

Mr. Muliro h/b for Mr. Bwire for the Respondent