



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 204 OF 2019

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION.....CLAIMANT

VERSUS

1. COUNTY GOVERNMENT OF TANA RIVER

2. TANA RIVER COUNTY PUBLIC SERVICE BOARD.....RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Brian Otieno & Company Advocates for the Claimant

John Bwire & Associates, Advocates for the Respondents.

RULING

1. In this Claim, the Claimant Union represents 20 of its Members, formerly employed by the Respondents. Their contracts were terminated by the Respondents, in March 2018. They allege that termination was unfair and unlawful. They seek by way of interlocutory orders to have the Respondent's restrained from filling positions previously held by the Claimant's Members. Their Claim was presented at the E&LRC in Nairobi as Cause Number 209 of 2019, before transfer to E&LRC in Mombasa.

2. The Respondents have raised preliminary objection contained in a notice filed on 25th April 2019. It is the Respondents' position that:-

I. The 1st Respondent is wrongly sued.

II. The Claim and the Application are in contravention of Section 77 of the County Governments Act.

III. The Claim offends the doctrine of exhaustion.

IV. The Claim is *res judicata* and *sub judice* by virtue of Mombasa E&LRC Cause Number 299 of 2018, between the same Parties herein.

V. The Claim is in abuse of the process of the Court.

VI. The Claim and Application are in flagrant violation of the law and cannot stand.

VII. The Claim has been brought prematurely and in any case without jurisdiction.

3. Parties agreed in Court on 24th October 2019 to have the Application considered and determined on the strength of the record. They confirmed filing of their Submissions at the last appearance in Court on 13th March 2020.

The Court Finds:-

4. The Parties, the nucleus of operative facts, and the law in this Claim, are similar to those in Cause Number 299 of 2018.

5. The Court in that Claim, found that the Claimant had not exhausted the dispute resolution mechanism under Section 77 of the County Governments Act.

6. The Claimant has not disclosed in the present Claim, whether it presented its Members' grievances before the Public Service Commission, and if in the affirmative, what the outcome of the proceedings before the Public Service Commission, was.

7. All the Claimant has done is present what essentially is the same dispute, to a different Court in Nairobi. The Court at Nairobi redirected the Parties to the original Court.

8. The Court does not see why the Claimant should file a fresh Claim, without exhausting the mechanism under Section 77, or reverting to the original Court to prosecute the Cause Number 299 of 2018. If the nature of the Claim has been in any way affected by the passage of time, it was open to the Claimant to revert to the initial Claim with amendments, or other facilitative interventions, instead of making another full blown and similar Claim, in a different geographical jurisdiction.

9. The Claimant has not approached the Public Service Commission, and ventilated what it argues to be a fresh dispute on termination of its Members' contracts, before filing this fresh Claim.

10. It is noted that termination of the contracts of Claimants' Members, took place in March 2018. The previous Claim was filed in April 2018. The Ruling in that Claim, was delivered on 27th September 2018. What, in relation to termination which took place in March 2018, could not have been raised in Cause Number 299 of 2018, necessitating filing of the new Cause?

11. The Court agrees, at the very least, with the Respondent's position that the present Claim is premature, *sub-judice* [if not *res-judicata*] and in abuse of the court process.

12. The Claimant should exhaust the mechanism under Section 77 of the County Governments Act, and/or revert to Cause Number 299 of 2018 if need be. If there are supervening matters that need to be brought to the attention of the Court, they can be introduced through an appropriate application under Cause Number 299 of 2018, rather than through presentation of fresh proceedings.

13. Lastly the Court must record that it has been compelled to release this Ruling from the confines of the Trial Judge's home at Chaka, Nyeri County, owing to covid-19 pandemic. In doing so the Court relies on Rule 38 of its Procedure Rules. The safety and lives of the participants in the proceedings does not permit the Court to deliver the Ruling in Open Court, as demanded by Rule 28. It is noted that the Hon. the Chief Justice has directed that all pending decisions must be released to the Parties, by 30th May 2020. Parties shall access a copy of the Ruling from the Court Registry and as soon as practicable, the Kenya Law Reports web portal.

IT IS ORDERED:-

a. This Claim is struck out with no order of the costs.

b. The Claimant may pursue its Members' grievances under Cause Number 299 of 2018, and the mechanism availed by Section 77 of the County Governments Act, as advised in the Ruling recorded in Cause Number 299 of 2018.

Dated, signed and released at Chaka, Nyeri County, for dispersal to the Parties, this 29th day of May 2020.

James Rika

Judge