



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 22 OF 2019**

*(Before Hon. Justice Mathews N. Nduma)*

**JAMES OURU OROKO.....CLAIMANT**

**VERSUS**

**KISII COUNTY GOVERNMENT.....RESPONDENT**

**RULING**

1. The counsel for the respondent Anne Baabu raised a preliminary objection against the claim filed by the claimant on 6<sup>th</sup> March 2010 to wit:

(i) Pursuant to *Section 87(2) of the Public Service Act, No. 10 of 2017 read together with Section 77 of the County Government Act, NO, 17 of 2012*, 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)* has been exhausted.

(ii) Since the claimant has not exhausted the appeal procedure, the court lacks jurisdiction to determine this claim as it was filed prematurely.

**Cause of action**

2. From the statement of claim, the claimant worked for the Kisii County Government from 30<sup>th</sup> January 2014 earning a monthly salary of Kshs. 120,270.

3. On 2<sup>nd</sup> May 2017, the claimant applied for unpaid leave to the defendant which leave was duly approved by the then acting county secretary and head of public service by a letter dated 29<sup>th</sup> May 2017. The leave was to end on 31<sup>st</sup> August 2017.

4. The claimant pleads that whilst on leave, he tendered resignation to vie for an elective post in the last general election which resignation was received by the office of the county secretary on the 13<sup>th</sup> of June 2017.

5. After elections, the claimant returned to work since the respondent did not respond to the resignation. He received a letter to show cause dated 30<sup>th</sup> October 2017 from the Director Human Resource Department of Kisii County on allegations that he had deserted duty. He was to respond to the notice to show cause in 10 days. The claimant responded to the Notice to show cause by a letter dated 9<sup>th</sup> November 2017 and he continued to work until he was interdicted verbally without pay.

6. On 1<sup>st</sup> February 2019, the claimant received a letter of summary dismissal on account of dismissal following a decision by the County Human Resource Management Advisory Committee held on 14<sup>th</sup> December 2017. The decision was conveyed by the County Secretary and Head of Public Service.

7. The suit is defended vide a statement of response filed on 26<sup>th</sup> April 2019 in which the claim is opposed on its merits.

8. Section 87(2) of the Public Service Act, No. 10 of 2017 reads:

*“A person shall not file any legal proceedings in any court of law with respect to matters within the jurisdiction of the public service*

commission to hear and determine appeals from county government public service unless the procedure provided for under this part has been exhausted”

9. The letter of dismissal dated 1<sup>st</sup> February 2019 concluded:

“Should you feel aggrieved by this decision you have the right of appeal to the secretary county public service board of Kisii within a period of 42 days from the date hereof”.

10. Section 77 of the County Governments Act, No. 17 of 2012 provides:

“(1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any public officer may appeal to the public service commission”.

(3) An Appeal to the public service commission 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”

The court was referred to its own decision in Shem Okora Onywera vs Kisii County Government and another (2018) eKLR in which we upheld a similar preliminary objection thus:

“This reasoning applies mutatis mutandis to the mandate of the public service commission with regard to exercise of disciplinary control and retirement and other removal from service under Section 77 (2) (c) and (e) of the said Act.

Accordingly, the present case was filed prematurely before the court in violation of a mandatory statutory procedure. The application and the entire suit is dismissed with costs”.

11. In the case of **Secretary, County Public Service Board and another vs Hulbhan Gedi Abdille (2017) eKLR**, the Court of Appeal allowed the Appeal on the basis that the respondent had failed to utilize the process provided by Section 77 of the County Governments Act as follows:

“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 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”.

12. In the present case, the claimant did not invoke the appellate procedure to the Public Service Commission provided under Section 77 of the County Governments Act 2012. The County Secretary had however misled the claimant to appeal to the Secretary County Public Service Board of Kisii, a procedure that is non-existent. The claimant did not appeal as advised nor did he appeal to Public Service Commission.

13. The claimant was a Senior Public Servant who sought an elective office in the county government and had voluntarily resigned his position to allow him to vie for an MCA seat at the Kisii County Assembly. The claimant cannot be presumed to be an ignorant person even though the maxim ignorance of the law is no defence applies to all persons regardless of their education, status and station at work and in life.

14. The hands of this court are tied by the Court of Appeal decision in **Hubbhai Gedi Abdalla** case (supra).

15. The preliminary objection is upheld with the result that the suit is struck off for want of jurisdiction.

**Ruling Dated, Signed and delivered at Nairobi this 13<sup>th</sup> day of May, 2020**

**Mathews N. Nduma**

**Judge**

**ORDER**

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this ruling has been delivered to the parties online with their consent. They 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, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**Mathews N. Nduma**

**Judge**

**Appearances**

Claimant in person

Anne Baabu for the Respondent

Chrispo – Court Clerk