



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 96 OF 2018

(Before Hon. Justice Mathews N. Nduma)

KENNEDY ONGIRO MOGIRE.....CLAIMANT

VERSUS

THE COUNTY GOVERNMENT OF KISIL.....1ST RESPONDENT

THE COUNTY SECRETARY, KISII COUNTY.....2ND RESPONDENT

THE SECRETARY, KISII COUNTY

PUBLIC SERVICE BOARD.....3RD RESPONDENT

DIRECTOR, HUMAN RESOURCE

MANAGEMENT, KISII COUNTY.....4TH RESPONDENT

CHIEF OFFICER, LANDS HOUSING

PHYSICAL PLANNING AND URBAN DEVELOPMENT.....5TH RESPONDENT

RULING

1. The respondents have raised a Notice of Preliminary Objection dated 6th July 2018 seeking for orders that the claim be struck out with cost on the grounds that:

(a) 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.

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

2. The applicant relies on the Court of Appeal decision in *Secretary, County Public Service Board and another vs Hulbhai Gedi Abdile (2017) eKLR* in which the court allowed the Appeal on the basis that the respondent had failed to utilize the process provided by *Section 77 of the County Governments Act* before coming to court.

3. In the present matter the suit was filed by the claimant on 12th April 2018 following dismissal of the claimant from service of the Kisii County Government on 13th December 2017. In terms of the letter of the same date, the claimant was advised of the right of appeal to the Secretary, County Public Service Board of Kisii within 42 days.

4. The claimant filed an Appeal dated 16th January 2018 to the Secretary County Public Service Board as advised in which he set out grounds against the decision of the County Human Resource Management Advisory Committee. By the time the suit was filed, the Appeal to the County Public Service Board had not been concluded.

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

“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 county public officer may appeal to the public service commission”.

6. This process of Appeal has been ruled by the Court of Appeal to be mandatory in ***Hulbhai Gedi Abdile case*** (supra). This court is bound by this decision and accordingly finds that the claimant approached court without exhausting the Appellate procedure provided by the law. For those reasons the suit was filed prematurely and is struck off for lack of jurisdiction to entertain the same.

7. In closing, the court cautions if the mandate to exhaust internal procedure is used against litigants regarding three years limitation period under Section 90 of the Employment Act, no. 11 of 2007 then the matter should be relooked afresh.

8. The court also notes that it is only the county public service board that has authority to discipline and dismiss county public servants and it is therefore not an appellate body as the County Government of Kisii appears to read. The authority exercised by the County Human Resource Advisory Committee appears to fall under that referred to as *“purported exercise of disciplinary control against any county public officer”*.

9. The County should desist from this folly in the court’s view.

Ruling Dated, Signed and delivered at Nairobi this 13th 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 15th 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

M/S Baabu for the Respondent/Objector

Aboki Begi for the Claimant

Chrispo – Court Clerk