



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 113 OF 2019

(Formerly Nairobi ELRC CAUSE NO. 762 OF 2019)

CONSOLIDATED WITH KISUMU ELRC PETITION NO. 40 OF 2019 AND NAIROBI ELRC PETITION NO. 232 OF 2019

(Before Hon. Justice Mathews N. Nduma)

KENYA UNION OF CLINICAL OFFICERS & 76 OTHERS.....APPLICANTS

VERSUS

COUNTY GOVERNMENT OF VIHIGA.....1ST RESPONDENT

DR. OTTICHILLO - THE GOVERNOR VIHIGA COUNTY....2ND RESPONDENT

PHILIP GAVUNA (ACTING COUNTY SECRETARY).....3RD RESPONDENT

RULING

1. Application dated 23rd December 2019 was filed by the respondent/Applicant (County Government of Vihiga) on 9/1/2020 praying for an order: -
2. That the consolidated suit being petition No. 40 of 2019 and 232 of 2019 be dismissed on the grounds set out on the Notice of Motion and in the supporting Affidavit of Stella Orange an Advocate of the High court and the Director of Legal Affairs of the Applicant to wit: -
 - (i) The Court has no Jurisdiction to hear and determine the matter.
 - (ii) It is the law and as was found and held by the Court of Appeal in the case of **Secretary, Wajir County Public Service Board and another –VS – Hubhari Gedi Abdille (2017) eKLR** the Respondents if aggrieved by the decision of the Applicant as regards their alleged recruitment and employment must first lodge an appeal to the Public Service Commission as per section 85 (a) and 80 of the Public Service Commission Act 2017 and section 77(2) of the County Governments Act 2012.
 - (iii) That the decision binds the ELRC Court and it is in the interest of Justice the Application be allowed as prayed with costs.
3. The Application is responded to by a replying affidavit of Geoffrey M. Emonde who deposes that he is a Claimant and a Co – worker of the claimants and petitioners in the consolidated suit.
4. That the Co – workers are enlisted as interested parties number 1 to 247 in the constitutional petition No. 40 of 2019 which was consolidated with cause no. 113 of 2019.
5. That he was together with three others being interested parties No. 85,133 and 83 amongst others willingly elected by the co-workers to represent them in the consolidated suit.
6. That the applicants have filed an application dated 23/2/2019 on the same date wherein is sought to have Dr. Ottichillo and Philip Gauvuma cited for contempt and or willful disobedience of the orders of this Court for failure to pay salaries of the health workers as directed by the Court.
7. That the Claimants were paid salaries up to the month of October 2019 as seen in a previous statement of the Governor (Dr. Ottichillo) issued on 21st January 2020. Attached to the affidavit as exhibit Eo -1.

8. That the reasons advanced for non-payment of salaries are not convincing and do not constitute justifiable excuse to disobey orders of the Court.
9. That as at the month of March 2020, all affected employees had not been paid for four (4) months including under payments arising from inaccurate calculation of monthly salaries payable to the employees.
10. That the two chief Executives of the County who are the final authority of the County be punished as prayed.
11. That the Court had directed that the two applications be dealt with together and the latter application filed on 9/1/2020 be treated as a response to the initial application filed on 23/12/2019.

Determination

12. The respondents/ applicants raised the issue of the Jurisdiction of the Court to entertain the consolidated dispute in the first place. Following the decision in **Owners of the Motor Vessel "Lillians" –VS- Caltex Oil (Kenya) Ltd (1989) eKLR**, read with the decision in **Mukhisa Biscuit Manufacturers Ltd – VS- West End Distributors Ltd (1969) E. A 696**, this Court is bound to determine whether what is raised by the respondents is a pure point of Law that must be determined by the Court at the outset and if the point of Law is good and is upheld by the Court, the Court must down its tools at once and not deal with the consolidated suit any further for lack of jurisdiction to do so.

13. In the Mukhisa Biscuits case, (Supra) Law J. A stated at age 700 "*so far as I am aware a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary objection may dispose of the suit.*"

14. In the present case, the issue of Jurisdiction was raised in a notice of motion application supported by an affidavit of Counsel deposing purely to matters of Law. The application was responded to by a replying affidavit and both parties made legal arguments before Court on the issue of Jurisdiction of the Court and whether or not a party who is in contempt of Court should be entertained by the court before they purge their contempt.

15. The parties had also filed written submissions and list of authorities on the two Legal issues that fall for determination being: -

- i. Firstly, if the Court has jurisdiction to entertain the suit and if the court has jurisdiction.
- ii. Whether the Court should hold the respondent in contempt of court and punish them for their indiscretions.

15. On the issue of jurisdiction, the facts discerned from the pleadings which are not in dispute are that the employees who are petitioners and claimants in the consolidated suit are health workers employed by the respondent.

16. It is not in dispute that the said employees continue to be employed by the respondent, the court having inducted the process of investigating the manner in which they were employed.

17. The facts regarding the status of all the health workers is captured succinctly in the press statement by the Governor of the respondent issued on 21st January 2020, which document was produced before Court by the respondent/Claimants.

18. From the said statement by the Governor, the process inducted by the Court was undertaken by an internal Adhoc Committee chaired by the Acting County Secretary whilst the term of the County Public Service Board had expired and there was vacuum therefore, at the time the impugned letters were written to the employees.

19. The communiqué by the Governor states that the impugned action was revoked by the County Public Service Board which was subsequently recruited, gazetted and sworn in according to Law.

20. The Court subsequently on 11th December 2019 ordered that all the cases revolving around the matter be consolidated, salaries including overdue salaries be paid and the affected staff who were working to continue working *inter alia*.

21. The Governor states that the county government had since paid the affected staff salaries up to October 2019 and was unable to continue payments due to budgetary constraints and that it had made a requisition to the controller of the budget in line with Article 204(a) to allocate extra funds to pay the health staff affected who are the subject of this suit.

22. The Governor proceeded to state that the County requires more health staff to operate the health facilities in the County but the county as at the time of hearing this application did not have a budget to pay the affected staff beyond October 2019.

23. That the County Public Service Board is now seized of the matter and had presented a preliminary report to the Governor dated 9th January 2020.

24. The reliefs sought by the petitioners/Claimants included orders to set aside the report of the Adhoc Committee on the recruitment and appointment of various staff in the Department of Health Services; the court to find and declare as unconstitutional and unlawful the purpose and/or mandate of the Adhoc committee, its proceedings and recommendations contained in the report dated 14th to 24th October 2019; and the Court to find that failure by the respondents(County Government), to appeal the recruitment, selection or appointment of the petitioners

and Claimants by the County Public Service Board to the Public Service Commission as provided under section 77 (2 (a) and (3) of the County Governments Act, were by reason of the said failure to appeal, permanently prohibited from interfering with the said recruitment, selection and or appointment in the manner required by the Adhoc committee or in the manner conveyed in the notices of termination issued or served on the petitioners/Claimants.

25. It is apparent that the petitioners/claimants in the consolidated suit are well aware of the requirement that any party aggrieved by a decision of the County Government Public Service Board must appeal to the Public Service commission before coming to Court. The petitioner/claimants accuse the respondents of having failed to do so before issuing them with termination notice.

26. However, the issue before court is whether or not a party maybe allowed to pursue a suit before a court of Law before exhausting the appeal procedure to the Public Service Commission under section 86 of the Public Service Commission Act 2017 and Section 77 (2) of the County Government Act, 2012.

27. **In the case of Secretary Wajir County Public Service Board and another –VS- Hulbhan Gedi Abdille (2017) eKLR**, the Court dealt with the matters now raised by the Petitioners/Respondents that the issues raised in the consolidated suit are constitutional issues that are not amenable to appeal to the Public Service Commission and therefore the preliminary objection by the County Government be dismissed with costs. The Court said:

28. *“In our view this was a gross misdirection on the part of the Learned Judge. The respondent’s claim was not initiated on the basis of violation of fundamental rights and freedoms or alleged violation of the constitution. The respondent’s case was that the process of recruitment was flawed and not in accordance with the Act. Indeed, in her own pleadings, she is categorical that she was not challenging the merits of the decision but rather the process. If the considerations of enforcement or breach thereof of the fundamental rights and freedoms were to come into play, then the challenge on that basis will be a matter of merit. Is it also not surprising therefore that even in the body of the application, the respondent does not cite any of the articles of the constitution that were violated or breached...”*

29. From the aforesaid rendition by the court of Appeal it may be deduced that a suit: -

a. Initiated on the basis of violation of fundamental rights and freedoms or alleged violation of the constitution is not amendable to a pre – appeal process to the public service commissions in terms of sections 85(a) and 86 of the Public Service Commission Act, 2017 and section 77(2) of the County Governments Act, 2012.

b. Must be one that challenges the merits of the decision but not the process and in this respect if the consideration of enforcement or breach thereof of fundamental rights and freedoms come into play, then the challenge on that basis is a matter of merit.

c. The articles of constitution that were violated or breached must be set out in the founding documents be it a petition, statement of claim or founding affidavit and not in subsequent supplementary documents so as to appear to be a peripheral issue.

30. Does the consolidated suit comprising two petitions and two claims fit the aforesaid bill?

31. In petition 40 of 2019, the petitioners allege in the body of the petition violation of Articles 10,41,232 and 236 of the constitution of Kenya 2010 in the manner the petitioners/Claimants were treated. The reliefs sought in the petition, include quashing an Adhoc report and notices issued. The Petitioners/Claimants also pray that the court declares the actions by the respondent unconstitutional and unlawful.

32. Similarly, under cause No. 762 of 2019, the claimants allege usurpation of the constitutional and statutory mandate given to the County Public Service Board by the alleged Adhoc committee and the respondent. The Claimants therefore pray the Court to find and declare that the respondents have contravened the rights of the claimants under Articles 29,30,36,37, 40 and 41 of the constitution.

33. From the foregoing analysis, the court has arrived at a considered decision that the consolidated suit falls within the exception to the mandatory procedure prescribed under section 85(a) and 86 of the Public Service Act 2017 read with section 77(2) of the County Governments Act ,2012.

34. Accordingly, the petitioners and the Claimants in the consolidated suit were not obliged to lodge an appeal to the Public Service Commission before seeking constitutional relief set out in the consolidated suit.

35. In the final analysis, the preliminary objection raised in the application dated 23rd December 2019 and filed on 9th January 2020 is dismissed.

36. Emanating from the aforesaid finding, the other issue for determination is whether or not to find the named persons in willful disobedience of the Court order above said by failing to pay the current and arrear salaries of the petitioner/claimants timeously.

37. The petitioners/Claimants filed the press statement by Governor Otichillo issued on 21st January 2020 urging this court to find that this was clear evidence that the Governor and the County Government was in willful disobedience of the court order.

38. In the said communiqué the governor has explained at length the extent to which the respondent had complied with court order by firstly, stating that in a bid to comply with the court order, the Public Service Board recently put in place revoked the nullification of the appointments by the Adhoc Committee and therefore validating the entire employment process of the petitioners/Claimants in the consolidated suit.

39. Furthermore, the Governor has demonstrated that the County Government had partly implemented the court order by paying salaries of the petitioners/Claimants who were in employment of the respondent up to October 2019.

40. Thirdly the Governor had outlined steps the County Government had taken thus far to prepare the relevant budgetary provisions and requisition of funds from the National Treasury to enable it to pay current and arrear salaries of all health workers in its employ.

41. Last but not least and in the same communiqué, the Governor has acknowledged that all the health workers in its employ were required to operate the County health facilities.

42. The contents of the document, produced before court by the Petitioners, Claimants themselves has not been contradicted and the documents speaks for itself.

43. In the Court's considered finding the conduct by the respondent falls way short of willful disobedience of court orders to attract penal sanctions by the court against the County Government and/or any of its officers.

44. Accordingly, the application by the petitioners/Claimants dated 23/2/2019 lacks merit and is also dismissed.

45. For the avoidance of doubt, the interim orders remain in place pending the hearing and determination of the consolidated suit and the respondent is to ensure full compliance with the interim orders before the matter is heard on the merits. Costs in the cause.

Ruling Dated, Signed and Delivered at Nairobi this 25th day of June 2020.

Mathew N. Nduma

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 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

Dr. Kamau Kuria S. C for the Petitioners/Claimants appearing with Mr. Otieno and Mr. Musiega.

M/s Liku and Amam for Respondent.

Chrispo: Court Clerk.