



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO. 118 OF 2019

IN THE MATTER OF ENFORCEMENT AND INTERPRETATION OF ARTICLES 2(4), 3(1), 234(1), 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF VIOLATION OF ARTICLES 27(1), 41, 48 AND 50 (1) OF THE CONSTITUTION

AND

IN THE MATTER OF THE CONSTITUTIONALITY OF SECTIONS 87 (2), 88(1). (4), (6) AND 89 OF THE PUBLIC SERVICE COMMISSION ACT AND REGULATION 13(4) OF THE PUBLIC SERVICE COMMISSION (COUNTY GOVERNMENT PUBLIC APPEALS PROCEDURES) REGULATIONS 2016

AND

IN THE MATTER OF VIOLATION OF REGULATIONS 4, 13(3), AND 26 (A) AND € AND 27 OF THE PUBLIC SERVICE COMMISSION (COUNTY GOVERNMENT PUBLIC APPEALS PROCEDURES) REGULATIONS 2016

BETWEEN

COUNTY GOVERNMENT OF MANDERA.....1ST PETITIONER

MANDERA COUNTY PUBLIC SERVICE BOARD.....2ND PETITIONER

-VERSUS-

ATTORNEY GENERAL.....1ST RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

-AND-

HUSSEIN DAYOW ABDULLAHI.....1ST INTERESTED PARTY

AFTIN AHMED ALLI.....2ND INTERESTED PARTY

ALIKHER HASSAN OSMAN.....3RD INTERESTED PARTY

ABDIAZIZ MOHAMED OMAR.....4TH INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 12th June, 2020)

JUDGMENT

The petitioners filed the notice of motion on 09.07.2019 together with the petition and through Issa & Company Advocates. The application by motion is under section 3A, Civil Procedure Act, Chapter 21 of the Laws of Kenya; Rule 19 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 Section 10 of the Judicature Act, Chapter 8 of the Laws of Kenya and all other enabling provisions of the law. The petitioners prayed for orders:

- a) That the application be certified as urgent and service hereof be dispensed with in the first instance.
- b) That pending the hearing and determination of the petition filed herein, the Honourable Court do issue a conservatory order staying and suspending the decision made by the 2nd respondent on 05.12.2018 and to stay any adoption and enforcement proceedings by the interested parties in any way whatsoever.
- c) That the Honourable Court do give directions for the expeditious hearing and determination of the petition.
- d) That costs of the application be provided for.

The application and the petition were based on the annexed affidavit of Anzal Rashid and the further affidavit of Anzal Rashid filed on 11.10.2019. The circumstances of the petition and the application are as follows. The interested parties were employed by the petitioners herein sometimes in 2014 as land administrators. On 11.12.2017 the interested parties were sent on 3 months' compulsory leave to allow an audit and investigation into land management processes and land revenues. The interested parties were invited and attended the relevant Departmental Human Resource Committee meeting on 02.05.2018 and on 04.05.2018 to answer the allegations that had been levelled against them. The Committee recommended suspension of the interested parties and they were suspended on 10.05.2018 by the Acting Chief Officer Lands, Housing and Physical Planning.

The interested parties moved and filed Cause No. 740 of 2018 in this Court at Nairobi together with a notice of motion dated 17.05.2018 against the petitioners. The parties entered a consent in that suit on 02.07.2018 to stay the proceedings in the suit to allow the interested parties herein to appeal to the Public Service Commission in line with the Commission's constitutional and statutory power and function to hear and determine appeals from human resource decisions of the county governments. On 10.07.2018 the interested parties filed their respective appeals against the suspension before the Commission being appeals Nos. 58, 59, 60, 61, and 62 all of 2018. On 19.11.2018 the Commission's committee handling the appeals directed the petitioners herein to file and serve their response and supporting documents and to avail their representatives for the hearing on 26.11.2018. The petitioners complied with the directives. On 26.11.2018 the interested parties were heard and cross-examined by the members of the Commission Committee and the petitioners' representatives who were present were not given an opportunity to be heard. The petitioners' case is that their witnesses who were present were not called and allowed to adduce evidence before the Committee. The petitioners' case is that the proceedings before the Commission's Committee on 26.11.2018 was procedurally and substantively unfair and unconstitutional because the proceedings violated the basic tenets of right to a fair hearing and rules of natural just. The present petition seeks declarations that sections 87(2), 88(1) and (4), 89(1) and 89(2) pursuant to which the Commission's Committee entertained and the Commission allowed the respective appeals by the interested parties are unconstitutional because they allegedly violate Articles 27(1), 48, 24(1) and 50(1) of the Constitution of Kenya, 2010. Consequential to the declarations, the present petition seeks to declare the proceedings and decisions in appeals Nos. 58, 59, 60, 61, and 62 all of 2018 unconstitutional and the same to be quashed by the Court granting the order of judicial review of certiorari. In the application, the petitioners prayed that there be stay and suspension of the Commission's decisions in the appeals and there be stay of adoption and enforcement of the decisions pending the hearing and determination of the petition.

The Commission had decided the appeals by the interested parties and ordered:

- a) That the disciplinary process against the appellants by the respondent was unlawful, irregular and unfair; and
- b) That the respondent reinstates the appellants and pays them all their withheld salaries and allowances.

The interested parties then moved this Court in Miscellaneous Application No. 82 of 2019 and on 26.07.2019 this Court issued orders for adoption of the Commission's decision as an order by the Court and for appropriate enforcement.

The interested parties opposed the application and the petition by filing a notice of preliminary objection on 15.07.2019 through Kamotho Njomo & Company Advocates. The interested parties urged that the notice of motion dated 05.07.2019 and filed herein on 09.07.2019 should be struck out upon the following grounds:

- a) The Court has no jurisdiction to hear the application and the petition as the Public Service Commission has clear constitutional and statutory jurisdiction under Article 234 (2) and section 88 of the Public Service Commission Act, 2017 to hear the matter and give the remedies as sought under section 88(5) of the Act. Under the section a person dissatisfied by the decision of the Commission made on appeal against the decision by the county government or county public service board may apply to the Commission for review on account of fresh material facts which with due diligence could not be presented when the decision was initially made; or there is an error apparent on the record of the earlier decision. An application for such review is to be in 6 months from the date of the decision to be reviewed and the Commission can extend the time if circumstances warrant it. Despite an application for review, subsection 88(4) states that the implementation of the decision shall not be deferred or suspended despite the right of appeal or review. Upon considering the application for review the Commission may uphold the decision; set the decision aside; vary the decision as it considers to be just; or give such directions as it may consider appropriate with respect to the decision.
- b) The Court lacks jurisdiction in the matter because the applicants are required to first apply for review to the Commission under section 77 of the County Governments Act, 2012 as affirmed by the Court of Appeal's decision in **Secretary County Public Service Board & Another –Versus- Hulbhai Gedi Abdille [2016]eKLR.**
- c) The filing of the application and the petition offend the mandatory provisions of section 9(2) of the Fair Administrative Action Act, 2015 and section 87 (2) of the Public Service Commission Act, 2017 (on exhaustion of administrative procedure before moving the Court.) Section 87 (2) of the Public Service Commission Act, 2017 provides that a person shall not file any legal proceedings in any Court of law with respect to matters within the jurisdiction of the Commission to hear and determine and appeals from county government public service unless the procedure provided for under this Part has been exhausted.

d) The Court lacks jurisdiction to grant orders of certiorari as sought in the petition after a period of six months since the decisions were made on 05.12.2018.

e) The application does not disclose constitutional issues which cannot be remedied through the statutory procedure under section 88 of the Public Service Commission Act, 2017 and are therefore an abuse of court process.

f) The orders sought seek to perpetuate an illegality under section 88(4) of the Public Service Commission Act, 2017 which expressly prohibits the suspension or deferment of a decision of the Public Service Commission pending review or appeal of the decision by the Commission.

The respondents opposed the application by filing on 19.07.2019 the replying affidavit of Simon K. Rotich, Acting Commission Secretary and Chief Executive Officer of the 2nd respondent. It was urged for the respondents as follows:

a) Under Article 234(2) (i) of the Constitution, the Commission is vested with the function and power to hear and determine appeals from officers serving in county governments.

b) The interested parties filed at the Commission appeals 58, 59, 60, 61 and 62 all of 2018 and under section 86 of the Public Service Commission Act, 2017.

c) The Commission wrote to the 2nd applicant on 23.07.2018 to respondent to the appeals and failing to do so, the Commission wrote a reminder on 17.09.2018.

d) The petitioners failed to respond until the hearing date when they appeared and were given chance to respond and they did so on 04.12.2018.

e) The Commission heard the appeals per provisions of the Public Service Commission Act, 2017 and the Public Service Commission (County Government Appeals Procedures Regulations) 2016 and decided to set aside the petitioners' decisions by allowing the appeals. The dismissal was found unlawful, irregular and unfair and hence the Commission issued an order of reinstatement with full pay. The Commission made the order after hearing the interested parties and the petitioners herein.

f) The petitioners' application is calculated to deny the interested parties the enjoyment of the fruits of the Commission's decision.

g) The review and appeal to the Commission under section 88 of the Public Service Commission Act, 2017 and the enforcement of commission's decision by filing the same in Court or by punishing public officers who disobey the Commission's decision per section 89 of the Act are all administrative internal processes and any person dissatisfied with the Commission's decision can seek redress in Court either by way of judicial review or any other avenues provided under the Employment and Labour Relations Court Act.

h) That failure to provide a right of appeal against the Commission's decision does not in any way make the Commission's decision unconstitutional.

i) The application is lacking in merits, is vexatious, and an abuse of Court process.

The Court considered the parties' respective positions on the application filed for the petitioners and in a ruling delivered on 15.11.2019 the Court found thus, **"The interested parties say that on the basis of the holding of the Court of Appeal in Secretary County Public Service Board & Another –Versus- Hulbhai Gedi Abdlle [2016]eKLR the petitioners ought to exhaust the appeal jurisdiction before the Commission as provided in section 77 of the County Governments Act and Article 234(2) (i) of the Constitution. Further the interested parties urge that the petitioners ought to exhaust the review jurisdiction before the Commission as per section 88 of the Public Service Commission Act. As submitted for the petitioners, the Court finds that the case as urged for the interested parties was misconceived. There is no decision by the county government against which the petitioners can appeal to the Commission. In any event it would be absurd that such decision would exist whereas the petitioners are the decision makers at the county government level. Further the petitioners have not put a case that there is fresh evidence which with due diligence was not before the Commission prior to deciding the appeals in issue or that there is an error on the face of the record. Accordingly, the Court finds that there is no case for review that would properly go to the Commission for review as per section 88 of the Public Service Commission Act. Further, by the same findings, the Court returns that the submission that the petitioners should have first exhausted prescribed statutory and administrative process and procedure as envisaged in section 9(2) of the Fair Administrative Action Act, 2015 and section 87 (2) of the Public Service Commission Act, 2017 will collapse because in the circumstances of this case there is no established case that the petitioners should have presented to the Commission in that regard. The Court finds that the holding in Secretary County Public Service Board & Another –Versus- Hulbhai Gedi Abdlle [2016]eKLR does not apply in this case as it is clearly distinguishable. Those grounds in the preliminary objection will collapse."**

In the ruling the Court further found, thus, **"The interested parties urge that certiorari cannot issue because 6 months have lapsed since the decision by the Commission on the appeals. The replying affidavit filed for the Commission shows that Commission made the decision allowing the appeals by the interested parties on 05.12.2018. The 6 months prescribed in Order 53 of the Civil Procedure Rules within which an application for judicial review order of certiorari must be made lapsed on or about 05.06.2018. The petition was filed belatedly on 09.07.2019. Thus the preliminary objection succeeds that the judicial review order of certiorari as prayed for is not available. To that extent, the Court returns that even if the Petition is successfully urged on the prayers of unconstitutionality as set out, the decision by the Commission in the appeals by the interested parties would remain intact. Further, as urged for the interested parties, the Commission's decision has since been adopted as an order by the Court on 26.07.2019 in Miscellaneous Application No. 82 of 2019. The Court finds for the interested parties that unless the order is challenged successfully and through**

appropriate process (even if certiorari were available as prayed for), the order is properly due for enforcement as provided for in section 89 of the Public Service Commission Act, 2019. The preliminary objection that certiorari is not available is upheld and on that count and findings, it cannot be said that the respondents have established a *prima facie* case for grant of the conservatory order as prayed for.”

The Court in the ruling further found as follows, “**The petitioner’s case is that they were not heard by the Commission when the Commission considered the appeal by the interested parties. The Commission’s case is that the petitioners were heard. That issue can only be resolved at full hearing by evaluating the evidence to resolve the dispute. Further at this stage it is clear that both the petitioners and the Commission are in agreement that the petitioners were entitled to present their case at the hearing of the appeals by the interested parties. As a matter of a systemic point, the petitioners and the interested parties are in agreement that due process or fairness as is also known as rules of natural justice apply to hearing and determination of appeals to the Commission as presented from decisions of County Governments. In such circumstances, the Court returns that there is no established divergence of views and the petition in so far as it sets out to challenge the constitutionality of some of the provisions of the Public Service Commission Act, 2007 should not be allowed to stand in the way of the enjoyment by the interested parties of the fruits of the Commission’s decision on their appeals.**” Further, the Court stated thus, “**It is clear to the Court that in so far as the petition generally questions the constitutionality of the cited provisions of the Public Service Commission Act, 2007, the same amounts to a separate cause of action from the validity of the decision of the Commission in specific cases (like the appeals by the interested parties) of application of the impugned sections by the Commission. In so far as certiorari is found unavailable, the present petition would suffer misjoinder of actions in so far as it sought to affect the Commission’s decisions on the appeals by way of that quashing order. The Court finds that nevertheless, the residual claims and prayers have some vitality and will be allowed to proceed to full hearing.**”

The ruling then culminated in orders thus, “**In conclusion, the application dated 05.07.2019 and filed on 09.07.2019 as well as the preliminary objection dated on 15.07.2019 and filed on 15.07.2019 are hereby determined with orders:**

- 1) The preliminary objection will succeed to the extent that the judicial review order of certiorari as prayed for in petition is unavailable by reason of time barring – and the petition partially fails to that extent.**
- 2) The application is dismissed with costs.**
- 3) The parties to take directions for the expeditious hearing and determination of the residual claims and prayers in the petition being whether the sections of the Public Service Commission Act, 2017 as cited and alleged are unconstitutional.”**

The Court has found it necessary to reproduce the ruling because after the ruling was delivered, the parties did not file any further affidavits and therefore the factual background of the petition has not changed at all and except for the submissions and authorities filed for the parties, there is no new or further material before the Court. On 25.02.2020 the Court, *inter alia*, ordered, “**2. The interested parties are excused from participating in the proceedings as suit is withdrawn against them.**”

In the Petition the petitioners prayed for orders:

- a) A declaration that section 87(2) of the Public Service Commission Act is unconstitutional and violates Article 27(1) of the Constitution.
- b) A declaration that section 88(1) and (4) of the Public Service Commission Act is unconstitutional and violates Article 48 of the Constitution and does not meet the Constitutional analysis test as provided under Article 24(1) of the Constitution.
- c) A declaration that section 89 (1) of the Public Service Commission Act is unconstitutional and violates Articles 48 and 27(1) of the Constitution.
- d) A declaration that section 89(2) of the Public Service Commission Act is unconstitutional and violates Article 50 (1) of the Constitution.
- e) A declaration that the disciplinary proceeding before the Public Service Commission in Appeals No. 58 of 2018, 59 of 2018, 60 of 2018, 61 of 2018 and 62 of 2018 violated the petitioners’ right to a fair hearing under Article 50(1) of the Constitution and the determination dated 05.12.2018 is therefore null and void.
- f) An order of certiorari do issue to bring into this Honourable Court and quash the proceedings in Appeals No. 58 of 2018, 59 of 2018, 60 of 2018, 61 of 2018 and 62 of 2018 before the Public Service Commission on the hearing of the Interested Parties’ appeals held on 19.11.2018 and 26.11.2018.
- g) An order of certiorari do issue to bring into this Honourable Court and quash the decisions of the Public Service Commission in Appeals No. 58 of 2018, 59 of 2018, 60 of 2018, 61 of 2018 and 62 of 2018 delivered by way of a letter dated 05.12.2018.
- h) That Costs of the petition be provided for.

By findings and orders in the ruling delivered on 15.11.2019 prayers (e) (f) and (g) were thereby spent so that the residual prayers are (a), (b), (c), (d) and (h). The respondents filed their submissions thereon on 19.02.2020 and the petitioners filed their submissions on 20.05.2020. The Court has considered all the material on record.

First, the constitutional and statutory background to the present petition is as follows. The Public Service Commission is established under

Article 233 of the Constitution of Kenya, 2010. Under Article 234 (2) (i), the Commission's powers and functions include to, "**i hear and determine appeals in respect of county governments' public service.**" Article 234(3) (b) provides that the functions and powers of the Commission do not apply to an office in the service of a county government, except as contemplated in Article 234 (2) (i). Article 235 (1) of the Constitution provides that a county government is responsible, within a framework of uniform norms and standards prescribed by an Act of Parliament, for:

- a) establishing and abolishing offices in its public service;
- b) appointing persons to hold or act in those offices, and confirming appointments; and
- c) exercising disciplinary control over and removing persons holding or acting in those offices.

Article 235(2) provides that Article 235(1) does not apply to any office or position subject to the Teachers Service Commission.

The Public Service Commission is one of the Commissions provided for under Chapter 15 of the Constitution on Commissions and Independent Office per Article 248 (2) (g). Article 249 (1) provides that the objects of the commissions and independent office are to:

- a) protect the sovereignty of the people;
- b) secure the observance by all state organs of democratic values and principles; and
- c) promote constitutionalism.

Article 249(2) thereof provides that the commissions and independent offices are subject only to the Constitution and the law; and are independent and not subject to direction or control by any person or authority.

Article 252 of the Constitution on general powers and functions of constitutional commissions provides that each commission and holder of an independent office:

- a) may conduct investigations on its own initiative or on a complaint made by a member of the public;
- b) has the powers necessary for conciliation, mediation and negotiation;
- c) shall recruit its own staff; and
- d) may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by the Constitution.

Within that constitutional background and with respect to the Public Service Commission's powers and functions under Article 234 (2) (i) to **hear and determine appeals in respect of county governments' public service**, the Parliament has enacted various statutory provisions. Part XV of the Public Service Commission Act, 2017 provides for hearing and determination of appeals in respect of county governments. It is some of the provisions under that part that are impugned in the present petition. Section 77 of the County Governments Act, 2012 also provides for appeals to the Public Service Commission against decisions of the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer. The section further provides that the Commission shall entertain appeals on any decision relating to employment of a person in a county government.

Second, what are the established guiding principles in declaration of statutory provisions as unconstitutional? Article 2 (1) on the Supremacy of the Constitution provides that any law including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission in contravention of the constitution is invalid. Article 259 (1) on construing the Constitution provides that the Constitution shall be interpreted in a manner that:

- a) promotes its purposes, values and principles;
- b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- c) permits the development of the law; and
- d) contributes to good governance.

Article 259 (3) provides that every provision of the Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and the criteria set therein applies.

The parties are in agreement on the applicable principles. As submitted for the petitioners in **Olum and Another –Versus- Attorney General** [2021]EA, the Court of Appeal of Uganda at Kampala held that in order to determine the constitutionality of a statute, the court had to consider the purpose and effect of the impugned statute or section thereof. If the purpose was not to infringe a right guaranteed by the Constitution, the court had to go further and examine the effect of its implementation. If either the purpose or the effect of its implementation infringed a right guaranteed by the Constitution, the statute or section in question would be declared unconstitutional. Again in **Kenya**

Human Rights Commission –Versus- Attorney General [2018]eKLR the High Court held, “Another key principle of determining constitutional validity of a statute is by examining its purpose or effect. The purpose of enacting a legislation or the effect of implementing the legislation so enacted may lead to nullification of the statute or its provision if found to be inconsistent with the Constitution.” Again as submitted for the respondent in **Ndyanabo –Versus- Attorney General [2001]EA 495** the Court held that there was a general presumption that every Act is constitutional and the burden of proof thus lies on any person who alleges unconstitutionality. Further in **Pearlberg –Versus- Varty (1972)1 WLR534** it was stated, “I would only emphasize that one should start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown....”

The Court also follows its opinion in the judgment in **George Maina Kamau –Versus- The County Assembly of Murang’a and 2 Others [2016]eKLR**, thus, “While addressing the 3rd issue for determination, the court is alert that in considering a case, a litigant may show that a provision of a statute as applied to that litigant is unconstitutional and if the court finds as much, the decision would apply to the parties to such litigation, such decision binds only the parties and the matter ends there. In the opinion of the court, in such cases, the statute does not thereby become unconstitutional generally and it remains good law to be applied constitutionally in future circumstances. However, if a statutory provision contains unconstitutional prescription or rule and the court finds as much, then the statute would not apply to any future circumstances as is a nullity as against every person. Such a statute or statutory provision would be incapable of ever being applied constitutionally. In such cases, where a statute is unconstitutional because it inherently contains a prescription or rule that is unconstitutional, it is the opinion of the court that the legislature should move with speed to repeal the statute so that the offensive provision does not remain on the statute book. In the opinion of the court, that is more so because by promptly repealing the unconstitutional statute or the offending unconstitutional provision, public officers and the general users of the statute or statutory provision would not be misled to apply it for the time it persists to exist on the statute book.”

Further in **Narok County Government & Another –Versus- Richard Bwongo Birir & Another [2015]eKLR** (Waki JA, Nambuye JA and Kiage JA), in recognizing that section 40 of the County Governments Act was available and constitutional, the Court of Appeal in that case at paragraph 48 of the judgment stated that the County Governments Act, 2012 was enacted pursuant to Article 200 of the Constitution to give effect to Chapter 11 of the Constitution which provides for devolved Government. The Court is guided accordingly and holds that a statute that is enacted pursuant to or to give effect to a provision in the Constitution would in that regard be constitutional unless if it is established that the statutory enactment by its content inherently violates a constitutional provision or rule.

Third, are the impugned sections of the Public Service Commission Act, 2017 as alleged and claimed in the petition unconstitutional?

Section 87(2) of the Public Service Commission Act, 2017 states, “A person shall not file any legal proceedings in any Court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from county government public service unless the procedure provided for under this Part has been exhausted.” It is submitted for the petitioners that the section is unconstitutional because it fails to accord the petitioners equal protection before the law as provided under Article 27(1) of the Constitution. The Court has considered the material on record and finds that there is no material evidence to justify the claim and allegation as submitted for the petitioners. In any event the section does not purport to conclusively or with finality oust the Court’s jurisdiction but only provides for exhaustion of the appeal jurisdiction before the Commission prior to institution of court proceedings with respect to matters falling within the Commission’s appellate jurisdiction. The Court returns that the section has not been shown to violate a constitutional provision in its wording, effect or purpose and it is therefore not unconstitutional.

As submitted for the respondents the Court upholds and follows its opinion in the ruling in **Abdikadir Suleiman –Versus- County Government of Isiolo [2015]eKLR** thus, “The court has considered the submissions made for the parties. Article 234(2) (i) of the Constitution provides that the Public Service Commission is vested with the function and power to hear and determine appeals in respect of county governments’ public service. Article 262 defines “public service” to mean the collectivity of all individuals, other than state officers, performing a function within a state organ. Accordingly, and firstly, the court holds that the power of the Commission to hear and determine appeals in respect of county governments’ public service constitutionally applies only to public officers, and not state officers, in the service of the county governments or any other state organ. Secondly, the court holds that section 77 of the County Governments Act, 2012 amplifies and brings into operation Article 234(2) (i) of the Constitution.

In considering the constitutional and statutory provisions that empower the Commission to hear and determine appeals in respect of county governments’ public service, the subject matter is set out in section 77 of the Act but the decisions the Commission may make are not set out in the Act or the Constitution. It is this court’s opinion and holding that in appeals to the Commission, the Commission can only make decisions that the County Public Service Board or relevant lawful authority could have made or vary such decision by simply setting it aside or making a decision that was in the Board’s or the other relevant lawful authority’s jurisdiction to make. The court has guided itself that on appeal the appellate authority applies the same substantive law and facts as applied by the primary authority that made the decision appealed against and generally considers facts as they were presented before the primary authority so that an appellate authority, in absence of anything else, may only set aside the decision appealed against or substitute the decision with any of the remedies that the primary authority was empowered to make. In other words, the appeal process deals with the merits or substance of the case and not procedural or legal propriety of the case.”

Similarly, the Court finds that Section 87(2) of the Public Service Commission Act, 2017 like section 77 of the County Governments Act, 2012 amplifies and brings into operation Article 234(2) (i) of the Constitution and being enacted pursuant to that constitutional provision, it has not been shown to have been unconstitutional.

Section 88 (1) of the Public Service Commission Act, 2017 states, “(1) A person who is dissatisfied or affected by a decision made by the Commission following an appeal under this section may apply for review and the Commission may admit the application if — (a) fresh material facts arise which with due diligence could not be presented when the decision was initially made; or (b) there is an error apparent on the record of the earlier decision.” Section 88 (4) of the Act provides, “(4) Despite the right of appeal or the right to apply for review in accordance with this Part, the implementation of the decision shall not be deferred or suspended pending the determination of the appeal or the application for review.” It is urged for the petitioners that Section 88 (1) and 88 (4) of the Act violates Article 48 of the Constitution on the right of access to justice and Article 24(1) on when rights in the Bill of Rights may be limited. Article

48 on access to justice provides that the state shall ensure access to justice for all persons and if any fee is required, it shall not impede access to justice. The Court has revisited the material on record and returns that there is no evidence or argument to support the petitioners' case as alleged and claimed. In the opinion of the Court, the section is clear that where a review of the Commission's decision or appeal against the county government's decision is preferred, the appeal or the request for review does not operate as an automatic stay of implementation of the county government's decision subject of the appeal or the Commission's decision subject of the review application. The sections do not have the effect of saying that such stay of implementation of the decision subject of appeal or review shall not be available in appropriate cases as the county public service board or relevant county government's authority, the Commission or other authority such as a court of law with relevant jurisdiction may be moved to grant such stay of execution. Once again, the Court returns that the petitioners have failed to establish that the provisions offend the cited or other constitutional rule or provision and the claim and prayer will fail. In particular, the Court returns that the provisions do not amount to a limitation of the right to access to justice in Article 48 but indeed foster that right. The Constitution by itself has prescribed that the appeals may be made to the Commission and as already cited earlier in this judgment the Commission is subject only to the Constitution and law in undertaking its powers and functions. The impugned provisions give the Commission an opportunity to review its own decisions within the prescribed parameters. The provisions as well as protect a decision already made by the county public service board or relevant county government's authority, or, the Commission towards its implementation but which may be subject of a review or appeal. The Court considers that such provisions foster tenets of justice and do not amount to limitation of the right of access to justice.

While making that finding the Court considers that it should be obvious that where it is alleged that in the process of considering an appeal as prescribed in the Constitution and statutes the Commission is proceeding unlawfully or unconstitutionally in any particular case, it should be possible for the aggrieved person to move the Court for appropriate remedies such as declarations and judicial review remedies. Thus the Court upholds and follows its opinion in the ruling in Abdikadir Suleiman –Versus- County Government of Isiolo [2015]eKLR thus, **“The court says it in other words as follows. The Constitution or legislation may provide that a person or public body or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions or powers as vested in the person or authority or public body by the Constitution or legislation. The Constitution or legislation may also vest in a person or authority or public body the power or function to consider or entertain given disputes or matters as of first instance or on appeal and to render decisions in that regard in accordance with the prescribed procedures. In the opinion of this court, such constitutional and legislative provisions shall not be construed as precluding a court from exercising the relevant jurisdiction in relation to any question whether that person or authority or public body has exercised the powers or functions in accordance with the Constitution or any other law. The court holds that such provisions do not oust or extinguish or adjourn the court's jurisdiction to hear and determine a dispute about the legality or the manner of the exercise of the constitutional or statutory powers and functions by the relevant person, public body or authority as may have been vested in the person, public body or authority under the Constitution or statute.**

The court is alert that under Article 159(2) (b) justice shall not be delayed and under Article 159 (2) (e) the court is guided that in exercise of judicial authority, the purpose and principles of the Constitution shall be protected and promoted. Under Article 159 (1) judicial authority is vested in the judiciary and it is the opinion of the court that issues of legality of actions or omissions is the immediate and proper primary or original province and jurisdiction of the court and is not the penultimate or initially ceded jurisdiction of persons, public bodies and authorities outside the judiciary. In the opinion of the court, it would amount to delayed justice to tell the claimant thus, “ The court knows your alleged case is that an illegality has taken place; you challenge the alleged illegality; on merits of the challenged decision you ought to appeal to the Commission; the Commission has no jurisdiction to consider issues of illegality as you have alleged in your case but it might consider it and may rule in your favour; and therefore, though this court has the primary jurisdiction to consider the issue of illegality as you have alleged, you ought to have gone to the Commission in the first instance just to see if the Commission might have considered the issue of illegality before you moved this court and your case is dismissed accordingly for failure to give the Commission chance to exercise the speculative and hopeful jurisdiction on that issue of alleged illegality. While....” Thus Article 259(3) of the Constitution provides that a function or power conferred by the Constitution on an office may be performed or exercised as occasion requires, by the person holding the office. The power to determine the lawfulness including constitutionality of matters is already vested in the judiciary, the Constitution requires the Commission to be subject to the Constitution and the law, and therefore, the Court returns that the impugned provisions do not in any manner begin to operate as a limitation to accessing justice or courts of law.

It should therefore be clear that the provisions do not bar a party aggrieved by the Commission's decision from moving the Court within the prevailing rules of procedure. On the merits of a proper case before the Commission, a party dissatisfied with the Commission's decision is at liberty to move this Court or other court with competent primary jurisdiction and if dissatisfied by this Court's decision is still at liberty to move the Court of Appeal as may be appropriate. In such proper case before the Commission, the Court returns that it was misconceived when it was submitted for the petitioners that section 88(1) denied an aggrieved party the right to move this Court (or even other court with relevant primary jurisdiction) and thereafter, if dissatisfied, the Court of Appeal. Further, section 88(1) uses the word “**may**” meaning that a person aggrieved by the Commission's decision enjoys a discretion to move the Commission by way of a review or may opt not to do so and therefore is open for such aggrieved person to opt for other appropriate action such as filing legal proceedings in this Court or other court with competent jurisdiction. For avoidance of doubt, section 18 of the Public Service Commission Act, 2017 provides that the Government Proceedings Act (Cap.40) shall apply with respect to any proceedings against the Commission. Thus the Court holds that the Commission and its decisions are amenable to legal proceedings as may be filed in a court of law with competent jurisdiction as provided for in the Constitution and enabling statutes. Thus Article 253 of the Constitution provides that the Commission is a body corporate with perpetual succession and a seal; and is capable of suing and being sued in its corporate name. It was not therefore necessary (as urged for the petitioners) for the Public Service Commission Act, 2017 to confer jurisdiction to a specified court such as this Court with respect to legal proceedings that may fall for institution against the Commission or about its decisions because jurisdiction of courts is already provided for in the Constitution and relevant statutes and it is for the aggrieved person to move the appropriate court as may be necessary in individual instances.

It was urged for petitioners that Section 89 (1) of the Public Service Commission Act, 2017 is unconstitutional and violates Article 48 on access to justice and Article 27(1) that every person is equal before the law and has the right to equal protection and equal benefit of the law. Section 89(1) of the Act provides, **“Any person who is affected by the decision of the Commission made under this Part may file the decision for enforcement by the Employment and Labour Relations Court provided for under Article 162 (2) (a) of the Constitution.”** It is submitted for the petitioners that the section provides an avenue for a successful party to enforce the decision before this Court but it does not give the unsuccessful party an avenue to challenge that decision so that the section contravenes Articles 27(1), 48 and

50 of the Constitution. The Court has already found that an aggrieved party is at liberty to move a court with competent jurisdiction and the Act did not need to provide as much. Thus the Court finds that the alleged unconstitutionality does not even begin to emerge at all. The obvious purpose and effect of section 89 (1) of the Act is to provide for a non-litigious summary procedure to enforce the Commission's decision and it does not provide that a person or body or authority aggrieved or adversely affected by such decision cannot move a court with competent jurisdiction towards an appropriate remedy.

It was urged for the petitioners that section 89(2) of the Act is unconstitutional because it violates Article 50(1) of the Constitution which provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Section 89 (2) of the Act states, “**Any person who refuses, fails or neglects to implement the Commission's decisions is liable to disciplinary action in accordance with the applicable laws including removal from office.**” The Court has revisited the pleadings and the submissions and it does not come out clearly how section 89 (2) of the Act offends Article 50(1) of the Constitution. It has already been found by the Court that an appeal or a review under Part XV of the Act on hearing and determination of appeals in respect of county public service does not amount to an automatic stay of implementation of the decision appealed against or to be reviewed. Under Part XV of the Act, the decision appealed against is one made by the county public service board or relevant authority or person in the county government system. Further, under the part, the decision that may be reviewed is one made by the Commission. The effect of section 88(4), in the Court's findings, is that the decision by the county public service board or relevant authority or person in the county government system shall be implemented and not automatically stayed from implementation by reason that an appeal has been filed before the Commission. The further effect of section 88(4) is that a decision by the Commission shall be implemented and not automatically stayed from implementation by reason that a review has been filed before the Commission. Thus the Court holds that the section protects decisions as may be made by the Commission or by the county public service board or relevant authority or person in the county government system. The Court has also found that where a stay of implementation of such decisions is desired, then the stay decision may be obtained from the relevant authority such as the county public service board or relevant authority or person in the county government system; the Commission; or the court with relevant jurisdiction. The Court further considers that it was not necessary for the Act to make an express provision on the manner of an aggrieved party seeking stay of implementation of the decision by the county public service board or other county authority or by the Commission – and the Court returns that such failure by the statute cannot be inferred to mean that the Act offended the Constitution as alleged and claimed for petitioners. Thus the Court finds that it was misconceived when it was submitted for the petitioners that section 88(4) of the Act renders an intended appeal or review nugatory *ab initio*. Indeed, the Court considers that (by way of an analogy) even in courts of law, stay of execution of orders and decrees must be specifically applied for and granted or denied and the mere filing of a review or appeal does not operate as an automatic stay of execution. Further, the Court finds that with respect to Commission's decisions, a stay decision of implementation or enforcement of the decision would not, in the opinion of the Court, be obtainable in proceedings under section 89(1) which essentially is summary and non-litigious – solely aimed at enforcing the Commission's decision.

Thus turning to section 89(2) of the Act, the Court finds that there is nothing unconstitutional about the provision. Instead the Court finds that it is well within furtherance of good governance and the rule of law that once the Commission has made its decision, such decision is for obedience failing the public officer or state officer responsible for the disobedience should be culpable in misconduct and therefore punishable in accordance with applicable law. The Court returns that the section clearly provides for due process should the culprit fall for action under the section. The Court finds that the purpose and effect of the section is to foster Chapter 6 of the Constitution on Leadership and Integrity, Article 10 on National Values and Principles of Governance, and Article 232 on the Values and Principles of Public Service. The Court finds that the provision has not been shown to be inimical to constitutional provisions as alleged for the petitioners.

Fourth, the parties referred to the Public Service Commission (County Government Public Services Appeals Procedures) Regulations, 2016. The regulations provide for elaborate procedures for hearing of appeals in respect of county public service. The provisions include, among other matters, procedures on lodging an appeal; notification of county government public service about lodging of the appeal; processing of the appeal; service of notices; hearings; recording of proceedings; findings and recommendations; making of decision; communication of the decision; hearing and determining the appeal in 4 months from the date of lodging the appeal; review; powers of the Commission on review; Communication of review decision; delivery of documents to the commission; and rights of appellants. The regulations provide that where the appeal is heard orally, then both the appellant and the respondent shall be given an opportunity to be heard and where necessary to present witnesses. The Court has considered the regulations and their detailed provisions and finds that they advance due process and uphold rules of natural justice. The court therefore finds that they are consistent with the purposes of the relevant constitutional provisions and enabling statute that empowers the Commission to hear appeals with respect to county government public service.

Fifth, in view of the findings the Court returns that the prayers made will be declined. The petition was by the county government against the Commission and the Honourable Attorney General and the Court returns that each party shall bear own costs of the suit.

In conclusion, judgment is hereby entered for the respondents against the petitioners for dismissal of the petition with orders each party to bear own costs of the petition.

Signed, dated and delivered in court at Nairobi this Friday, 12th June, 2020.

BYRAM ONGAYA

JUDGE