



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU
CAUSE NO. 382 OF 2013

PATRICK KARIITHI WAHOME & 114 OTHERS.....CLAIMANTS

VERSUS

COUNTY GOVERNMENT OF LAIKIPIA.....1ST RESPONDENT

LAIKIPIA COUNTY PUBLIC SERVICE BOARD.....2ND RESPONDENT

AND

THE TRANSITIONAL AUTHORITY.....INTERESTED PARTY

THE PUBLIC SERVICE COMMISSION OF KENYA....INTERESTED PARTY

RULING

On the court ruling delivered on 23rd January, 2020 the court allowed the respondents to address the preliminary objections vide Notice of Preliminary Objections filed on 13th August, 2019 and dated 25th June, 2019.

The objections are that;

The suit herein has been filed contrary to the provisions of section 77(2) of the County Government Act No.12 of 2012 and the same should therefore be struck out.

The parties filed written submissions.

The respondents on their objections submitted that the dispute herein relates to alleged recruitment and unlawful retirement and removal from office of the claimants by the respondents as county officers and seek the remedy of damages for unlawful removal from office. Such dispute should have been addressed pursuant to procedure stipulated at section 77 of the County Government Act but the claimants opted to file suit with the court. The claimants failed to exhaust the express provisions of the law at section 77 of the County Government Act and the claim herein is premature and the court lacks jurisdiction.

Section 77 of the County Government Act and Article 234 of the Constitution enumerate the mandate of the Public Service Commission to hear and determine appeals in respect of County Government Public Service. In this regard the dispute herein relating to removal from office and the right forum for adjudication should be the Public Service Commission. This ought to have been the first forum of adjudication and removing jurisdiction from this court as held in the **Supreme Court Advisory Opinion Constitutional Application No.2 of 2011** that without jurisdiction, a court must stop. This court is bound by the principle of exhaustion as held by the Court of Appeal in **Secretary, County Public Service & Another versus Hulbhai Gedi Abdille [2017] eKLR** that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue and not invoke the court process if the dispute can effectively be dealt with in that other forum.

In **ELRC Petition No.4 of 2018 – Kenya County Government Workers Union versus Nyeri County Government & Nyeri County Public Service Board** the court held that it had no jurisdiction to hear the petition as the petitioners failed to file the suit before the Public Service Commission as the first adjudication forum.

Where there are statutory provisions providing for an appeal procedure it is only in exceptional circumstances that a party can be allowed to approach this court in the first instance which is not the case here. The claimants ought to have challenged the decision to terminate their employment by the respondents to the Public Service Commission as provided under section 77 of the County Government Act and Article 234 of the Constitution.

The claimants shall suffer no prejudice if their claim is dismissed and allowed to file appeal with the Public Service Commission out of time as provided under section 77(3) of the County Government Act.

The claimants submitted that section 77(1) of the County Government Act allow the Public Service Commission to hear appeals from the decisions of the County Public Service Board and cannot invoke the provisions of section 77(2) before applying section 77(1) thereof. These provisions are not mandatory as the word “may” apply. On the claims made which are intertwined the claims initiated suit in the right forum, this court which has mixed jurisdiction as held in **Abdikadir Suleiman versus County Government of Isiolo & Another [2015] eKLR** that the legitimate path to follow was to file suit in court which has jurisdiction to hear intertwined issues. The appeal process before the Public Service Commission does not deal with the procedural or legal propriety of the case which is the centre stage in the claimants’ case.

The claimant could not approach the Public Service Commission as termination of employment was done without notice. Such denied them material to initiate the appeals procedure. The legitimacy of the procedure or punishment imposed as measured against the provisions of section 77 of the County Government Act is an issue of law and not appealable to the Public Service Commission as held in the **Abdikadir Suleiman, Abdikadir Suleiman**, cited above.

The claimants also submitted that the untimeliness of the objections by the respondents are made six (6) years after filing suit when the claimants have testified and matter waiting for the call of defence and after efforts to have proceedings set aside, reviewed and upon failing in all these instances the respondents have opted to apply technical matters and application of section 77(2) of the County Government Act contrary to the principles enumerated in the case of **Republic versus Chief Registrar of the Judiciary & 2 others ex parte Riley Services Limited [2015] eKLR** that preliminary objections should be raised at the earliest opportunity to avoid a waste of judicial time.

The respondents have not acted expeditiously and objections made lack merit and should be dismissed.

The claimants also submitted that the doctrine of exhaustion is subject to exceptions as held in the case of **Republic versus Kenya School of Law ex parte Kgaborone Tsholofelo Wekesa [2019] eKLR** that there should be no unreasonable delay or inaction which can prejudice the applicant, the issue should be purely based on legal provisions, and there must be a strong public interest is involved. The claimants have since closed their case and irreparable injustice, loss, damage and prejudice shall occur and only the court can sufficiently address their grievances without bias and undue influence. The judicial intervention invoked is the right forum for adjudication.

Determination

On the objections raised with regard to the application of section 77(2) of the County Government Act does this court have jurisdiction to hear and determine the dispute herein?

The background of this matter is that The claimants filed suit on 4th November, 2013 together with a Notice of Motion under Certificate of Urgency seeking interim orders that they be reinstated back to work and the respondents be restrained from denying them access to their respective duty stations.

The court heard the application and issued interim orders that;

the oral termination of the applicants [claimants] by the respondents on the 24th October, 2013 is stayed until further orders of the court;

The applicants to continue in their employment pending interparties hearing of the application.

The respondents filed defence on 18th December, 2013.

The basis of the objections by the respondents is premised on the provisions of section 77(2) of the County Government Act and which provides that;

(2)The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of—

The respondents thus challenge the claimants for filing the instant suit with the court instead of applying the procedure set out under section 77(2) by filing an appeal to the Public Service Commission.

The court reading of section 77(2) of the County Government Act would not have a holistic meaning and appreciation if read alone and outside of the earlier part at section 77(1) thereof and which provides that;

(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 county public officer may appeal to the Public Service Commission (in this Part referred to as the “Commission”) against the decision.

The law contemplates a decision made by the County Public Service Board or a person in exercise of disciplinary control against any county public officer who may file an appeal to the Public Service Commission against the decision.

As correctly referenced by the respondents **In the Matter of Interim Independent Electoral Commission [2011] eKLR**, jurisdiction is

everything. That;

The classic decision in this regard is the Court of Appeal decision in [Owners of Motor Vessel „Lillian S? v. Caltex Oil \(Kenya\) Limited](#) [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

With regard to the application of section 77(2) of the County Government Act the court in **Abdikadir Suleiman v County Government of Isiolo & another** [2015] eKLR in addressing the provisions held that;

... 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. ...

It is clear that the legitimacy of the procedure or punishment imposed as measured against the provisions of section 76 of the Act would be an issue of law and therefore not appealable to the Commission but subject to the jurisdiction of the court. This court’s opinion is that it is not for the County Public Service Board or the person exercising disciplinary control in the county government, as the case may be, to determine a dispute as to its or person’s compliance with section 76 of the Act, and similarly, the Commission would not have jurisdiction to decide such issue on appeal, which essentially would not be conceivable as a matter of a primary decision and therefore subject to the Commission’s appellate jurisdiction under section 77 of the Act. This court’s holding is that while making its primary decisions or decisions on appeals, the Commission like any other state organ or person under Article 10 of the Constitution must care and ask itself whether the decision is lawful or legitimate in view of relevant constitutional and statutory provisions but the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions rests with the court as vested with the appropriate jurisdiction under Article 162 (2) (a) as read with Article 165(5) and (6) of the Constitution; Article 22(1), and section 12 of the Employment and Labour Relations Act, 2011.

The Court of Appeal in addressing the provisions of section 77(2) of the County Government Act followed an appeal of the judgement of the High Court in **Secretary, County Public Service Board & another v Hulbhai Gedi Abdille** [2017] eKLR held that;

*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 a 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. In terms of **Republic v National Environment Management Authority** (supra), we discern no exceptional circumstances in this appeal that would have warranted the bypassing of the statutory appellate process by the respondent. Her contention that she disregarded the appeal because it could not afford her an opportunity to question the procedure followed by the appellant is in our view, without basis because **Section 77** has placed no fetter to the jurisdiction of the Public Service Commission. There is no requirement for instance that reasons for the decision be availed to an aggrieved party before he can prosecute an appeal before it.*

Aware of the findings by the Court of Appeal as above cited and As noted above, the claimants moved the court and filed a Memorandum of claim together with a Notice of Motion under Certificate of Urgency and upon the court hearing them issued interim orders directing the reinstatement back into employment and to be allowed access to their work positions.

There was no compliance.

In the Memorandum of Claim the substantive orders and remedies sought by the claimants are that;

- a) That pending hearing and determination of this cause, the Honourable court be pleased to issue an order suspending respondents decision to terminate claimant’s employment, it further be pleased to issue an order directing reinstatement of the claimant to their respective capacities of work.
- b) That the court be pleased to declare the respondent’s mode of terminating the claimant’s employment unlawful and illegally.
- c) That the Honourable court be pleased to issue an order directing the respondent to pay claimant’s respective salary arrears.
- d) That the Honourable court be pleased to issue a permanent order restraining the respondent from terminating claimants’ employment.

The substance of the dispute hence relates to the termination of employment which is alleged to be unlawful and illegal and the primary remedy sought is that of reinstatement, payment of salary/wage arrears.

Article 162 (2) (a) and (3) as read with Article 165(5) and (6) of the Constitution, 2010; and section 12 of the Employment and Labour Relations Act, 2011 and section 87 of the Employment Act, 2007 confer the court with original jurisdiction to hear and determine employment and labour relations disputes within the Republic of Kenya. Such jurisdiction is constitutional and statutory. The court is the original adjudication forum.

Section 87 of the Employment Act, 2007 provides as follows;

87. Complaint and jurisdiction in cases of dispute between employers and employees

(1) Subject to the provisions of this Act whenever—

(a) an employer or employee neglects or refuses to fulfill a contract of service; or

(b) any question, difference or dispute arises as to the rights or liabilities of either party; or

(c) touching any misconduct, neglect or ill-treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.

(2) No court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1).

The constitutional and statutory jurisdiction of the court cannot be removed and conferred to a tribunal or other quasi-judicial body. Where a claim/dispute/suit/matter relates to *employment and labour relations and for connected purposes* the original forum to adjudication is with the court unless the parties opt to apply the provisions of section 15 of the Employment and Labour Relations Court Act, 2011 and make reference to alternative disputes resolution mechanisms.

In my humble view, there is a deliberate application by Parliament of the word(s) *may* with regard to section 77(2) of the County Government Act. Context is given by subsection (1).

My reading of these provisions in whole is that where an employee is allowed internal disciplinary mechanisms by the employer such as the County Public Service Board, a decision is rendered and then the employee *may* invoke the *appeal* procedure with the Public Service Commission. The decision of the employer at the shop floor following application of internal disciplinary procedures is imperative.

Where the employer *suo moto* and without any written notice proceeds to terminate employment, such employer effectively removes the employee from the shop floor and the employee is left at liberty to urge his/her rights under the provisions of article 162(2) (a) read together with section 12 of the Employment and Labour Relations Court Act, 2011 and section 87 of the Employment Act, 2007.

The facts leading to the claimants' termination of employment are not contested.

Even where the claimants may have wished to prefer an appeal, Without the opportunity of a hearing at the shop floor in the first instance, the respondents effectively denied the claimants the fair chance to urge any form of an appeal with the Public Service Commission for the respondents now urge the court to extend time to allow the claimants apply the provisions of section 77(3) of the County Government Act. Such application of the law would defeat the constitutional jurisdiction of this court under Article 162(2) (a) and (3) referenced above.

I agree with the position taken in **Abdikadir Suleiman versus County Government of Isiolo & another [2015] eKLR** that;

Section 77 of the County Government Act, 2012 does not oust or restrict the jurisdiction of the court for want of exhaustion of the procedure and remedies envisaged under the section... The original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between employers and employees rests with the Employment and Labour Relations Court as vested with the appropriate jurisdiction under articles 159(1), 162 (2)

(a) as read with article 165(5) and (6) of the Constitution; articles 22(1) and 258(1) of the Constitution, and the provisions of the Employment and Labour Relations Act, 2011.

As noted above, the above findings must be read together with section 87 of the Employment Act, 2007. A statute cannot oust the court jurisdiction conferred under and by the constitution. This court has jurisdiction to hear and determine the dispute herein.

Fundamentally, all preliminary objections out to be addressed with the court instantly. A party, who files a defence, sits back for 6 years and when called to give defence sways with objections and counter-application to avoid urging such defence comes to court with unclean hands.

Upon filing the defence on 18th December, 2013 where the respondents were keen to address the question of jurisdiction, this ought to have been the sole and primary agenda. This has not been the case as the history of proceedings herein can attest.

Accordingly, objections by the respondents filed on 13th August, 2019 are found without merit and hereby dismissed with costs to the claimants.

Dated and delivered electronically this 4th June, 2020 at 0900 hours

M. MBARU

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 the Order herein shall be delivered to the parties via emails. this 4th June, 2020 at 0900 hours

M. MBARU

JUDGE