



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO. 1 OF 2020

FRED MARMALEI LORONYOKWE.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF SAMBURU.....1<sup>ST</sup> RESPONDENT

AG. COUNTY SECRETARY SAMBURU COUNTY....2<sup>ND</sup> RESPONDENT

RULING

1. The Respondents herein raised a preliminary objection to the Claimant's suit. It is asserted that this Honourable Court lacks the jurisdiction to entertain the suit in the first instance. It was additionally asserted that the Claimant's suit was premature, bad in law, incompetent and an abuse of court process. The Claimant opposes the preliminary objection on the basis that the impugned letter is from a non-existent acting officer & chief of staff and even if the acting officer & chief of staff was in office properly he lacked the statutory authority to communicate on behalf of the County Public Service Board which has the mandate to undertake disciplinary process against the Claimant. The Claimant further opposed the preliminary objection on the basis that an appeal under Section 77(2)(c) and (e) is made to the Public Service Commission against a decision of the County Public Service Board which is not the case in this particular case as this is a challenge against a decision of an individual 'acting County Secretary & Chief of Staff'.

2. The Respondents filed submissions in which they argued that the provisions of Section 77(1) and (2)(c) and (e) of the County Governments Act give Public Service Commission the powers to deal with a dispute relating to disciplinary control and removal from service of any public officer in the County Government. The Respondents submitted that decision that the Claimant seeks to challenge falls within the ambit of Section 77(2) of the County Government Act. The Respondents relied on the cases of **Secretary, County Public Service Board & Another v Hulbhai Gedi Abdille [2017] eKLR** and the case of **Moses Maina Ngari & Another v Nyeri County Government & Another [2018] eKLR**. The Respondents submitted that under Section 77(1) the law provided that any person dissatisfied or affected by a decision made by the County Public Services Board or a person in exercise of purported exercise of disciplinary control against any county public officer may appeal the decision to the Public Service Commission. The Respondents submit that the mandate of the Public Service Commission is not limited to the decisions made by the County Public Service Board but its mandate extends to a decision of any person in purported exercise of disciplinary control against any public officer. The Respondents thus sought the striking out of the suit with costs.

3. The Claimant filed submissions in which he argued that the Court should determine whether the Acting County Secretary and Chief of Staff has the authority and power to dismiss the Claimant and communicate on behalf of the County Public Service Board and whether the jurisdiction of this Honourable Court is removed by the provisions of Section 77 of the County Government Act to appeal the decision of the Public Service Commission. The Claimant submitted that under Section 5(2)(f) of the County Governments Act, a County Government is responsible for establishing and staffing its public service as contemplated under Article 235(e) of the Constitution. The Claimant relied on the case of **David Ogega Kebiro & Another v Kisii County Public Service Board & Another [2017] eKLR** where Onyago J. held that Section 2 of the County Governments Act defines county public office, officer and service. He submitted by exclusion the only officers excluded from the county public service are those of Governor, Deputy Governor, Members of the County Executive Committee and the Members of the County Assembly. The Claimant submitted that only the County Public Service Board has the mandate to exercise disciplinary control over staff in the county public service as provided for under Section 59 of the County Governments Act. The Claimant submitted that the head of the County Public Service Board is the County Secretary appointed under Section 44 of the Act. The Claimant relied on the case of **Samuel Okuro & 7 Others v Olang'o Onudi, County Secretary Kisumu County [2018] eKLR** and submitted that whereas the County Secretary is the head of public service and Secretary to the County Executive Committee, the County Secretary has no power or authority to communicate on behalf of the County Public Service Board as the Board has its own Secretary appointed in terms of Section 58(1)(c) of the Act. The Claimant submitted that it was not anticipated that an individual in an acting capacity can usurp the powers of an independent institution as held in the case of **June Mawia Munyao v Secretary County Public Service Board Kitui & 3 Others [2019] eKLR**. The Claimant also cited the case of **Haron Muma Nyamache v Kisii County Government & Another [2019] eKLR** and that of **Kisumu County Public Service Board & Another v Samuel Okuro & 7 Others [2018] eKLR** which considered the functions of the County Public Service Boards as spelt out under Section 59 of the County Governments Act.

4. The objection taken must be reflected against the *locus classicus* of objections which is the **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**. In the celebrated case Law J.A. stated a preliminary objection to be thus:-

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 point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

Further in the same judgment, Sir Charles Newbold, President stated as follows:-

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

5. In this case the objection raised is to the effect that Section 77 of the County Governments Act applies to the dispute and that the Claimant ought to have appealed. From a reading of Section 77(1) it is apparent the Claimant ought to have raised an appeal in the first instance to the Public Service Commission. Contrary to the assertions by the Claimant, the objection taken is not whether this Court has the jurisdiction to deal with the appeals from the decisions of the Public Service Commission. The Claimant is challenging the exercise of disciplinary control against him and whether it was from the Acting County Secretary or the County Public Service, such a decision should first be challenged before the Public Service Commission which has the mandate to determine the matter before the Claimant can approach the Court for relief. In the final analysis the preliminary objection is allowed and the suit is struck out albeit with no order as to costs.

It is so ordered.

**Dated and delivered at Nyeri this 21<sup>st</sup> day of July 2020**

**Nzioki wa Makau**

**JUDGE**