



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 9 OF 2020

SUSAN WANJIRU MWAI & 65 OTHERS.....CLAIMANTS

VERSUS

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

CHAIRMAN COUNTY PUBLIC SERVICE BOARD.....2<sup>ND</sup> RESPONDENT

SECRETARY COUNTY GOVERNMENT OF KIRINYAGA.....3<sup>RD</sup> RESPONDENT

RULING

1. Before me is the 2<sup>nd</sup> Respondent's preliminary objection dated 14<sup>th</sup> July 2020. It states that the Claimants' Application dated 17<sup>th</sup> June 2020 is fatally defective, premature and misconceived as it violates Article 234(2)(i) of the Constitution of Kenya 2010 and Section 77(1) of the County Governments Act 2012 as the Claimants herein having been dissatisfied with the decision made by the County Public Service Board did not appeal to the Public Service Commission against that decision before instituting this suit. In submissions filed in support of the preliminary objection, the 2<sup>nd</sup> Respondent submitted that the issues for determination were whether the Claimants having been dissatisfied with the decision made by the County Public Service Board appealed to the Public Service Commission against the decision in the first instance before instituting the suit herein; and secondly, whether this Honourable Court should strike out this suit *ab initio*. The 2<sup>nd</sup> Respondent submitted that the objection was founded on Article 233 and 234(2)(1) of the Constitution of Kenya 2010 and Section 77(1) of the County Governments Act 2012. It submitted that under Rule 7 of the Public Commission (County Government Public Services Appeals Procedures) Regulations 2016, a person dissatisfied with the decision of the County Public Service Board in its discharge of a human resource function may appeal to the PSC against that decision. The 2<sup>nd</sup> Respondent submitted that under Section 87(2) of the Public Service Commission Act, 2017 it is expressly provided that

*87. (2) 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.*

The 2<sup>nd</sup> Respondent relied on the cases of **James Akelerio alias Muguu & Another v Moses Kasaine Lenolkilal & 3 Others [2014] eKLR** and **James Tinai Murete & Others v County Government of Kajiado & Another; Nailantei Supeiyo & 19 Others (Interested Parties) [2015] eKLR** and submitted that the suit before me should not be entertained because the disciplinary process before the public body exercising quasi-judicial function should be left alone to complete the process after which the offended party can challenge the decision by judicial review. The 2<sup>nd</sup> Respondents also cited the case of **Secretary County Public Service Board & Another v Hulbhai Gedi Abdille [2016] eKLR** and submitted that where there exists a sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. The 2<sup>nd</sup> Respondent thus urged the dismissal of the application with costs.

2. The Claimants are opposed to the preliminary objection and assert that it is worth noting that they were not subjected to any decision of the County Public Service Board that they were dissatisfied with to warrant an appeal to the Public Service Commission against that decision. The Claimants submitted that they were as a matter of fact satisfied by the decision of the County Government to reinstate them to work and that the Claimants seek for the reinforcement of the employment contract in regards to their unpaid remuneration as of March 2019, a redress for the violation of their rights which is well within the jurisdiction of the Court. The Claimants relied on the case of **Seven Seas Technologies Limited v Eric Chege [2014] eKLR** which cited the case of **Owners of the Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd [1989] KLR 1** where it was held that jurisdiction is everything, without it a court has no power to make one more step and where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. The Claimants submitted regarding Section 77(1) of the County Governments Act that the section is not couched in mandatory terms and that a person may appeal. The Claimants submitted that the word 'may' is permissive and not mandatory and that the 2<sup>nd</sup> Respondent's reliance on this Section as a limiting clause against seeking legal redress was misconceived and misplaced. The Claimants submitted that the Court had competent jurisdiction to hear and determine the claim as filed. The Claimants submitted that Article 27(4) of the Constitution of Kenya 2010 explicitly forbids any form of discrimination and the Court should forbid any form of discrimination based on any unfounded grounds. The Claimants submit the same condemnation should be visited upon anyone who is found in breach of Sections 25(1) & (2) of the Employment Act and Article 41 of the Constitution of Kenya. The Claimants submitted that the Court is clothed with exclusive jurisdiction to hear and determine all disputes in accordance with Article 162(2) of the Constitution as stated in the case of **Patrick Kariithi Wahome & 114 Others v County Government of Laikipia & Another; Transitional Authority & Another (Interested Parties) [2020] eKLR** where the Court held that

*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.*

The Claimants submitted that they elected to institute the matter before Court because there is a violation of the human rights where the Respondents failed to remit the salaries of the Claimants who are still working and rendering service to the Respondents. The Claimants assert that they expect nothing short of remuneration after performing their civic duties. The Claimants assert that he who comes to equity must come with clean hands and he who seeks equity must also do equity. They argue that the Respondent argues that the Claimants should have appealed the decision yet they themselves moved Court in Nairobi ELRC No. 17 of 2019 seeking temporary injunction against the intention to strike. The Claimants argue that now that they are the ones who have come to Court seeking redress the Respondents want this suit struck out yet having taken the same initiative instituted a similar suit and got relief. The Claimants cited the case of **Patrick Waweru Mwangi & Another v Housing Finance Co. of Kenya Ltd [2013] eKLR** on injunctive equitable remedy. The Claimants submit that the Respondents violated various Articles of the Constitution and have in a great way failed to fulfil their Constitutional duties as state organs. The Claimants thus urged the Court to dismiss the preliminary objection with costs to the Claimants.

3. The preliminary objection is founded on the requirements of the Constitution and the law contained in the County Governments Act 2012 and the Public Service Commission Act. The objection is to the effect that this Court lacks jurisdiction as the Claimants have approached this Court prematurely since there is prescribed in law a mechanism to resolve the dispute before approaching the Court. The argument is that the suit offends the exhaustion doctrine. In opposition, the Claimants argue that their suit is not misplaced as their suit is on account of the action taken by the Respondents in reinstating them to work. The Claimants assert that they were not subjected to any decision of the County Public Service Board which they could be dissatisfied with to warrant an appeal to the Public Service Commission against that decision. From the material before the Court, it is clear that there was action taken by the 2<sup>nd</sup> Respondent in respect to the employment of the Claimants. They aver in their claim that the Respondent has declined to pay their salaries thus subjecting to untold suffering. In my considered view, the Claimants quite clearly ought to have preferred an appeal to the Public Service Commission against the decision as contemplated in the law before approaching this Court for redress. The provisions of Section 77 of the County Governments Act and Section 87(2) of the Public Service Commission Act read in conjunction with Article 234(2)(i) of the Constitution place the present suit out of the jurisdiction of this Court at present as the Claimants ought to have appealed the decision before they filed this suit. As stated in the *locus classicus* on jurisdiction, **Owners of the Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd (supra)** where it was stated that jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Further, it has been repeatedly held that where there was an alternative forum provided in law the party who is offended is to seek redress in accordance with the statutory provision and not rush to court. In this case there being the forum prescribed by Section 77 of the County Governments Act and Section 87(2) of the Public Service Commission Act as well as Article 234(2)(i) of the Constitution the dispute before this Court is plainly prematurely before and is an abuse of the Court process. The inevitable outcome is that the Claimants suit being premature is struck out with no order as to costs.

It is so ordered.

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

**Nzioki wa Makau**

**JUDGE**