



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 37 OF 2018

(Before Hon. Justice Mathews N. Nduma)

HARON MUMA NYAMACHE.....PETITIONER

VERSUS

KISII COUNTY GOVERNMENT.....1ST RESPONDENT

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

J U D G M E N T

1. In the present petition, a preliminary objection has been raised to wit that the Petition was filed prematurely, in that the Petitioner did not follow the mandatory procedure provided in section 77 of the County Government Act to appeal the decision to the public service commission before approaching court. That on that ground alone, the petition be dismissed with costs.

2. The court was referred to its own decision in **Shem Onyewera v Kisii County Government & Another, ELRC Cause No. 37 of 2018** in which it upheld a preliminary objection based on the petitioner's failure to appeal pursuant to section 77 of the County Government Act as follows:-

“This reasoning applies Mutatis Mutandis to the mandate of the public service commission with regard to exercise of disciplining control and retirement and other removal from service under section 77(2)(c) and (e) of the said Act.

Accordingly, the present case was filed prematurely before the court in violation of a mandatory statutory procedure. The application and the entire suit is dismissed with costs.”

3. However, the preliminary objection is opposed on two grounds mainly:-

That the issue is resjudicata having been determined by Marete J. in a ruling delivered on 11th December, 2017 dismissing the preliminary objection.

Secondly an appeal under section 77(2)(c) and (e) is to be made to the public service commission against a decision of the County Public Service Board which is not the case and allegation in this Petition. Instead the Petitioner has challenged a decision by an individual “acting County Secretary & Head of Public Service” and not a decision of County Public Service Board. It is submitted by the Petitioner therefore, section 77(2) (c) & (e) is not applicable to the matter. The Petitioner has referred the court to a notice of appeal filed by the Respondent in this matter on 14th February, 2017 against the ruling by Marete J. on the preliminary objection as confirmation that this matter is resjudicata and was taken out of the jurisdiction of the court by the notice of appeal and the intended appeal is still pending hearing and determination at the court of appeal.

4. The court has considered the above said submissions and finds that the preliminary objection lacks merit since the impugned decision is not by the County Public Service Board as contemplated by section 77(2) (c) & (e) of the County Government Act. Secondly, the point was dismissed by Hon. Marete J in his ruling delivered on 11th December, 2017 and is resjudicata.

Merits of the Petition

5. The Petitioner was employed by the County Public Service Board of Kisii by a letter dated 23rd January, 2014 in the capacity of Assistant Director Corporate Services and Stake Holder Management effective 23rd January, 2014. The Petitioner resigned from the Teachers, Service Commission (TSC) to take up this position. By a letter dated 21st march, 2016 the Petitioner was deployed as Acting in Charge of Government Offices.

6. By a letter dated 15th September, 2017 the “Acting County Secretary & Head of Public Service” wrote to the Petitioner releasing the Petitioner to the Teachers Service Commission. TSC wrote back on 6th October, 2017 stating that the Petitioner could not be taken back by TSC since he had resigned his position and was employed by the County Government of Kisii. In short, the Petitioner lost his job at the County and could not go back to his previous employer TSC.

7. This is the genesis of this suit which is based on the following grounds:-

(i) Position of “Acting County Secretary & Head of Public Service” is nonexistent and that the action by the purported person was a nullity.

(ii) The Petitioner was an employee of the County Public Service Board and only the Secretary to the County Public Service Board and not Secretary to the County Government & Head of Public Service could communicate decision of the Board to the Petitioner. Accordingly, the decision to terminate services of the Petitioner was not by the County Public Service Board and was a nullity. For this proposition, we were referred to the decision of this court in **Kisumu ELRC Petition No. 5 of 2018 Samwel Okuro & 7 others v Dr. olang’o Ongundi**, the acting County Secretary Kisumu County where the court rendered itself thus:-

“(20) whereas the County Secretary is the head of Public Service and Secretary of the County Executive Committee he has no power to communicate on behalf of the County Public service Board. The Board has its own Secretary appointed in terms of section 58(1) of the Act.”

8. Furthermore, section 59 (1)(c) of the County Government Act provided that the functions of the County Public Service Board shall be on behalf of the County Government to:-

“(c) exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under this part.”

9. It was submitted by the Petitioner that it is not anticipated by section 59(1)(c) that an individual in an acting capacity on behalf of the County Government (the executive) can usurp the powers of an independent institution, namely the County Public Service Board.

10. That following the decision in **Republic v National Irrigation Board & 2 others Ex-parte Danson Mute Mugo [2016] eKLR**, an order of certiorari ought to issue to quash the illegal conduct by a public functionary by stating –

“...only an order of certiorari can quash an order already made if the court is satisfied that the same was done in excess of jurisdiction or in abuse of the rules of natural justice or for any other valid reasons – Kenya National Examination Council v Republic Exparte Geoffrey Gathenji & others 1997 eKLR”

11. The Petitioner states that the decision by purported Acting Secretary of the Public Service was issued in excess of authority and without granting the Petitioner opportunity to be heard in violation of the rules of natural justice. That the same is a nullity ab initio and the court should issue an order of certiorari to quash the decision.

Response

12. Replying Affidavit to the Petition and Notice of Motion Application was filed by Mr. Robert Ombasa, Acting County Secretary and head of Public Service who deposes as follows inter alia:-

That employment of the petitioner was pursuant to a request of leave of absence from TSC in a letter dated 4th June, 2013.

That the Petitioner only held the position of Assistant Director, Administration, Cooperate Services and Stake holder Management and not Acting Deputy Director, Administration, in charge of Government Offices as alleged by himself.

13. It is submitted that the decision to terminate the Petitioner’s employment was a decision of the County Public Service Board even though there is no evidence presented by he Respondents to show participation of the County Public Service Board in the said termination.

14. Respondent further submits that a person appointed in an acting position is a competent officer in terms of section 2 of the County Governments Act which provides –

“Any person appointed by the County Government and holding or acting in any County Public Office whether paid, unpaid or on contractual or permanent terms but does not include a person engaged on a part time basis in a County Public body paid at an hourly of daily rate.”

Furthermore, in terms of section 64 thereof, a person may not be appointed in an acting position if the person has not satisfied all the prescribed qualifications for holding that public office. Respondents submit that no allegations have been made to the effect that the Acting Secretary was not qualified to hold the position. He was legally in office and that the Petitioner having been seconded to the County Government by TSC; in terms of section 73(2) the Acting County Secretary was within his powers to return him back to his previous employer.

15. Respondents submit that in the same manner the appointment of the Petitioner was by the County Secretary by the letter dated 23rd

January, 2014, it was also in order for the County Secretary to communicate the release to TSC of the Petitioner.

16. It is also submitted that the Petitioner has not provided any evidence that he had resigned from TSC. He was seconded to the County Government and internal memo dated 12th June, 2014 refers to his secondment and not appointment. After all, the Petitioner wrote a letter dated 5th October, 2017 to TSC requesting for terms and conditions of his release.

17. It is therefore submitted for Respondents that the Petitioner was seconded to the Respondents and was lawfully released back. That the Petition be dismissed with costs.

Determination

18. The court has carefully considered the competing arguments on facts and Law applicable and specifically finds that pursuant to the appointment of the petitioner by the County Government of Kisii, he had forfeited his position at TSC as evidenced by a letter written to that effect by Mr. P. M. Kiandiko for the Chief Executive of TSC on 6th October, 2017 to that effect. Therefore, termination of employment of the Petitioner at the County Government left him with no option to return to the TSC notwithstanding earlier letter by the same TSC Officer to the Petitioner dated 4th February, 2014 releasing the Petitioner from TSC without pay.

19. The court also makes a finding of fact that on 21st March 2016, the Petitioner was deployed to the position of Ag. Deputy Director, Administration, in charge of Government Officers by a letter of the same dated signed by Mr. Johnstone O. Ndege County Secretary at the time and Chief Officer Administration, Corporate Services and Stake Holder Management was notified of that deployment. There is no evidence that the Chief officer rejected the deployment.

20. The letter by Mr. Robert Ombasa, releasing the Petitioner back to TSC dated 5th September, 2017 was done after TSC had on 6th October 2017 clarified that the Petitioner could no longer return to TSC upon being employed by the Kisii County Government. The letter by the Acting Secretary was not therefore a release to TSC but a termination on the grounds that –

“Your services are no longer needed by the Kisii Government”

There is absolutely no evidence before court to show that the provision of section 59(1)© of the County Government Act were invoked to allow the County Public Service Board on behalf of the County Government to exercise disciplinary control over and/or for any reason remove the Petitioner from his substantive and acting capacity in the County Government.

21. The Ag. County Public Secretary acted in excess of his authority and violated the rules of natural justice in purporting to remove the Petitioner from the positions he held substantively and in acting capacity by the letter dated 15th September, 2017. The action by the Ag. County Secretary and Head of County Public Service was therefore unlawful, null and void.

22. Accordingly, the court issues an order of certiorari to remove into this court and to quash the decision in the letter 15th September, 2017. The Petitioner to remain in the substantive and acting position held by him by virtue of his appointment to the County Government of Kisii. The 1st and 2nd Respondents’ to ensure that the orders of the court are fully implemented. The 1st Respondent to pay costs of the suit.

Judgment Dated, Signed and delivered this 24th day of January, 2019

Mathews N. Nduma

Judge

Appearances

Ms. Nyamurongi Co. Advocates for Petitioner

Anne Babu & Co. Advocates for the Respondent

Chrispo – Court Clerk