



**Kenya County Government Workers Union v Nyeri County Government & another
(Constitutional Petition 4 of 2018) [2019] KEELRC 2619 (KLR) (12 March 2019) (Judgment)**

Neutral citation: [2019] KEELRC 2619 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

CONSTITUTIONAL PETITION 4 OF 2018

NZIOKI WA MAKAU, J

MARCH 12, 2019

**IN THE MATTER OF: BREACH OF FUNDAMENTAL RIGHTS AND
FREEDOMS ESPECIALLY ARTICLE 1(3)(B), 1(4)(B), 2, 3, 10, 19, 20, 21, 22(2)
(D), 23, 27, 41, 47, 232, 235 & 236 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: THE SECTION 57, 59, 63(1)
& 65 OF THE COUNTY GOVERNMENTS ACT**

AND

IN THE MATTER OF: SECTION 10(5) OF THE EMPLOYMENT ACT, 2007

AND

**IN THE MATTER OF: SECTION 3, 4, 5, & 7 OF THE FAIR ADMINISTRATIVE
ACTIONS ACT 2015 AND OTHER PROVISIONS THEREOF**

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION
OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)
HIGH COURT PRACTICE AND PROCEDURE RULES 2013 SECTION 4**

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION PETITIONER

AND

NYERI COUNTY GOVERNMENT 1ST RESPONDENT

NYERI COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT



JUDGMENT

1. The Petitioner seeks through the petition dated 14th March 2018 for relief against the harmonisation and grading of the salary scales of the members of the Petitioner from salary scales 1-18 to Job Groups 'A' to 'N'. The gravamen of their displeasure is the fact that the Respondents had embarked on the harmonisation of the salary grades in the civil service for former employees of the local authorities who are members of the Petitioner without involving the Petitioner and that the 2nd Respondent had altered the salary structure of these employees to their detriment without involving them. The Petitioner asserts that the letter and spirit of the CBA is being abridged by the Respondents who have advertised what appears to be senior positions but whose effect is a pay cut should the employees apply and succeed in the interviews. The Petitioner argues that the impugned harmonisation and grading of the employees of Respondent was done without the participation of their union representatives in violation of the law. The Petitioner avers that its members have been receiving allowances which are less than what they are supposed to be paid as per the CBA and on enquiry they were told that the amount is as per the circular from the Salaries and Remuneration Commission (SRC) to which the 1st Respondent states it is bound by. The Petitioner asserts that the Respondents are hell bent on implementing these illegal policies from SRC which has ensured that the employees and members of the former local authorities are placed in job groups to which they earn maximum salary and will thus never get a salary increment when it falls due as per the CBA.
2. The Respondents on their part assert that the notable difference between the 2 scales is that the defunct local authority scheme and the mainstream civil service structure scheme of service is that in the latter there is room for career progression for deserving officers which was lacking in the former. It is asserted that in the defunct local authorities the salaries for the employees were based on the existing collective bargaining agreement while in the mainstream civil service it is based on a scheme of service. The Respondents assert that in effecting the harmonisation, the 2nd Respondent took into account the salaries that the employees were earning as well as the qualifications possessed by the employees to place them in the commensurate job group in the mainstream civil service structure scheme of service and that additionally, the 2nd Respondent took into account the guidelines issued by the Salaries and Remuneration Commission to ensure the employees of the defunct local authorities would do not be negatively affected in their remuneration in the harmonisation process. The Respondents asserted that there was no exhibition of any complaints by the Claimant's members demonstrating objection to the harmonisation process.
3. The Petition was canvassed by way of written submissions and the Petitioner submitted that it has locus standi and cited the case of Cereal Growers Association & Hugo Wood v County Government of Narok & 11 Others [2014] Eklr where Onyango J. held that the provisions of Article 22(2) as read together with Article 258(2) of *the Constitution* establishes who can institute court proceedings for enforcement of *the Constitution*. The Petitioner submitted that procedural fairness is a constitutional imperative in administrative action and cited the case of Republic v National Police Service Exparte Daniel Chacha Chacha [2016] eKLR. The Petitioner submitted that it was never consulted in the variation of salary. Reliance was placed on the case of Maxwell Miyawa & 7 Others v Judicial Service Commission [2017] eKLR where Radido J. opined that a unilateral variation of an employment contract without consent of the employee would amount to breach of contract or repudiation. The Petitioner argued that public participation is key in every decision making and called to aid the South African decision by Sachs J. in Minister of Health and Another v New Clicks South Africa (Pty) Ltd



and Others (CCT 59/2004) [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) (30 September 2005) where he held that

The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.

The Petitioner thus urged the court to find that the harmonisation of salary, grade of unionisable members to be unconstitutional and an order of certiorari do issue quashing all the proceedings to implement the proposed salary scales.

4. The 1st Respondent submitted that the provisions of Article 47 are to the effect that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Republic v National Police Service Exparte Daniel Chacha Chacha (supra) was cited for the argument that procedural action goes further than the traditional meaning of the duty to afford one an opportunity of being heard and that the tribunal or authority entrusted with the mandate of making the decision must act fairly. It was argued that the definition of procedural fairness was flexible and entirely dependent on context. The Respondents assert that the Petitioner cannot claim it was not given an opportunity to be heard as in the process of harmonisation of the job grades there have been talks between the parties as evidenced by correspondence attached to the Petition. The Respondents submit that the harmonisation will not prejudice the members of the Petitioner. The Respondents submitted that the Petitioner should have appealed the decision in terms of Section 77(1) of the County Governments Act to challenge the decision and not file suit. The provisions of Section 77(2)(a) and (b) of the County Governments Act were cited and it was submitted that the Petitioner had thus failed to follow the law. The Respondents cited the case of Secretary, County Public Service Board v Hulbhai Gedi Abdille [2017] eKLR where the Court of Appeal held that

Time and again it has been said that where there exists other 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. Such party ought to seek redress under the other regime.

The Respondent relied further on the cases of James Tinai Murete & Others v County Government of Kajiado & 22 Others [2015] eKLR and Wilson Mutegi Nyaga & Others v The County Public Service Board, Kitui County & 2 Others [2016] eKLR and submitted that the Petitioner had initiated these proceedings in utter disregard for the procedure set out in the County Government Act. The Respondents thus urged the court to disallow the Petition.

5. The principle of procedural fairness is fluid. In the case cited by both parties being the case of Republic v National Police Service Exparte Daniel Chacha Chacha (supra) Odunga J. citing Michael Fordham's Judicial Review Handbook 4th Edition at page 1007 held that procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case"
6. The Petitioner was in communication with the 1st Respondent regarding the harmonisation process. In view of the foregoing treatise by Michael Fordham, there is some element of procedural fairness though the 1st Respondent should have done better in terms of engagement of the Petitioner. Be that



as it may, the matter falls on the salient aspects of Section 77 of the County Governments Act. Section 77(2)(a) and (b) provide as follows:-

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- (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—
 - (a) recruitment, selection, appointment and qualifications attached to any office;
 - (b) remuneration and terms and conditions of service;
7. This court would be falling into error if it permitted the Petition as the decision of the Court of Appeal per Makhandia, Ouko, M’Inoti JJA held that where there exists other 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. In this case, the appeal to the Public Service Commission would have been the appropriate and legal recourse available. The Petition is only fit for dismissal with costs as I hereby do.

It is so ordered.

DATED AND DELIVERED AT NYERI THIS 12TH DAY OF MARCH 2019

NZIOKI WA MAKAU

JUDGE

I certify that this is a true copy of the Original

DEPUTY REGISTRAR

