



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO. 5 OF 2019

THURANIRA SALESIO MUTUMA.....PETITIONER

VERSUS

COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

GOVERNOR MERU COUNTY.....2ND RESPONDENT

COUNTY SECRETARY MERU COUNTY.....3RD RESPONDENT

RULING

1. The matter was scheduled for *inter partes* hearing of the Notice of Motion application dated and filed on 8th May 2019 by the Petitioner. On the date of the hearing of the motion, a preliminary objection was filed by the 1st, 2nd and 3rd Respondents. The preliminary objection was to the effect that the court lacks jurisdiction to entertain the Petition by virtue of Section 77 of the County Governments Act, 2012 and that the Petition was fatally defective for misjoinder and non-joinder. When the matter was called and after resolving the order of proceedings, the court directed that the preliminary objection would be dealt with first at the jurisdiction of the court was challenged and that the issue of jurisdiction goes to the root.

2. Mr. Muriuki argued the preliminary objection dated 17th May 2019. He submitted that was 2 pronged and that first and foremost, the Respondents were of the view that the Court lacks jurisdiction to entertain the matter which is mutated into a Petition. He stated that by way of background, the 1st Respondent had introduced service contracts to be executed by casual workers and that these contracts had been produced by both the Petitioner and the Respondents. He submitted that the Petitioner was seemingly aggrieved by the decision of the County Public Service Board and that the provision of Section 77 of County Government Act is that the aggrieved party should appeal to the Public Service Commission (PSC). He submitted that an appeal ought to have been forwarded to PSC. He relied on the authority of **Secretary, Wajir County Public Service Board v Hulbal Gedi Abdille [2017] eKLR** where the Court of Appeal observed a party cannot bypass the provision of Section 77 and come to court by way Petition. He associated himself with the jurisprudence in the decision by the Court of Appeal and argued that the Petitioner should have just appealed before coming to court. He cited the case of **James Tinai Murete & Others v County Government of Kajiado & 22 Others [2015] eKLR** where the court stated that *the petitioners were obliged to approach the Public Service Commission if dissatisfied with the decision of the respondents. The petitioners were dissatisfied with the decision of the respondents with regard to recruitment to various positions within the county and they cannot argue, in the face of the clear provisions of section 77 of the County Government Act, that they can bypass the legislation and come to this Court by way of a constitutional provision.* He submitted that he was in agreement with the court that a party cannot bypass the statute. He asserts that the court lacks jurisdiction because a party ought to first exhaust the mechanism set under the statute. On the second limb, he submitted that the Petition is flawed due to the joinder and misjoinder. He stated that the Petition is brought by a person called Selesio Thurania Mutuma who is not an employee of the Respondents and that he has come to court and purports to allegedly seek the orders on behalf of 291 workers. He submitted that there is no indication they gave him authority and that they ought to have been written authority prior to filing and that any authority that is to follow is therefore untenable. He submitted that the Petitioner has no nexus or stake with Respondents. He relied on the case of **Kenya County Government Workers Union v County Government of Tana River & Another [2018] eKLR**. He submitted that the facts in this case are on all fours with the present Petition. He cited the decision by the court which stated that *it was incumbent upon the Claimant to name the Grievants, in the Statement of Claim. It is not sufficient to allude to 36 Employees, without giving specific names in the Statement of Claim. The verifying Affidavits on record are sworn by only 2 of the Employees alleged to be the Grievants. The Affidavits were not filed with the Statement of Claim, but way after the Statement of Claim. The 2 deponents do not allege to speak for other Grievants. The Court has not been shown who are the Grievants, in the Pleadings filed by the Claimant.*

He thus prayed that the court upholds the Preliminary objection and strike out the Petition with costs.

3. Learned counsel for the Petitioner Mr. Ndichu submitted that firstly he was in agreement that Section 77 of the County Governments Act does provide that an appeal should have been preferred to Public Service Commission. He asserts that Section 77 of the Act is not couched in

mandatory terms and that the Act speaks of the word 'may'. He submitted that reading of the Act needs no rehashing. He argued that an aggrieved person can move the PSC or come to this court. He relied on the case of **Abdikadir Suleiman v County Government of Isiolo [2015] eKLR** where Mr. Muriuki for successfully managed to stop a similar objection. He submitted that the *ratio decidendi* was that Section 77 was not mandatory and that a party could chose a remedy better suited to the matter. He relied on the determination of the learned Judge where he stated thus:-

In disciplinary matters, section 76 of the County Governments Act, 2012 is elaborate that punishment contrary to the Constitution cannot be imposed against a public officer. In particular, the section provides that the rules of natural justice must be observed, and the punishment cannot be contrary to provisions of the Constitution and Acts of Parliament. 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.

He submitted that the court held that PSC did not have jurisdiction on matters touching on Constitutional relief and that in this Petition, the Petitioner is seeking the declaration that right to fair practices under Article 41 of the Constitution have been infringed. He argued that if we take the approach suggested by Respondents we will be going back to a time before 2010 and he submitted that the Court is not shown why it should depart from this decision by Ongaya J. On the issue of misjoinder, he submitted that is to be answered by the further affidavit which shows the authority to act on behalf of the 291 casual workers. He stated that the Constitution allows the Petitioner to file the Petition on his own or on behalf of a class of persons per Article 20. He submitted that this suit cannot be found to have misjoinder or non-joinder and further that the preliminary objection is meant to obfuscate the real issues. He urged the court to dismiss the preliminary objection and determine the real issues.

4. In a brief reprise Mr. Muriuki submitted that Section 77 is couched in mandatory terms and that the Court of Appeal found that where there is a procedure prescribed in statute that procedure should be strictly followed. He stated that the Court of Appeal authority is binding while the decision cited by learned Counsel for the Petitioner is merely persuasive as it is from another High Court. He submitted that the genesis of the claim is similar to that in the Court of Appeal decision where it was alleged there was Constitutional violation. He submitted that the Court held that if a claim is mutated that does not change the character of the claim. He submitted that the same authority stated how Section 77 should operate and that the Court came to the conclusion that Section 77 should be sacrosanctly adhered to. He submitted that the authority to sue cannot be given after the suit is filed. He relied on the authority of **Kenya County Government Workers Union v County Government of Tana River & Another** (*supra*) where a person tried to introduce authority after filing. He argued that if there is no authority and a party files suit in absence of authority, that should be disregarded. He stated that nowhere is it stated the Petition was made for the 291 and because the Petitioner did not mention that the Petition was commenced on their behalf, bereft of this authority it is to be struck out. He opined that is the only fate it should suffer.

5. The preliminary objection is to the effect that the court lacks jurisdiction to entertain the Petition by virtue of Section 77 of the County Governments Act, 2012 and that the Petition is fatally defective for misjoinder and non-joinder. To buttress this point, counsel for the Respondents cited the law and a few authorities. Section 77 of the County Governments Act materially provides as follows:-

77. (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.

(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;

(c) disciplinary control;

(d) national values and principles of governance, under Article 10, and values and principles of public service under Article 232 of the Constitution;

(e) retirement and other removal from service;

(f) pension benefits, gratuity and any other terminal benefits; or

(g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.

(3) An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the

Commission may entertain an appeal later if, in the opinion of the Commission, the circumstances warrant it.

(4) *The Commission shall not entertain an appeal more than once in respect to the same decision.*

..... (underline for emphasis mine)

The law is clear in as far as appeals to PSC lie. These are discretionary. In this case, the Petitioner has moved the court instead of moving the PSC and that is within the remit of the law as there are notable Constitutional imperatives that only this Court and the Superior Courts (Environment and Land Court, High Court, Court of Appeal and Supreme Court) can enforce.

In the case of **Abdikadir Suleiman v County Government of Isiolo & Another** (*supra*), Ongaya J. while determining whether Section 77 ousts the jurisdiction of this court in matters such as the one before me held as follows:-

Article 234(2) (i) of the Constitution provides that the Public Service Commission is vested with the function and power to hear and determine appeals in respect of county governments' public service. Article 262 defines "public service" to mean the collectivity of all individuals, other than state officers, performing a function within a state organ. Accordingly, and firstly, the court holds that the power of the Commission to hear and determine appeals in respect of county governments' public service constitutionally applies only to public officers, and not state officers, in the service of the county governments or any other state organ. Secondly, the court holds that section 77 of the County Governments Act, 2012 amplifies and brings into operation Article 234(2) (i) of the Constitution.

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. The court has guided itself that on appeal the appellate authority applies the same substantive law and facts as applied by the primary authority that made the decision appealed against and generally considers facts as they were presented before the primary authority so that an appellate authority, in absence of anything else, may only set aside the decision appealed against or substitute the decision with any of the remedies that the primary authority was empowered to make. In other words, the appeal process deals with the merits or substance of the case and not procedural or legal propriety of the case.

In disciplinary matters, section 76 of the County Governments Act, 2012 is elaborate that punishment contrary to the Constitution cannot be imposed against a public officer. In particular the section provides that the rules of natural justice must be observed, and the punishment cannot be contrary to provisions of the Constitution and Acts of Parliament. 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.

It is amply clear from the reading of the decision by Ongaya J. that in certain instances where there is a reference for relief to this court, the Court would have to weigh whether the approach to court is legitimate and not an effort to circumvent the primary dispute resolution mechanism placed in the Public Service Commission vide Section 77 of the County Governments Act. In this case, it is my holding that the articulation of violations of the Constitution alleged by the Petitioner place the Petition within the purview of this court's jurisdiction but this should not be construed as *carte blanche* for litigants who like short-circuiting the dispute resolution process established in statute. This disposes of the first limb of the objection.

6. The second limb of the objection is that there is misjoinder and non-joinder of parties. The Petitioner is accused of preferring the Petition in the interest of the 291 workers of the 1st Respondent without their authority. In the case relied on by the Respondents being the case of **Kenya County Government Workers Union v County Government of Tana River & Another** (*supra*) Rika J. held as follows:-

The Court has also encountered difficulty in understanding the Claim in full, on the ground that Employees, on whose behalf the Claim is made, have not been named in the Statement of Claim, or on the defective Affidavits on record. It was incumbent upon the Claimant to name the Grievants, in the Statement of Claim. It is not sufficient to allude to 36 Employees, without giving specific names in the Statement of Claim. The verifying Affidavits on record are sworn by only 2 of the Employees alleged to be the Grievants. The Affidavits were not filed with the Statement of Claim, but way after the Statement of Claim. The 2 deponents do not allege to speak for other Grievants. The Court has not been shown who are the Grievants, in the Pleadings filed by the Claimant.

7. Just like my brother Rika J., I have a difficulty in understanding on whose behalf the suit is brought. The defect in the affidavit in not enclosing the authority of the people for whom the Petitioner is articulating the matter places the Petition in precarious position. One cannot purport to obtain authority later for an act he ought to have obtained authority prior to the action. In the instant case the absence of authority is that the Petition is fundamentally flawed for non-joinder. In the final result the Petition is struck out with costs to the Respondents.

It is so ordered.

Dated delivered at Nyeri this 30th day of May 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar