



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 740 OF 2018

HUSSEIN DAYOW ABDULLAHI.....1ST APPLICANT

AFTIN AHMED ALL.....2ND APPLICANT

ALIKHER HASSAN OSMAN.....3RD APPLICANT

NAIMA MOHAMED SUGAL.....4TH APPLICANT

ABDIAZIZ MOHAMED OMAR.....5TH APPLICANT

- VERSUS -

COUNTY GOVERNMENT OF MANDERA.....1ST RESPONDENT

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

(Before Hon. Justice Byram Ongaya on Friday 24th May, 2019)

RULING

The claimants filed the present suit on 18.05.2018 through Kamotho Njomo & Company Advocates. The respondents filed on 04.06.2018 a notice of preliminary objection through Issa & Company Advocates upon the ground that the Court lacks jurisdiction to hear the suit under section 77 of the County Governments Act as affirmed by the Court of Appeal in **The Secretary County Public Service Board, Civil Appeal No. 202 of 2015** (unreported). By consent of the parties on 02.07.2018 the preliminary objection was determined with orders:

- 1) The claimants/applicants to file an appeal to the Public Service Commission of Kenya within 7 days from today.
- 2) The proceedings herein are stayed to await the Commission's decision on the appeal.
- 3) The claimants being the applicants to remain in employment but on suspension without pay pending determination of the appeal to the Commission.
- 4) Mention on 11.10.2018, 9.00am to report on the outcome or progress on the appeal and further orders.

The appeal to the Commission was filed and determined as reported in the Court on 13.12.2018 and the Court ordered thus, **"I have considered the submissions made and order that the suit is determined in view of the decision by the Public Service Commission PSC/CAP/AB/1(a) dated 05.12.2018 with orders parties to compromise on the issue of costs failing the Court to be moved accordingly."**

On 09.04.2019 the claimants filed an urgent notice of motion under section 89 of the Public Service Commission Act, Section 51(3) of the Employment Act, 2007, Section 3(1), 12 & 20 of the Employment and Labour Relations Act and Rule 17 (2) of the Employment and Labour relations Court (Procedure) Rules, 2016 and all other enabling provisions of the law. The claimants prayed for orders:

- 1) That the motion herein be certified urgent and be heard ex-parte in the first instance on account of urgency.
- 2) That the Court does issue summons to the county secretary, County Government of Mandera and the secretary, Mandera County Public Service Board to appear in Court on a day to be appointed by the Court to show cause why disciplinary action should not be taken for refusal, failure or neglect to implement the decisions of the Public Service Commission dated 05.12.2018 and the orders of

the Court issued on 13.12.2018.

- 3) That in default of appearance and or in default of compliance with the order of the Court, the Court does issue warrants of arrest against the County Secretary, County Government of Mandera and the secretary, Mandera County Public Service Board.
- 4) That the respondents be barred from addressing the Honourable Court in this matter unless and until they purge themselves of the contempt.
- 5) That the County Secretary, County Government of Mandera and the secretary, Mandera County Public Service Board to be imprisoned for a term of six (6) months and, or, be removed from office.
- 6) That the respondents be compelled to pay damages suffered by the applicants herein.
- 7) That costs of the application to be borne by the respondent.

The applicants' case is that after the Court adopted the Commission's decision on 13.12.2018, the applicants reported on duty on 17.12.2018 but were turned away to await the respondents' decision. Thereafter the respondents have failed to comply with the Commission's decision as adopted by the Court. It was now over 4 months and the respondents had continued in defiance. Thus, it was the applicants' case that the respondents' had no justifiable reason for failing to implement the Commission's decision as adopted by the Court and the prayers made should be granted to ensure that the dignity and authority of the Court is maintained. The application was based on the attached supporting affidavit of Hussein Dayow Abdullahi. The affidavit narrates numerous meetings and correspondence seeking that the respondents implement the Commission's decision reinstating the claimants to employment but the respondents have failed to comply.

The respondents opposed the application by filing on 30.04.2019 the replying affidavit of Anzal Rashid, the County Legal Officer of the 1st Respondent. The respondents' case is as follows:

- a) The applicants filed their respective appeals before the Commission being appeals No. 58, 59 and 60 all of 2018. The appeals came up for hearing on 26.11.2018 and each applicant was given an opportunity to be heard and to adduce sworn evidence but the respondents' advocates were not given an opportunity to cross-examine or test the oral evidence adduced by the applicants. Three representatives of the respondents who were present on 26.11.2018 were not given an opportunity to be heard and no respondent witness was called to give evidence and to oppose the applicants' case before the Commission. It is the respondents' case that the hearing and proceedings before the Commission's committee on 26.11.2018 were procedurally and substantively unfair as Articles 47 and 50 of the Constitution were violated. The respondents further urge that the Commission's committee breached section 13(3) of the Public Service Commission (County Government Public Service Appeal Procedure) Regulations, 2016 providing that the appellants file submissions first and effect service upon respondents within provided time lines, and thereafter, the respondent to have leave to file the submissions – and in the case, the respondents filed their submissions on 04.12.2018 without having seen the applicants' submissions. Further Regulation 4 (c) thereof required the Commission to accord all parties justice and fairness and observe the rules of natural justice in hearing and determining the county public service appeals. Further Regulation 26 thereof had been breached as it provided that every appellant, applicant and respondent shall have a right to be heard in person.
- b) By the letter of 05.12.2018 and email of 11.12.2018 the Commission communicated its decision on appeal by allowing the applicants' appeals.
- c) The respondents propose and intent to file judicial review application before the Court in view of the procedural unfairness in the manner the Commission handled the appeal.
- d) The notice of motion is premature because the right to challenge the Commission's decision has not lapsed.

The Court has considered the submissions made for the parties and their respective positions and makes findings as follows:

- 1) On 13.12.2018 the Court ordered thus, **“I have considered the submissions made and order that the suit is determined in view of the decision by the Public Service Commission PSC/CAP/AB/1(a) dated 05.12.2018 with orders parties to compromise on the issue of costs failing the Court to be moved accordingly.”** The order is clear. It was not that the decision of the Public Service Commission was adopted. It was that in view of the Commission's decision, the suit was determined – because the cause of action thereby became extinct. Thus the applicants were misconceived in urging that there was a court order made that date subject of the present contempt proceedings.
- 2) Section 89 of the Public Service Commission Act 10 of 2017 is clear that any person affected by the decision of the Commission made on appeal like in the instant case may file the decision for enforcement by the Employment and Labour Relations Court provided for in Article 162(2) (a) of the Constitution. The Court returns that it is obvious that the provision has not been complied with in so far as the Commission made a decision to reinstate the applicants. Further the section provides that any person who refuses, fails or neglects to implement the Commission's decisions is liable to disciplinary action in accordance with the applicable laws including removal from office. The applicants have not made submissions on applicable law for removal of the county secretary and for removal of the secretary to the county public service board. The Court considers that it was misconceived that the applicants prayed for an order that they are so removed without the applicants having invoked the relevant law on such removal.
- 3) The respondents submit that they are dissatisfied with the manner the Commission procedurally handled the applicants' appeals. The Court considers that such is a matter forming a new cause of action and the Court will not delve into the merits of that submission.

4) The Court considers the unique circumstances of the case and the emergent laws in the nascent devolved system of government and returns that each party shall bear own costs of the application.

In conclusion the application filed for the claimants on 09.04.2019 and dated 08.04.2019 is hereby dismissed with orders that each party will bear own costs of the application.

Signed, dated and delivered in court at Nairobi this Friday 24th May, 2019.

BYRAM ONGAYA

JUDGE