



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**

**KENYA AT NAIROBI**

**PETITION 53 OF 2018**

**JUNET MOHAMED IBRAHIM.....1<sup>ST</sup> PETITIONER**

**ALI MAALIM AHMED.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF MANDERA....1<sup>ST</sup> RESPONDENT**

**COUNTY SECRETARY,**

**MANDERA COUNTY GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**COUNTY EXECUTIVE FOR HEALTH SERVICES**

**MANDERA COUNTY GOVERNMENT.....3<sup>RD</sup> RESPONDENT**

**MANDERA PUBLIC SERVICE BOARD.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. By a notice of preliminary objection filed on 17<sup>th</sup> September, 2018 the respondent stated that the court lacked jurisdiction to hear the matter because the applicants were required to appeal first to Public Service Commission under Section 77 of the County Government Act. The petition according to the respondent was therefore immature.

2. Mr Isa for the respondent submitted that by a letter dated 5<sup>th</sup> March, 2018 the 1<sup>st</sup> Petitioner was informed of the decision of the Human Resource Audit Task Force to surcharge him for the salary earned from August, 2016 to November, 2017 for being absent from work without permission. The petitioner was asked to file a response within 7 days of receipt of the letter that is to say on or before 12<sup>th</sup> March, 2018. The petitioner did not file any response or objection to the letter within the notice period instead the petitioner filed the current petition and application seeking to challenge that decision.

3. The decision to surcharge the 1<sup>st</sup> petitioner was in exercise of the 2<sup>nd</sup> respondent disciplinary powers under Article 235(2) of the Constitution. The 1<sup>st</sup> petitioner being aggrieved by that decision was required to first lodge an appeal before the Public Service Commission. According to counsel, the Public Service Commission Act provides for elaborate and comprehensive appeal process and section 85 provides for the jurisdiction of the commission in hearing and determining appeals from County Government.

4. On the issue of jurisdiction of the court donated by article 162 (2) of the Constitution, to hear exclusively employment disputes. Counsel submitted that this provision should not be interpreted in a way that is disruptive of the legal framework established under the County Government Act, the Public Service Commission Act and the PSC (County Government Public Service Appeal, Procedure Regulations 2016).

5. Mr Abdirazak for the petitioner submitted that as per the decision in the case of Abdikadir Suleiman Vs County Government of Isiolo & Another [2015] eKLR the fact that the constitution or legislation vests in a person or authority the power to consider or entertain a given dispute or matter as of first instance or on appeal shall not be construed as precluding a court from exercising the relevant jurisdiction in relation to any question whether that person or authority has exercised the powers or functions in accordance with the constitution or any other law.

6. Such provisions do not extinguish or adjourn the court's jurisdiction to hear and determine a dispute about the legality or the manner of the exercise of the constitutional or statutory powers by the relevant public body or authority. Counsel further submitted that section 77 of the County Government Act does not in any way relate to the present matter. Further that the section does not give any opportunity for an aggrieved party a chance to appeal to a court of law where an employee will get a fair hearing.

7. In the case of **James Tinai Murete & Others Vs County Government of Kajiado & 22 Others** relied on by the respondent. Justice Mumbi Ngugi stated that it was not the intention of the legislature to establish a dispute resolution mechanism and then render the same redundant by giving parties the option to choose whether to follow it or not. The learned Judge went further and stated that read as a whole, the provision of section 77 of the County Government Act evinced an intention to have all disputes arising out of appointments by County Service Boards dealt with by the Public Service Commission. There was no option for a party to choose whether or not to file grievances with the commission.

8. This section is the point of contention in this matter before me and I cannot construe it differently. Section 9(2) of the Fair Administrative Action Act provides that the court shall not review an administrative action or decision unless the mechanism including internal mechanism for appeal or review and all remedies available under any other written law are first exhausted. The court however has power in exceptional circumstances to exempt a person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

9. The petitioner was informed of the intention to surcharge him for salaries drawn while absent from work without authority. He was required to respond to the letter communicating the decision within 7 days of receipt. He did not do so. The court does not see any exceptional circumstances demonstrated by the petitioner to warrant exemption from clear provisions of section 77 of the County Government Act.

10. The court therefore upholds the objection and hereby orders the suit herein stayed pending the exhaustion of the internal appeal process provided for under section 77 of the County Government Act.

**Dated at Nairobi this 14<sup>th</sup> day of June, 2019**

**Abuodha J. N.**

**Judge**

**Delivered this 14<sup>th</sup> day of June, 2019**

**Abuodha J. N.**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.