



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

PETITION NO. 2 OF 2019

IN THE MATTER OF ABUSE OF ADMINISTRATION ACTION AND LABOUR RELATIONS CONTRARY TO ARTICLES 41, 47 & 48 OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 20, 21 & 27 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

HUSSEIN GUYO.....PETITIONER

AND

COUNTY GOVERNMENT OF ISIOLO.....1ST RESPONDENT

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

JUDGMENT

1. The Petitioner sued the 1st and 2nd Respondents for unilaterally altering and/or varying his terms of employment from permanent and pensionable to a five year contract without complying with the provisions of Section 4 of the Fair Administrative Action Act. He asserts that he was appointed by the 2nd Respondent as a Ward Administrator on permanent and pensionable terms on 21st February 2014 and based on his academic credentials his request for re-designation was considered by the 2nd Respondent and was by a letter dated 23rd July 2014 redeployed from a Ward Administrator to Human Resource Officer I with effect from 1st August 2014. He averred that on 7th February 2017 he received a letter signed by the 2nd Respondent's Secretary/CEO and dated 22nd December 2016 which called upon him to respond within 21 days to various allegations of gross misconduct with respect to his docket. The Petitioner asserts that he responded to the allegations of gross misconduct vide a letter dated 20th February 2017 but was however on the same date suspended from his duties pending purported investigations for procedural improprieties in the Human Resource Management by the 2nd Respondent through its Secretary/CEO. The Petitioner averred that despite issuing a comprehensive response to clear the air on all allegations levied against him vide his advocate's letter dated 15th June 2017, the 2nd Respondent continued to enforce the illegal suspension which undermined the Petitioner's capacity to support his family. The Petitioner averred that he read malice in the handling of the whole process because the letter calling for explanation was dated 20th December, 2017 but was never delivered to the Petitioner until 7th February 2017 long after the 21 days notice had lapsed. He averred that it was deliberately designed to take effect 21 days after it was written instead of after receipt. The Petitioner asserts that he alongside 2 other employees who had been suspended from employment, filed judicial review proceedings vide Nyeri ELRC No. 400 of 2017 which he asserts is pending determination. The Petitioner averred that in an attempt either to contravene the determination of the above referenced suit or in further breach of the Petitioner's rights to a fair remuneration, the 2nd Respondent through a letter addressed to him dated 9th July 2018 and copied to the Public Service Management and Director Human Resource Management, altered and/or varied the terms of appointment from permanent and pensionable to 5 years contract backdated to 3rd March 2014 thereby breaching Section 4 of the Fair Administrative Actions Act. The Petitioner averred that the 2nd Respondent's move was calculated to frustrate any reliefs he may be seeking from the courts of law as his contract would have expired on 3rd March 2019 and he shall be rendered jobless. The Petitioner averred that variation of the terms of engagement without undergoing due process is a gross violation of his fundamental rights as contemplated under Articles 20, 21, 22, 27(5), 41(1) and 47 of the Constitution as well as Section 4 (2) and (3) of the Fair Administrative Action Act. He asserts that the variation of his terms was illegal, unlawful, arbitrary, oppressive and unreasonable. He prayed that the court declares the unilateral administrative action by the 2nd Respondent altering and/or varying his terms of employment from permanent and pensionable to 5 year contract backdated to 3rd March 2014 as a breach of his fundamental rights as provided under Article 41(1) of the Constitution. He sought the prohibition of the 2nd Respondent from altering and varying his terms of employment without complying with Section 4 of Fair Administrative Action Act, general damages for gross violation of fundamental rights and abuse of administrative process and costs of the

petition.

2. The 2nd Respondent filed a notice of preliminary objection dated 6th May 2019 stating that this honorable court lacks jurisdiction to entertain this matter as the Petitioner ought to have preferred an appeal to the Public Service Commission in line with Section 77(3) of the County Governments Act and Section 87 of the Public Service Commission Act. The 2nd Respondent also contended that the Petition is time barred, incompetent, and an abuse of the court process for being in contravention of Section 77(3) of the County Governments Act and the same ought to be dismissed with costs to the 2nd Respondent. The 2nd Respondent filed a replying affidavit to the petition through its Secretary who averred that the suspension alluded to by the Petitioner was never effected and hence by now it has been rendered time barred. The 2nd Respondent averred that Meru ELRC J.R No. 14 of 2017 was determined on 17th February 2019 whereas the Petition herein is dated 13th February 2019 and was filed on 19th February 2019. The 2nd Respondent asserts that the Petitioner is therefore being untruthful by alleging that J.R No. 14 of 2017 is still pending determination. It was averred that according to the decision in that case the issue of suspension was fully determined and the Petitioner ought not to revisit that issue in this proceedings. The 2nd Respondent further averred that it is mandated to regulate the appointment of persons on contract in line with Section 74 of the County Governments Act, and in furtherance of that mandate section 75 of the County Governments Act tasks the 2nd Respondent with the power to investigate any irregular and/or fraudulent appointment of persons and thereafter take necessary action. The 2nd Respondent averred that in line with the aforesaid mandate conducted a payroll audit report for the period between April 2013 and January 2018 and the report revealed that the Petitioner, amongst other employees, was not eligible for appointment on permanent and pensionable terms due to his age at the time of appointment. The 2nd Respondent averred that the report recommended that a review of the terms of employment be undertaken and that the 2nd Respondent duly acted in accordance with the recommendations made in the report. The 2nd Respondent averred that the Petitioner shall not be rendered jobless at all as alleged in the Petition as he shall be at liberty to renew the 5 years contract as the same is renewable. The 2nd Respondent averred that the Petitioner should only fault and/or challenge the investigations by the 2nd Respondent which revealed that his appointment on permanent and pensionable terms was irregular rather than abusing the court process through unnecessary litigation. The 2nd Respondent asserts that the Petition is an afterthought, lacks merit and it is an abuse of the court process since the Petitioner did not prefer any appeal against the 2nd Respondent's decision to the Public Service Commission in line with the set procedure. The 2nd Respondent sought the dismissal of the Petition with costs to it as the Petitioner is totally undeserving of the orders sought.

3. Parties agreed to have the Petition and the preliminary objection be canvassed by way of written submissions. The Petitioner's written Submissions were to the effect that Article 22 of the Constitution gives every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. It was further submitted that Section 4(2) of the Fair Administrative Action gives every person a right to be provided with written reasons for any administrative action that is taken against him. The Petitioner submits that he was never furnished with any written reasons culminating to the alteration of his terms of employment by the 2nd Respondent and it was impossible for the Petitioner to prefer an appeal under Section 77 of the County Governments Act. The Petitioner submitted that the only recourse lies with this court as mandated under Article 22 of the Constitution to determine whether or not the 2nd Respondent's actions of altering his terms of employment without furnishing him with written reasons amounted to a breach of his fundamental rights as envisaged under Article 41(1) of the Constitution. Relying on the case of **Mohamed Sheria & 2 Others v Simon Kipkorir Sang & 5 Others [2018] eKLR**, the Petitioner submitted that the Petition is properly before this court as it seeks to address denial of the right to fair administrative action under Article 47 of the Constitution. The Petitioner submitted that this denial entailed substantive injustice and that the purported audit report which revealed that his appointment on permanent and pensionable terms was irregular was never revealed to him until when this Petition was filed. He asserted that this was calculated by the 2nd Respondent to ensure that the period of appeal had lapsed. He submitted that Section 77 of the County Governments Act has a time limit of 90 days and there was therefore nothing to appeal against and that this amounts to denial of a fair hearing as well as a deprivation of the right to a fair administrative action under Article 47. The Petitioner submitted that there was no age limit requirement either in his application for the position of a ward administrator or when he was re-designated to a human resource officer and that in his letter of suspension various allegations of gross misconduct were raised, but the issue of age never featured anywhere and that raising the issue of age as a basis of altering the Petitioner's terms of employment which essentially renders him jobless is *mala fide* and an afterthought. He submitted that failing to communicate this ground of age to the Petitioner to enable him to respond appropriately amounts to being deprived of the right to a fair administrative action contrary to Article 47 of the Constitution and the court is empowered to review the said administrative action.

4. The 2nd Respondent's written submissions submitted that jurisdiction is everything and without it a court must down its tools. It submitted that Section 77(1) and (2) of the County Governments Act and Section 87(2) of the Public Service Commission Act are clear on where the jurisdiction to entertain the issues raised in the Petition lies. The Respondent submitted that the Petitioner did not file any response to the preliminary objection and that it was clear that he did not prefer any appeal to the Public Service Commission against the decision of the 2nd Respondent as was expected of him. The 2nd Respondent submitted that it is trite law that where there is a set down dispute resolution mechanism the same ought to be exhausted before parties can pursue litigation in a court of law. The 2nd Respondent submitted that this Petition must therefore fail for being filed in court before the exhaustion of the laid down dispute resolution mechanisms. It relied on the case of **Republic v Secretary, County Public Service Board & Another ex parte Hulbhai Gedi Abdille [2017] eKLR** where the Court held that

the most appropriate recourse for the respondent was to invoke the appellate procedure under the County Governments Act rather than resort to the judicial process in the first instance....

The 2nd Respondent cited the case of **David Baariu Mwirabua & 2 Others v Governor Meru County & Another [2019] eKLR** where the court held that under Section 77 of the Act, the claimants who were aggrieved by the decision of the respondents ought to have appealed to the Public Service Commission as provided for in that section. The 2nd Respondent submitted that Section 77(3) of the County Governments Act provides that an appeal under the Act shall be in writing and made within 90 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. It was submitted that Subsection 1 entails appeals relating to decisions made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any County Public officer. The 2nd Respondent submitted that the above provisions are couched in mandatory terms and sets out the timelines for the appeals and because the Petitioner had failed to prefer any appeal in the prescribed manner or at all it was therefore trite that

the Petitioner has no recourse herein having failed to adhere to the set timelines and dispute resolution mechanisms. On the Petition proper, the 2nd Respondent submitted that its averments in the replying affidavit were uncontroverted as the Petitioner never filed any further affidavit in response to the replying affidavit. The 2nd Respondent submitted that Nyeri ELRC No. 400 of 2017 had been determined and it was therefore clear that the suspension of the Petitioner is now water under the bridge and ought not be an issue for determination herein. It submitted that the Petitioner alleged that the Respondents had acted improperly by varying his terms of employment, but he however never challenged the Payroll Audit Report that was conducted by the 2nd Respondent and he also did not challenge the copy of the National Identity Card annexed as representing his actual age. The 2nd Respondent submitted that it therefore acted within its mandate as required under the 1st Respondent and the decision against the Petitioner was as per the recommendations of the audit report which is process is permitted under the provisions of Section 75 of the County Governments Act. The 2nd Respondent submitted that since the Petitioner did not fault its investigations in the proper manner and forum he cannot seek to challenge the same through this Petition as he cannot allege breach of his Constitutional rights when he is the party at fault for failing to follow the laid out procedures in pursuing his claim. The 2nd Respondent submitted that the Petition is itself therefore unmeritorious and the Petitioner undeserving of the orders sought. The 2nd Respondent urged that given the submissions made above the Petition should be dismissed with costs.

5. The 2nd Respondent's preliminary objection would take precedence as it raises a question on jurisdiction. It is trite law that jurisdiction is everything. In the case of **MV Barbara & Another v MV Joey & Another [2000] eKLR** the decision of Nyarangi JA in the case of **The Owners of the 'Motor Vessel Lilian S' v Caltex Oil (Kenya) Limited [1989] KLR 1** was reiterated. The learned Judge of Appeal eloquently stated that

I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it a Court has no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it once it holds that it is without jurisdiction.

The position in that case holds to date. If a court has no jurisdiction its decision amounts to nothing and it should down its tools in respect of the matter before it once it establishes it has no jurisdiction.

7. The Petition was lodged in court on 19th February 2019. It seeks relief in respect of the re-designation of the Petitioner from permanent and pensionable to 5 year contract. JR No. 14 of 2017 between the parties dealt with the issue of the Petitioner's suspension. That matter is settled and therefore is not open for re-litigation. Where an issue is determined there is finality before the court that makes the pronouncement and the only recourse is to appeal. Regarding his re-designation and the backdating of the re-designation, that is a matter that is new before me and was not litigated upon. *Res judicata* and issue estoppel would apply in such a scenario such as the suspension before me.

8. In the present Petition the Petitioner seeks to have the rights under the provisions of Section 4 of the Fair Administrative Action Act enforced. Section 4 provides as follows:-

4.(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

9. Can an employer seek and obtain a re-designation then backdate it? Was the right to information, the opportunity to be heard and the reasons for the impugned administrative action given? I think that is not possible for the Petitioner's contract of employment to be subject of a reversal in 2018 re-designating him as being on contract from the date of execution of his employment contract. In my view, the decision was contrary to the provisions of Section 4 of the Fair Administrative Actions Act as the Petitioner was not afforded the safeguards against the administrative action taken vide the letter of 9th July 2018. The Petitioner therefore succeeds in as far as the impugned administrative action related to the re-designation is concerned and he is entitled to relief as follows:-

i. The employment contract of the Petitioner is re-designated as being on a 5 year contract effective the date of re-designation, i.e 9th July 2018.

ii. The terms of permanent and pensionable entered into at time of employment to subsist until the date of re-designation being 9th July 2018.

iii. Costs of the Petition be borne by the Respondents.

It is so ordered.

Dated and delivered at Meru this 4th day of October 2019

Nzioki wa Makau

JUDGE

I certify that this is a true

Copy of the original

Deputy Registrar