



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO. 118 OF 2019

IN THE MATTER OF ENFORCEMENT AND INTERPRETATION OF ARTICLES 2(4), 3(1), 234(1), 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF VIOLATION OF ARTICLES 27(1), 41, 48 AND 50 (1) OF THE CONSTITUTION

AND

IN THE MATTER OF THE CONSTITUTIONALITY OF SECTIONS 87 (2), 88(1). (4), (6) AND 89 OF THE PUBLIC SERVICE COMMISSION ACT AND REGULATION 13(4) OF THE PUBLIC SERVICE COMMISSION (COUNTY GOVERNMENT PUBLIC APPEALS PROCEDURES) REGULATIONS 2016

AND

IN THE MATTER OF VIOLATION OF REGULATIONS 4, 13(3), AND 26 (A) AND € AND 27 OF THE PUBLIC SERVICE COMMISSION (COUNTY GOVERNMENT PUBLIC APPEALS PROCEDURES) REGULATIONS 2016

BETWEEN

COUNTY GOVERNMENT OF MANDERA.....1ST PETITIONER

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

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

AND

HUSSEIN DAYOW ABDULLAHI.....1ST INTERESTED PARTY

AFTIN AHMED ALI.....2ND INTERESTED PARTY

ALIKHER HASSAN OSMAN.....3RD INTERESTED PARTY

ABDIAZIZ MOHAMED OMAR.....4TH INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 15th November, 2019)

RULING

The petitioners filed the notice of motion on 09.07.2019 together with the petition and through Issa & Company Advocates. The application by motion is under section 3A, Civil Procedure Act, Chapter 21 of the Laws of Kenya; Rule 19 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 Section 10 of the Judicature Act, Chapter 8 of the Laws of Kenya and all other enabling provisions of the law. The petitioners prayed for orders:

- a) That the application be certified as urgent and service hereof be dispensed with in the first instance.
- b) That pending the hearing and determination of the petition filed herein, the Honourable Court do issue a conservatory order staying and suspending the decision made by the 2nd respondent on 05.12.2018 and to stay any adoption and enforcement proceedings by the interested parties in any way whatsoever.
- c) That the Honourable Court do give directions for the expeditious hearing and determination of the petition.
- d) That costs of the application be provided for.

The application was based on the annexed affidavit of Anzal Rashid and the further affidavit of Anzal Rashid filed on 11.10.2019. The circumstances of the petition and the application are as follows. The interested parties were employed by the petitioners herein sometimes in 2014 as land administrators. On 11.12.2017 the interested parties were sent on 3 months' compulsory leave to allow an audit and investigation into land management processes and land revenues. The interested parties were invited and attended the relevant Departmental Human Resource Committee meeting on 02.05.2018 and on 04.05.2018 to answer the allegations that had been levelled against them. The Committee recommended suspension of the interested parties and they were suspended on 10.05.2018 by the Acting Chief Officer Lands, Housing and Physical Planning.

The interested parties moved and filed Cause No. 740 of 2018 in this Court at Nairobi together with a notice of motion dated 17.05.2018 against the petitioners. The parties entered a consent in that suit on 02.07.2018 to stay the proceedings in the suit to allow the interested parties herein to appeal to the Public Service Commission in line with the Commission's constitutional and statutory power and function to hear and determine appeals from human resource decisions of the county governments. On 10.07.2018 the interested parties filed their respective appeals against the suspension before the Commission being appeals Nos. 58, 59, 60, 61, and 62 all of 2018. On 19.11.2018 the Commission's committee handling the appeals directed the petitioners herein to file and serve their response and supporting documents and to avail their representatives for the hearing on 26.11.2018. The petitioners complied with the directives. On 26.11.2018 the interested parties were heard and cross-examined by the members of the Commission Committee and the petitioners' representatives who were present were not given an opportunity to be heard. The petitioners' case is that their witnesses who were present were not called and allowed to adduce evidence before the Committee. The petitioners' case is that the proceedings before the Commission's Committee on 26.11.2018 was procedurally and substantively unfair and unconstitutional because the proceedings violated the basic tenets of right to a fair hearing and rules of natural just. The present petition seeks declarations that sections 87(2), 88(1) and (4), 89(1) and 89(2) pursuant to which the Commission's Committee entertained and the Commission allowed the respective appeals by the interested parties are unconstitutional because they allegedly violate Articles 27(1), 48, 24(1) and 50(1) of the Constitution of Kenya, 2010. Consequential to the declarations, the present petition seeks to declare the proceedings and decisions in appeals Nos. 58, 59, 60, 61, and 62 all of 2018 unconstitutional and the same to be quashed by the Court granting the order of judicial review of certiorari. In the present application, it is prayed that there be stay and suspension of the Commission's decisions in the appeals and there be stay of adoption and enforcement of the decisions pending the hearing and determination of the petition.

The Commission had decided the appeals by the interested parties and ordered:

- a) That the disciplinary process against the appellants by the respondent was unlawful, irregular and unfair; and
- b) That the respondent reinstates the appellants and pays them all their withheld salaries and allowances.

The interested parties then moved this Court in Miscellaneous Application No. 82 of 2019 and on 26.07.2019 this Court issued orders for adoption of the Commission's decision as an order by the Court and for appropriate enforcement.

The interested parties have opposed the application and the petition by filing a notice of preliminary objection on 15.07.2019 through Kamotho Njomo & Company Advocates. The interested parties urge that the notice of motion dated 05.07.2019 and filed herein on 09.07.2019 should be struck out upon the following grounds:

- a) The Court has no jurisdiction to hear the application and the petition as the Public Service Commission has clear constitutional and statutory jurisdiction under Article 234 (2) and section 88 of the Public Service Commission Act, 2017 to hear the matter and give the remedies as sought under section 88(5) of the Act. Under the section a person dissatisfied by the decision of the Commission made on appeal against the decision by the county government or county public service board may apply to the Commission for review on account of fresh material facts which with due diligence could not be presented when the decision was initially made; or there is an error apparent on the record of the earlier decision. An application for such review is to be in 6 months from the date of the decision to be reviewed and the Commission can extend the time if circumstances warrant it. Despite an application for review, subsection 88(4) states that the implementation of the decision shall not be deferred or suspended despite the right of appeal or review. Upon considering the application for review the Commission may uphold the decision; set the decision aside; vary the decision as it considers to be just; or give such directions as it may consider appropriate with respect to the decision.
- b) The Court lacks jurisdiction in the matter because the applicants are required to first apply for review to the Commission under section 77 of the County Governments Act, 2012 as affirmed by the Court of Appeal's decision in **Secretary County Public Service Board & Another –Versus- Hulbhai Gedi Abdille [2016]eKLR.**
- c) The filing of the application and the petition offend the mandatory provisions of section 9(2) of the Fair Administrative Action Act, 2015 and section 87 (2) of the Public Service Commission Act, 2017 (on exhaustion of administrative procedure before moving the Court.) Section 87 (2) of the Public Service Commission Act, 2017 provides that a person shall not file any legal proceedings in any Court of law with respect to matters within the jurisdiction of the Commission to hear and determine and appeals from county government public service unless the procedure provided for under this Part has been exhausted.

d) The Court lacks jurisdiction to grant orders of certiorari as sought in the petition after a period of six months since the decisions were made on 05.12.2018.

e) The application does not disclose constitutional issues which cannot be remedied through the statutory procedure under section 88 of the Public Service Commission Act, 2017 and are therefore an abuse of court process.

f) The orders sought seek to perpetuate an illegality under section 88(4) of the Public Service Commission Act, 2017 which expressly prohibits the suspension or deferment of a decision of the Public Service Commission pending review or appeal of the decision by the Commission.

The respondents opposed the application by filing the replying affidavit of Simon K. Rotich, Acting Commission Secretary and Chief Executive Officer of the 2nd respondent. It was urged for the respondents as follows:

a) Under Article 234(2) (i) of the Constitution, the Commission is vested with the function and power to hear and determine appeals from officers serving in county governments.

b) The interested parties filed at the Commission appeals 58, 59, 60, 61 and 62 all of 2018 and under section 86 of the Public Service Commission Act, 2017.

c) The Commission wrote to the 2nd applicant on 23.07.2018 to respond to the appeals and failing to do so, the Commission wrote a reminder on 17.09.2018.

d) The petitioners failed to respond until the hearing date when they appeared and were given chance to respond and they did so on 04.12.2018.

e) The Commission heard the appeals per provisions of the Public Service Commission Act, 2017 and the Public Service Commission (County Government Appeals Procedures Regulations) 2016 and decided to set aside the petitioners' decisions by allowing the appeals. The dismissal was found unlawful, irregular and unfair and hence the Commission issued an order of reinstatement with full pay. The Commission made the order after hearing the interested parties and the petitioners herein.

f) The petitioners' application is calculated to deny the interested parties the enjoyment of the fruits of the Commission's decision.

g) The review and appeal to the Commission under section 88 of the Public Service Commission Act, 2017 and the enforcement of the Commission's decision by filing the same in Court or by punishing public officers who disobey the Commission's decision per section 89 of the Act are all administrative internal processes and any person dissatisfied with the Commission's decision can seek redress in Court either by way of judicial review or any other avenues provided under the Employment and Labour Relations Court Act.

h) That failure to provide a right of appeal against the Commission's decision does not in any way make the Commission's decision unconstitutional.

i) The application is lacking in merits, is vexatious, and an abuse of Court process.

The Court has considered the material on record, the parties' respective submissions and makes findings as follows on the application and the preliminary application.

1. The interested parties say that on the basis of the holding of the Court of Appeal in **Secretary County Public Service Board & Another –Versus- Hulbhai Gedi Abdlle [2016] eKLR** the petitioners ought to exhaust the appeal jurisdiction before the Commission as provided in section 77 of the County Governments Act and Article 234(2) (i) of the Constitution. Further the interested parties urge that the petitioners ought to exhaust the review jurisdiction before the Commission as per section 88 of the Public Service Commission Act. As submitted for the petitioners, the Court finds that the case as urged for the interested parties was misconceived. There is no decision by the county government against which the petitioners can appeal to the Commission. In any event it would be absurd that such decision would exist whereas the petitioners are the decision makers at the county government level. Further the petitioners have not put a case that there is fresh evidence which with due diligence was not before the Commission prior to deciding the appeals in issue or that there is an error on the face of the record. Accordingly, the Court finds that there is no case for review that would properly go to the Commission for review as per section 88 of the Public Service Commission Act. Further, by the same findings, the Court returns that the submission that the petitioners should have first exhausted prescribed statutory and administrative process and procedure as envisaged in section 9(2) of the Fair Administrative Action Act, 2015 and section 87 (2) of the Public Service Commission Act, 2017 will collapse because in the circumstances of this case there is no established case that the petitioners should have presented to the Commission in that regard. The Court finds that the holding in **Secretary County Public Service Board & Another –Versus- Hulbhai Gedi Abdlle [2016]eKLR** does not apply in this case as it is clearly distinguishable. Those grounds in the preliminary objection will collapse.

2. The interested parties urge that certiorari cannot issue because 6 months have lapsed since the decision by the Commission on the appeals. The replying affidavit filed for the Commission shows that Commission made the decision allowing the appeals by the interested parties on 05.12.2018. The 6 months prescribed in Order 53 of the Civil Procedure Rules within which an application for judicial review order of certiorari must be made lapsed on or about 05.06.2018. The petition was filed belatedly on 09.07.2019. Thus the preliminary objection succeeds that the judicial review order of certiorari as prayed for is not available. To that extent, the Court returns that even if the Petition is successfully urged on the prayers of unconstitutionality as set out, the decision by the Commission in the appeals by the interested parties would remain intact. Further, as urged for the interested parties, the Commission's decision

has since been adopted as an order by the Court on 26.07.2019 in Miscellaneous Application No. 82 of 2019. The Court finds for the interested parties that unless the order is challenged successfully and through appropriate process (even if certiorari were available as prayed for), the order is properly due for enforcement as provided for in section 89 of the Public Service Commission Act, 2019. The preliminary objection that certiorari is not available is upheld and on that count and findings, it cannot be said that the respondents have established a *prima facie* case for grant of the conservatory order as prayed for.

3. The petitioner's case is that they were not heard by the Commission when the Commission considered the appeal by the interested parties. The Commission's case is that the petitioners were heard. That issue can only be resolved at full hearing by evaluating the evidence to resolve the dispute. Further at this stage it is clear that both the petitioners and the Commission are in agreement that the petitioners were entitled to present their case at the hearing of the appeals by the interested parties. As a matter of a systemic point, the petitioners and the interested parties are in agreement that due process or fairness as is also known as rules of natural justice apply to hearing and determination of appeals to the Commission as presented from decisions of County Governments. In such circumstances, the Court returns that there is no established divergent of views and the petition in so far as it sets out to challenge the constitutionality of some of the provisions of the Public Service Commission Act, 2007 should not be allowed to stand in the way of the enjoyment by the interested parties of the fruits of the Commission's decision on their appeals.

4. It is clear to the Court that in so far as the petition generally questions the constitutionality of the cited provisions of the Public Service Commission Act, 2007, the same amounts to a separate cause of action from the validity of the decision of the Commission in specific cases (like the appeals by the interested parties) of application of the impugned sections by the Commission. In so far as certiorari is found unavailable, the present petition would suffer misjoinder of actions in so far as it sought to affect the Commission's decisions on the appeals by way of that quashing order. The Court finds that nevertheless, the residual claims and prayers have some vitality and will be allowed to proceed to full hearing.

In conclusion, the application dated 05.07.2019 and filed on 09.07.2019 as well as the preliminary objection dated on 15.07.2019 and filed on 15.07.2019 are hereby determined with orders:

1. The preliminary objection will succeed to the extent that the judicial review order of certiorari as prayed for in petition is unavailable by reason of time barring – and the petition partially fails to that extent.
2. The application is dismissed with costs.
3. The parties to take directions for the expeditious hearing and determination of the residual claims and prayers in the petition being whether the sections of the Public Service Commission Act, 2017 as cited and alleged are unconstitutional.

Signed, dated and delivered in court at Nairobi this Friday, 15th November, 2019.

BYRAM ONGAYA

JUDGE