

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 250 OF 2018

MARTIN KABUBII MWANGI.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF LAIKIPIA....RESPONDENT

RULING

1. Before me is the Respondent's notice of preliminary objection seeking to have the entire claims struck off on grounds that the court lacks the jurisdiction to hear and determine this matter as the Claimant ought to have preferred an appeal to the Public Service Commission under Section 77 of the County Governments Act before moving to Court, the Claimant used a wrong party and failed and or neglected to sue his employer Laikipia Public Service Board an independent body capable of being sued on its own account under Section 57 of the County Government Act and finally that the cause is incompetent, bad in law, fatally defective and otherwise an abuse of the Court Process, hence the prayers sought cannot stand in law. The preliminary objection was canvassed by way of written submissions. The Respondent submitted that Section 77(1) provides for decisions which might be referred to the Public Service Commission and stated that the Section should not be read in isolation. The Respondent submitted that includes the decisions made by the County Public Service Board or a person in exercise or purported exercises of disciplinary control against any County Public Officer. The Respondent submitted that Section 77 of the County Government Act does not exclude the decisions of persons purporting to exercise disciplinary control or decisions made by any person with regards to an employee of the Public Service Board and that therefore, any decision that is meted against any person employed by the Public Service Board or an individual purporting to exercise the powers of the Board is capable of being subjected to the Public Service Commission on appeal. The Respondent submitted that this court is bound and has previously adhered to the Rule or Principle of exhaustion which is cited in the Court of Appeal decision in **Secretary, County Public Service & Another v Hulbhai Gedi Abdille [2017] eKLR**. The Respondent submitted that the court was guided by the decision in the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR**. In both cases the Court was clear that where redress of any particular grievance is prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. The Respondent argued that Section 77 prescribes the recourse to follow and it does not create an option by which one may elect whether or not to lodge a claim with the Public Service Commission. The Respondent submitted that the Claimant has not demonstrated any lack of suitability of the statutory appeal process provided in the County Governments Act and the Public Service Commission is the appropriate forum to determine the issue of the Claimant's removal from office and terminal benefits as raised in the Claimant's case. It was submitted that on the basis of the exhaustion principle this Honourable Court lacks Jurisdiction to entertain this matter. The Respondent submitted that this suit must be struck out as an amendment of the pleadings to introduce a new party in the suit does not cure the offense of failing to exhaust the remedies provided in the statute before filing the claim before this court. The Respondent submitted that this being a court of justice and not of sympathy, it should uphold the precedent binding it and direct the Claimant to the correct forum to have the alleged grievances adjudicated upon by the appropriate forum as provided in law.

2. The Claimant submitted that the cause of action in this suit is founded on the letter of termination of contract dated 26th September 2017 authored and signed by H.E. Ndiritu Muriithi-Governor County Government of Laikipia. The Claimant submitted that his contract was not terminated by the County Public Service Board as provided under Section 55(d) and 59(c) of the County Governments Act and that in terminating the Claimant, the Governor was not exercising disciplinary control or proceedings against the Claimant, rather he was erroneously effecting the powers conferred on him by Section 31(d) of the County Governments Act as read together with the letter of offer dated 26th August 2014 and Section D20 of Human Resources Policy and Procedure manual for the Public service. The Claimant submitted that the Governor acted on the misconceived notion that he had powers under Section 31(d) of the County Governments Act to terminate the Claimant's contract. The Claimant submitted that the Respondent's argument emanates from the fact that it is only the County Public Service Board which had powers to terminate the Claimant's contract and that the Governor therefore acted in excess of his powers as he usurped the powers of the County Public Service Board and therefore this suit. The Claimant submitted that this court is seized of jurisdiction to determine the dispute before it and the Public Service Commission has no powers over the claim. He submitted that in addition Section 77 (1) used the word 'may' and therefore an appeal to the Public Service Commission is not mandatory and the Claimant acted within the law by lodging a claim under Section 49 of the Employment Act as read with Section 12 of the Employment and Labour Relations Court Act. The Claimant submitted that the legal position is now settled that a Governor has no powers under the County Government Act and the Constitution to dismiss a Chief Officer and added that he was not dismissed by the County Public Service Board as the letter was issued by the Respondent and executed by the Governor. He submitted that the Respondent was his employer in accordance with Section 2 of the interpretation Section to the Employment and Labour Relations Court Act and he thus had no grievances against the Board. The Claimant submitted that under Order 1 Rule 9 of the Civil Procedure Rules 2010, no suit should be defeated by reason of the misjoinder or non-joinder of parties and that the Respondent is a necessary party to this suit as the Governor was acting as the head of the County Executive as established under Article 179 of the Constitution. He submitted that further, Article 159(2)(d) of the Constitution requires the court to discharge justice without undue regard to procedural technicalities and that the suit is yet to be heard and the Claimant has a chance of amending his statement of claim to include the County Public Service Board if indeed the court finds that the Board is a necessary party to the proceedings as the Respondent stands not to suffer any prejudice. The Claimant submitted that striking out the suit will do great injustice to him and the same should be a last resort. He argued that he should be granted a chance to articulate the claim since from the face of it, it is clear that his employment was unlawfully terminated and this could be the reason why the Respondent is afraid of a full trial. The Claimant relied on the case of **D.T Dobie Company (Kenya) Ltd v Joseph Mbaria Muchina & Anor. [1980] eKLR**, where it was held that " *as power to strike out pleadings is exercised without the court being fully informed on the merits of the case, through discovery and oral evidence, it should be used sparingly and cautiously.*" The Claimant submitted that the court therefore has jurisdiction and the Respondent is

a proper party to this suit and the preliminary objection should be dismissed with costs.

3. The exhaustion principle enunciated in precedents such as the case of **Secretary, County Public Service & Another v Hulbhai Gedi Abdille** (*supra*) does not permit an election as to the parts of a statute that one should rely on. Put another way, it removes discretion on the part of a litigant from choosing whether to follow the provision or not. In this case the suit was filed before the exhaustion of the remedy under the law, namely the provisions of Section 77 of the County Governments Act. The Claimant ought to have appealed against his removal to the Public Service Commission before moving the court. The suit did not fall in the category of suits that can be entertained by the court. As he did not appeal as provided for in law, the suit is a non-starter and is accordingly struck out with no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 4th day of December 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar