



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 37 OF 2018

(Before Hon. Justice Mathews N. Nduma)

SHEM OKORA ONYWERA.....CLAIMANT

VERSUS

KISII COUNTY GOVERNMENT.....1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD....2ND RESPONDENT

R U L I N G

1. In the Notice of Motion Application dated 8th February 2018, the Applicant seeks for orders:-

- a. That a mandatory injunction directed at the County Government of Kisii and Kisii County Public Service Board to reinstate the Claimant to his position as Director Operations on full pay and allowances unconditionally and
- b. Temporary injunction be issued reinstating the Respondent from proceeding with disciplinary process of any nature on the basis of unsubstantiated grounds of gross misconduct contained in a letter of interdiction dated 12th January 2018, pending the hearing and final determination of the claim.

2. The application is opposed by a Replying Affidavit of the Respondents sworn on 5th March, 2018 in which it is deposed inter alia, that the entire claim is premature as the claimant did not allow the disciplinary process to take its full course before coming to court.

3. That the Claimant received a show cause letter to which he responded on 22nd January, 2018 and the Respondents were yet to finalize the matter before the suit was filed.

4. Furthermore, upon finalization of the disciplinary process by the County Public Service Board, the Claimant is mandated under section 77 of the County Governments Act, 2012 to file an Appeal to the National Public Service Commission.

5. That under section 59 of the County Governments Act 2012, the County Public Service Board has the statutory mandate to exercise disciplinary control over, and remove persons holding or acting in those offices as provided under part vii of the Act, and the 2nd Respondent rightfully exercised the said powers by requiring the Claimant to show cause.

6. That prayer 3 of the application is final in nature, and if granted would dispose of the entire claim.

7. That disciplinary processes are internal mechanisms legally existing and the powers donated by the legislature cannot be wished away by the applicant.

Determination

8. The issues raised by the Respondent as to the maturity of the suit are preliminary in nature and if determined at this stage would dispose of the entire suit.

9. It is not in dispute that the Claimant filed the suit before the disciplinary process had concluded and that the Claimant did not follow the appellate procedure provided under section 77 of the county Government Act, by filing an appeal to the Public Service Commission, if he was aggrieved by the decision by the 2nd Respondent to interdict him and subject him to a disciplinary process.

10. The court relies on the decision of the court of appeal at **Nairobi Civil Appeal No. 92 of 1992, speaker of the National “Assembly Vs James Njenga Karume [1992] eKLR** when they rendered themselves as follows:-

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed.”

11. Section 77 of the County Government Act provides:-

“(1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any County Public Officer may appeal to the Public Service Commission (in the part referred to as the ‘commission’) against the decision.

(2) The Commission shall entertain appeals on any decision relating to employment of a person in a County Government including a decision in respect of

(c) disciplinary control

(e) retirement and other removal from service

12. The decision of the Court of Appeal in James Karume case, supra, was applied by Mumbi Ngugi L. in a case which is similar to the present one **HCC No. 283 of 2014, James Tinai Murete & others Vs County Government of Kajiado and others** with regard to the application of section 77 of the County Governments Act, 2012 as follows:-

“(24) There is a lot of case law on due process and this court is guided by the court of appeal case of speaker of the National Assembly Vs The Hon. James Njenga Karume Civil Appl No. NA 192 of 1992 where Kwach, cocker and Muli

JJA stated –

‘that where there is clear procedure for the redress of any particular grievance prescribed by constitution or an Act of parliament that procedure should be strictly followed’

13. The Judge went on to say –

“Aside from the views expressed in the two decisions set out above I take this view for the two additional reasons. First, it is my view that the Legislature could not have intended to establish a dispute resolution mechanism, and then render it redundant immediately by giving parties the option to choose whether to follow it or not. Read as a whole, the provisions of section 77 of the County Government Act evince an intention to have all disputes arising out of appointment, by County Service Boards dealt with by the Public Service Commission, hence its grant to the commission of the mandate in mandatory terms by providing that the commission ‘shall entertain appeals in respect of recruitments, selection, appointment and qualifications attached to any office’. There is no option given to a party to choose whether or not to file grievances with the commission.”

14. This reasoning applies *Mutatis Mutandis* to the mandate of the public service commission with regard to exercise of disciplinary control and retirement and other removal from service under section 77(2)(c) and (e) of the said Act.

15. Accordingly, the present case was filed prematurely before this court in violation of a mandatory statutory procedure. The application and the entire suit is dismissed with costs.

Ruling Dated, Signed and delivered this 12th day of April, 2018

Mathews N. Nduma

Judge

Appearances

Mr. Begi for Claimant

Mr. Onsembe for Respondents

Chrispo – Court Clerk