

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 208, 209, 210, 211, 213, 214, 215 & 218 OF 2018

DANIEL WANG'OMBE MAINA & 7 OTHERS.....CLAIMANTS

VERSUS

NYERI COUNTY GOVERNMENT.....1ST RESPONDENT

NYERI PUBLIC SERVICE BOARD.....2ND RESPONDENT

RULING

1. The application before me is the Respondent's preliminary objection dated 6th July 2018. The objection is that the lacks jurisdiction to hear the matter as the Claimants are required to first appeal to the Public Service Commission under Section 77 of the County Government's Act. The objection is replicated in Causes No. 209 of 2018 Hiram Nderitu Ngatia v Nyeri County Government & Another, No. 210 of 2018 Stephen Weru Muruga v Nyeri County Government & Another, No. 211 of 2018 Samuel Kennedy Muthui Ndung'u v Nyeri County Government & Another, No. 213 of 2018 Fredrick Mathenge Wachira v Nyeri County Government & Another, No. 214 of 2018 Boniface Moyo Mahugu v Nyeri County Government & Another, No. 215 of 2018 Peter Wambugu Wachira v Nyeri County Government & Another and No. 218 of 2018 Elijah Mwaniki Maina v Nyeri County Government & Another which are all comprised in the Ruling and are consequently impacted by this Ruling.

2. In response to the preliminary objection the Claimants filed submissions. The Respondents' objection advances the notion that the suits are untenable for reason of the statutory bar to approach court prior to exhausting the appeal mechanism at PSC. The Claimants assert that on the strength of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** where the Court of Appeal stated that a preliminary objection consists of a point of law which has been pleaded or which arises out of clear implication out of pleadings. It is raised on pure points of law and is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact is to be ascertained. Further reliance was placed on the case of **John Mathu Ndung'u v B.O.M Ihwa Secondary School [2018] eKLR** (unreported) where this court held that in matters where no pleadings are filed such a preliminary objection hangs in the air.

3. Section 77 of the County Governments Act provides in *parri materia* as follows:-

77.(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 this 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—

(a)...

(b) remuneration and terms and conditions of service;

4. The matters before the Court are matters concerning the terms of service touching on remuneration and conversion of the terms from contract to permanent and pensionable. These are matters within the remit of Section 77 of the County Governments Act 2012 and therefore in the mandate of the Public Service Commission. I am emboldened in my decision by the case of **Secretary, County Public Service Board & Another v Hulbhai Gedi Abdille [2017] eKLR** where the Court of Appeal held that:-

There is no doubt that the respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by Section 77 of the Act. The section provides not only a forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one, specifically tailored by the legislators to meet needs such as the respondent's. In our view, the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure under the Act rather than resort to judicial process in the first instance.

5. The upshot of the foregoing is that I find merit in the preliminary objections taken and order the suits struck out as the matters are for Public Service Commission to handle in the first instance. There will be no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 22nd day of November 2018

Nzioki wa Makau

JUDGE