



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**SUIT NO. 135 OF 2018**

**MOSES MAINA NGARI.....CLAIMANT**

**VERSUS**

**NYERI COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**NYERI COUNTY PUBLIC SERVICE BOARD.....2<sup>ND</sup> RESPONDENT**

**AND**

**SUIT NO. 136 OF 2018**

**RITA KABUI BUTEYO.....CLAIMANT**

**VERSUS**

**NYERI COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**NYERI COUNTY PUBLIC SERVICE BOARD.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup> Respondent raised a preliminary objection against the two suits in the respective causes. For ease of determination, I combined the two rulings since the objection was exactly the same word for word though the objections were raised in the individual files. The Preliminary objections were to the following effect:-

- i. That this suit as filed is fatally and incurably defective in law and as such cannot stand or be ventilated before this honourable court.
- ii. That this honourable court lacks jurisdiction to hear and determine this matter
- iii. That this suit as it is an abuse of the court process and ought to be dismissed with costs to the 1<sup>st</sup> Respondent.

The 1<sup>st</sup> Respondent filed submissions in support of the preliminary objections in which it was argued that under Article 234(2)(1), the Constitution of Kenya provides that the Public Service Commission shall hear and determine appeals in respect of County Governments Public Service and that under Section 85 of the Public Service Commission Act No. 10 of 2017 in order to discharge its mandate under Article 234(2)(1) aforesaid shall hear and determine appeals in respect of any decision relating to engagement of any person in a County Government including a decision in respect of:-

- (a) recruitment, selection, appointment and qualifications attached to any office;
- (b) remuneration and terms and conditions of service;
- (c) disciplinary control;

- (d) national values and principles of governance under Article 10 and values and principles of public service under Article 232 of the Constitution;
- (e) retirement and other forms of removal from public service;
- (f) pension benefits, gratuity and any other terminal benefit; or
- (g) any other decision the Commission considers to fall within its constitutional competence to hear and determine an appeal in that regard.

The 1<sup>st</sup> Respondent submits that the provision of Section 77 of the County Government Act 2012 also emphasizes this and that therefore the cause of action does not fall within the mandate conferred upon by Section 85 of the Public Commission Act 2017 and that the court therefore does not have jurisdiction. The 1<sup>st</sup> Respondent submitted that on the strength of Section 87(2) of the Public Commission Act 2017 which makes it mandatory that the Claimant must exhaust the available dispute resolution mechanism provided therein before seeking redress from a court of law. The 1<sup>st</sup> Respondent cited 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.*

The 1<sup>st</sup> Respondent submitted that the Claimants claims fell within the mandate conferred upon by Section 85 of the Public Commission Act 2017 and they had not invoked the dispute resolution mechanism provided under the law, to wit Sections 85, 86, 87 of the Public Service Commission Act, Act no. 10 of 2017 and Section 77 of the County Government Act, 2012. The 1<sup>st</sup> Respondent thus submitted that the suits were prematurely before the Court and the court lacked jurisdiction and ought to have dismissed the suits with costs.

2. The Claimants submitted that the preliminary objections were devoid of merit. The Claimants submitted that the dispute herein was on the failure to pay outstanding salaries and allowances arrears. The Claimants argued that the issue in dispute per the memorandum of claims filed is the

*Unlawful refusal to effect promotion of the Claimants effective 2010, non-payment of arrears, the harmonization of the Claimants salary with those of other county staff, non-payment of responsibility allowances to the Claimants.*

In respect of the first Claimant Moses Maina Ngari, there was the additional issue of non-payment of the September 2014 salary due to him.

The Claimants submitted that this is distinct from the provisions of the Public Service Commission Act which relates to complaints on the appointment of a person to the public service where the criteria and manner of appointment, the first call is the appeal to the Public Service Commission and the court would only receive the matter after the appeal process before the Public Service Commission. The Claimants cited the case of **Callen Gatune Francis alias Callen Gatune Kamau v Tharaka Nithi County Government & Another [2018] eKLR** a decision of this court and argued that the objection filed is devoid of merit and ought to be dismissed with costs.

3. The objection taken is in respect of the Claimants suit as filed. In the memorandums of claim filed, the Claimants mainly seek relief related to the promotion, harmonization of salary, payment of allowances arising from the promotions etc. These are matters well within the mandate of the Public Service Commission in terms of Part XV titled HEARING AND DETERMINATION OF APPEAL IN RESPECT OF COUNTY GOVERNMENT PUBLIC SERVICE. The Part has sections dealing with the appeals, the procedure, the enforcement of the decision through this court and so on. The Claimants therefore have in line with the Court of Appeal decision in **Secretary, County Public Service Board & Another v Hulbhai Gedi Abdille** (*supra*) a case only after the appeal. The case I decided being **Callen Gatune Francis v Tharaka Nithi County Government & Another** (*supra*) related to dismissal of the Claimant and was not therefore within the mandate of the Public Service Commission. In the final result I find the suits are premature and I order them struck out. I will make no order as to costs.

It is so ordered.

**Dated and delivered at Nyeri this 19<sup>th</sup> day of November 2018**

**Nzioki wa Makau**

**JUDGE**