



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 115 OF 2006

KENYA COUNTY GOVERNMENT WORKERS UNION.....APPLICANT

VERSUS

THE GOVERNOR,

COUNTY GOVERNMENT OF KIAMBU.....1ST RESPONDENT

SECRETARY,

PUBLIC SERVICE BOARD KIAMBU COUNTY...2ND RESPONDENT

COUNTY SECRETARY OF KIAMBU.....3RD RESPONDENT

THE PRINCIPAL SECRETARY,

MINISTRY OF DEVOLUTION AND PLANNING.....4TH RESPONDENT

THE SUB COUNTY ADMINISTRATOR

THIKA SUB COUNTY.....5TH RESPONDENT

THE HON. ATTORNEY GENERAL.....6TH RESPONDENT

RULING

1. The Court is faced with two sets of what the movers describe as preliminary objection which they require determined before the matter can proceed further.
2. The 1st, 2nd, 3rd, and 5th respondents represented by Mwaura and Wachira Advocates object that:-
 - a. The “**Court**” before which these proceedings have been instituted lacks the requisite jurisdiction to adjudicate over this matter within the meaning of section 5 of the Judicature Act Cap 8 of the Laws of Kenya as read together with Rule 31 (2) of the Industrial Court

(Procedure) Rules, 2010.

- b. The committal proceedings herein is ab initio incompetent, fatally defective and cannot stand in law for want of compliance with the provisions of Rule 81.4 of the Civil Procedure (Amendment No. 2) Rules, 2012 of England.
3. The 4th, and 6th respondent represented by the Attorney General object that:-
- a. The 4th Respondent was not a party to Industrial Cause No. 115 of 2006. It is a clear law that committal proceedings are quasi criminal directed at the parties in the case/proceedings. The orders emanating therefore cannot bind the 4th Respondent at this stage.
 - b. The 2nd Respondent is a legal entity which can sue and be sued on its own behalf.
 - c. Article 6(1) of the Constitution 2010, establishes counties as distinct and independent entities and can only cooperate with the national government.
 - d. Article 152(2) of the Constitution 2010, establishes the Cabinet and makes AG a member therein at the National level where the AG thus represents the National government other than in Criminal cases. This is however a labour relation case where the National Government should not be a party rather the County Government is the right party.
 - e. The AG can only be a party to this suit upon request and with the leave of the Court which in this case does not apply.
 - f. That Court cannot issue AG with orders with no legal force otherwise the 2nd Respondent would be subordinate to the National Government which would offend it.
 - g. The application as drawn is defective, bad in law as the applicant has not sought leave to join the Respondents as is required by law.
4. In her submission in support of the objection, Ms. Akuno for the Attorney General contended that the County Government of Kiambu was an autonomous legal entity which can sue and be sued in its own name. According to Counsel Article 6(1) and (2) of the Constitution 2010 establishes counties as distinct and independent entities and can only cooperate with national government.
5. Counsel further submitted that article 152(2) of the Constitution establishes the cabinet and makes the Attorney General a member thereof at National level where the Attorney General represents national government in all civil cases. This being an employment and labour relations matter, the national government should not be a party. Further the Attorney General could only be a party upon request and with leave of the Court. In support of this submission, the Counsel relied on the case of **Tom Luusa Munyasya & Another v Governor of Makeni County & 2 Others (2014) eKLR.** It was Ms. Akuno's further contention that any orders which might be issued against the 4th respondent and the Attorney General by the Court cannot be enforced by the said parties since that would make the 2nd respondent to be subordinate to the National Government hence would offend the Constitution.
6. Concerning joinder of parties, Counsel submitted that the 4th respondent was not a party to Cause No. 115 of 2006, the orders emanating therefore cannot bind the 4th respondent. In this regard Counsel relied on the case of **Lilian Ngatho & Another v Mokii Sacco Ltd & Anor (2014) eKLR.**
7. The Court did not seem to have found the submissions on behalf of 1st, 2nd, 3rd and 5th

respondent. If they were filed they must have been misplaced.

8. The Court however noted important issue of law raised in the affidavit of Justin Kimani sworn on behalf of the 2nd respondent of relevance to the objection. He deponed that the applicant did not seek leave to substitute parties as reflected in the present cause making the entire application defective.

9. Mr. Wandaka for the applicant submitted that Employment and Labour Relations Court has jurisdiction to punish for contempt and in this regard relied on the case of **Teachers Service Commission v KNUT & 2 Others (2013) eKLR.**

10. On the issue of personal service in contempt proceedings Counsel submitted that it was sufficient to serve a person assigned and authorized to receive such service for and on behalf of the respondents. On this point counsel cited the case of **James Gitau Mwaura v. AG & Anor (2015) eKLR.** He further submitted that the law on personal service with regard to contempt of Court has changed and in this respect relied on the case of **Basil Criticos v. AG & 8 Others.** On whether the 1st, 2nd, 3rd and 5th respondents should be a party to the suit, Counsel submitted that the award by Madzayo J made on 13th May, 2009 was an award against the Municipal Council of Thika. However, legal proceedings instituted against the local authorities prior to the repeal of the Local Government Act were sustainable against the county government. To this extent he relied on section 33 of the 6th schedule to the Constitution and section 59 of the Urban Areas and Cities Act and further the case of **Argos Furnishers Ltd v Municipal Council of Mombasa (2014) eKLR.**

11. Mr. Wandaka further submitted that the Government Department of Devolution and Planning replaced the Ministry of Local Government hence the issue of whether service was effected were matters of evidence and could not be resolved by a preliminary objection.

12. The controversy on whether this Court has jurisdiction on matters outside its perceived mainstream mandate is not new. A considerable number of lawyers still take the fixed view that this Court only has jurisdiction over disputes between an employer and an employee. This view is not only narrow but also unprogressive in terms of development of jurisprudence and constitutionalism. If one unbundles the word “dispute” it can include a number of issues in the context of an employer-employee relationship. For instance it could be a dispute over allegation of discrimination, dehumanizing working conditions. It could be a dispute over employment-dependent mortgage or loan scheme. These are matters that have overlap in jurisdiction among superior courts of equal status including High Court hence it would be inconvenient and tantamount to strait-jacketing access to justice to argue that this Court cannot tackle disputes concerning breach of fundamental rights and freedoms, unfair or discriminatory treatment in work place simply because the High Court does have jurisdiction as well over these disputes. Further, it would be subordinating Courts of equal status to High Court if they were to be deprived of power to punish for contempt of their orders. This would be outrightly unconstitutional. The jurisdiction to deal with issues or disputes which on the face of them seem to belong to another Court of equal status is an accrued or consequential jurisdiction. To this extent the Court does not agree that it lacks jurisdiction to punish for contempt of its orders. This objection is therefore rejected.

13. On the question of joinder and substitution of parties, I have perused the record and did not come across any formal application or minute authorizing the inclusions of additional parties to this suit. The original parties in cause no. 115 of 2006 were **Kenya Local Government Workers Union v. Municipal Council of Thika and John Mutia.** It may well be true that due to the transitory developments occasioned by the promulgation of the Constitution in 2010 confusion could arise, the proper procedure would be to move the Court formally for addition and or substitution of parties. The party to be joined or substituted needs prior notice in order for him or her to make representations if and why he or she should or should not be joined. It cannot be assumed.

14. Regarding the relationship between national and county government, article 6 (2) of the Constitution provide that the government at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation. This means the County government of Kiambu where this suit originated has the capability to sue or be sued independent of the national government in matters concerning it and its residents or people with whom it enters into contractual or commercial relations. Whereas the plain reading of provisions of section 33 of the 6th Schedule to the Constitution and section 59 of the Urban Areas and Cities Act naturally leads to the conclusion that the 1st, 2nd, 3rd, and 5th respondents are the proper parties under the new dispensation, there is no connection at all between the 4th respondent hence the 6th, and the claimants. The fact that the Madzayo J (as he then was) directed that a copy of his award be served on the then Ministry of Local Government was merely informational and did not include the then Ministry as a party hence the Permanent Secretary.

15. In conclusion the Court upholds the objection by the respondent on these issues and directs that within 60 days of this order, the claimant amends his application to exclude the 4th and the 6th respondent and join or substitute the successor in title to Municipality Council of Thika originally sued in cause no. 115 of 2006. The Court will reserve any comments on whether upon substitution the applicant would still want to proceed with the contempt proceedings on the facts as filed or consider other recourse.

16. It is so ordered.

Dated at Nairobi this 26th day of February 2016

Abuodha J. N.

Judge

Delivered this 26th day of February 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge