



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 428 OF 2016

PHILEMON MBOYE KACHILACLAIMANT

VERSUS

COUNTY PUBLIC SERVICE BOARD OF TAITA TAVETA

COUNTY GOVERNMENT OF TAITA TAVETA.....RESPONDENTS

RULING

Introduction

1. The claimant was employed by the respondents on 3. 2. 2014 as a County Chief Officer a Public Works and Infrastructure under a period term contract of 4 years. He was however interdicted on 10. 2. 2016 for alleged misconduct. The interdiction letter also asked the claimant to show cause within 21 days why disciplinary action should not be taken against him. That three months after responding to the show cause letter, the respondent remained mute prompting the claimant to bring this suit.

2. The suit seeks for declaration that the entire disciplinary process is a breach of legitimate expectation, unfair, unlawful and unconstitutional. It further seeks that the interdiction be lifted and the claimant reinstated with full salary and benefits plus damages from violation of his Constitutional rights.

3. The respondent denied liability for any wrong doing and averred that the interdiction of the claimant is in compliance with Public Service Commission of Kenya Discipline Manual 2008. In addition the respondent has filed a Notice of Preliminary Objection (P.O.) objecting the entire suit on grounds that:

(a) The Notice of Motion dated 30. 6. 2016 is incompetent as it does not conform to rule 16 (3) of industrial Court procedure rules (ICPR).

(b) The suit is premature in light of Article 234 (2) (b) (i) of the Constitution and section 77 (1) & (2) of the County Orders Act (CGA).

(c) The disciplinary proceedings sought to be restrained are before a quasi-judicial body that enjoys absolute privilege.

(d) The Notice of Motion violates the principle of subsidiarity that courts can only be invoked through judicial review to ascertain legality and adherence to the rules of natural justice

before a domestic forum.

4. The Preliminary Objection was argued on 26. 6. 2016 by Mr. Omondi and Mr. Magara learned counsel for the respondent and the claimant respectively.

Respondent's Case

5. Mr. Omondi submitted that the Preliminary Objection is founded on Article 233 and 234 (2) (1) of the Constitution which establishes the PSC with power to hear and determine appeals from the County Government and the County Public Service Boards (CPSB). he further relied on section 77 (1) of the LGA which provides these any person dissatisfied on affected by the decision of the CPSB should direct the grievance to the PSC by way of an appeal. That the decisions by the CPSB that may lead to appeal to the PSC include discipline and control.

6. In addition he relied on section 7 of the PSC (County government Public Service Appeals procedure) Regulations 2014 to urge that a person dissatisfied with the decision of the County Government Public Service in its discharge of a human resource function may appeal to the PSC against that decision. That rule 8 (c) of the said regulations empowers the PSC to hear and determine an appeal from a Public officer in a County Government Public Service regarding any decision relating to the engagement of the person in the County government, including the appeal in respect of disciplinary control like imposition of any punishment including dismissal.

7. The Counsel cited court of Appeal decision in the ***Speaker of the National Assembly vs. Kamume [2008] KLR*** where it was held that where a statute on the Constitution provides for a procedure for redressing a dispute, that procedure must be strictly followed. He also relied on several other persuasive decisions of the High Court where the Courts declined to exercise jurisdiction over disputes relating to recruitment of employees by CPSBs on grounds that the petitioner should have filed appeals with the PSC under section 77 of the LGA and article 234 of the Constitution. The Courts further held that the use of the word 'may' in the Article 234 of the Constitution did not give any option not to appeal to the PSC.

8. In addition the foregoing, the respondent submitted that the suit should not be entertained because the disciplinary process was before a public body exercising quasi-judicial function and should be left alone to complete the proceedings after which the offended party to challenge the decision by Judicial Review.

9. Finally, the Counsel submitted that the prayer for reinstatement is premature because the claimant has not yet been dismissed. That the claimant is only on interdiction and still drawing half salary. He urged that the Preliminary Objection be allowed and the suit be struck out with costs.

Claimant's Case

10. Mr. Magara Advocate submitted that Section 77 (2) of the CGA and Article 234 of the Constitution and the precedents cited by the defence are not relevant to the suit herein. That this court has jurisdiction to deal with this suit because there are no active disciplinary proceedings pending anywhere. That Article 234 (1) of the Constitution uses the word "may" to give an aggrieved party the option to the employment contract to either go to court or other tribunals.

Analysis and Determine

11. There is not dispute that the parties herein are related as employer and employee under a contract of service. There is also no dispute that the employee has been interdicted for alleged misconduct, pending investigations but he has brought this suit to challenge the said interdiction by his employer. The issues for determination in the Preliminary Objection.

(a) Whether the Notice of Motion dated 30. 5. 2015 is incompetent vis a vis Tule 16 (3) of the Civil Procedure Rules (CPR)

(b) Whether the suit herein is prematurely brought vis a vis Article 234 (2) of the Constitution and Section 77 (1) and (2) of the LGA.

(c) Whether the disciplinary proceedings being challenged are before a quasi-judicial body which enjoys absolute privilege.

(d) Whether the Notice of motion violates the principle of subsidiarity, which requires that legality and adherence to the rules of National justice in a matter be challenged through Judicial Review.

Incompetent Motion

12. After careful consideration of the reliefs sought in the suit, I have observed that there is prayer for injunction yet the Notice of Motion dated 30. 5. 2013 seeks for injunction pending the hearing and determination of the suit that interlocutory relief sought by the motion cannot therefore be availed to the claimant in the face of clear provision of rule 16 (3) of the ICPRs. The said rule disqualifies any litigant from getting interlocutory injunction is not sought as a relief in the main suit. Consequently, I find and hold that the Notice of motion by the claimant dated 30. 5. 2016 is incompetent and it is struck out.

Premature Suit

13. According to the respondents, the proper forum for the claimant to ventilate his grievance is to file an appeal to the PSC in line with Article 234 (2) of the Constitution and section 77 (1) & (2) of the CBA

14. Article 234 (2) of the Constitution outlines the Powers and formulation of the PSC as including:

1. “Hear and determine appeals in respect of County Governments Public Service”

15. On the other hand section 77 (1) and (2) of the CBA 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 Commissioner against the decision

(2) The Commission shall entertain appeals on any decision relating to employments of a person in a County government including a decision in respect of; -

a) Recruitment, selection, appointment and qualification attached to any office;

b) Recommendation and terms and condition of service;

c) Disciplinary control. . .”

16. After careful consideration of the foregoing provisions of the Constitution and the CGA, I find nothing that extinguishes or adjourns or in any manner affects the exclusive jurisdiction of this court to determine any dispute between the employer and their employee. In my considered opinion the drafters for the law intentionally or otherwise, provided an option to the County government Service grievant to either appeal to the PSC or to come to this court with original proceedings as provided by the court’s rules of procedure.

17. In that respect I am convinced beyond doubts that under Article 162 and 165 (5) of the Constitution and section 12 of the employment and Labour relations Act, the suit by the claimant is properly before the court. The said provisions of the law vests on this court, exclusive originating and appellate jurisdiction on this court on all matters related to Employment and Labour Relations. The constitution and the statute law cannot have intended to deny the county governments and their employee’s access to the courts of law for determination of their disputes. If that was the case, the same could have been expressly provided

for in the law. There being no express adjournment or restriction of the said jurisdiction of this court in the Constitution and the statute law, I have formed the opinion that PSC (County Government Public Services Appeals Procedures) Regulations, 2016 do not provide the only legal and mandatory procedure for initiating employment related grievances between the county Governments and their employees. In my view, the option of ventilating employee's grievances through appeals to the PSC can only yield a limited range of reliefs to the grievant, if any. In deed the provisions of the Article 234, section 77 of the CGA and the PSC Regulation, 2016 have not provided for the kind of reliefs that a party can get from the PSC.

18. However, section 12 of the ELRCA, section 49 of the Employment Act and Article 165 of the Constitution Provides expressly the kind of reliefs that can be ordered by this court in respect of any dispute filed between Employees and employers including County governments. Consequently, I therefore agree with the claimant's submissions that the judicial precedents cited by the respondents in support of the Preliminary objection are not relevant to this case because there exists a duality of procedural avenues for a County Government Public Officer to choose when challenging discussions by CPSB or County government privileged proceedings/the Principle of subsidiarity.

19. In view of the finding herein above that the Notice of Motion dated 30.5.2016 is incompetent, I eschew from determining the remaining aforesaid two grounds raised in the Preliminary objection

Disposition

20. The Preliminary objection is allowed only to the extent that the Notice of Motion dated 30.5.2016 is truck out for being incompetent. The main suit will therefore proceed to hearing and determination on merits. Each party to bear his or her own costs.

Signed and delivered this 9th day of September 2016

ONESMUS MAKAU

JUDGE