



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

EMPLOYMENT CAUSE NO. 11 OF 2016

SCHOLASTICA OKWARO.....CLAIMANT

-VERSUS-

TAITA TAVETA COUNTY GOVERNMENT.....RESPONDENT

RULING

Introduction

1. The claimant brought this suit on 21.1.2016 seeking the following reliefs against the respondent:
 - (a) **A Declaration that termination of his employment was unlawful.**
 - (b) **Reinstatement to his employment.**
 - (c) **Payment of his salary and allowances amounting to Kshs 1,655,200.**
 - (d) **Salary for the period between her termination and reinstatement.**
 - (e) **Costs**
2. The respondent has denied liability and objected to the suit through the Notice of preliminary Objection (P.O.) dated 12.5.2016. The main ground of the Preliminary Objection is that this Court lacks jurisdiction to hear and determine this suit.
3. The Preliminary Objection was disposed of by written submissions filed by the parties on 20.5.2015 and 8.6.2016 respectively.

Respondent's Case

4. The respondent submitted that under section 77 (2) of the County Governments Act (CGA) and Article 234 of the Constitution, any employee of County Government like the claimant herein, who is dissatisfied with the decision of employer including removal from office cannot directly sue to this Court but only appeal to the Public Service Commission (PSC). Consequently according to the respondent the claimant's grievance lies as an appeal to the Public Service Commission and not this Court because it lacks original jurisdiction to hear and determine the dispute. She consequently contented that the suit is prematurely before this Court.

5. To support her Preliminary Objection, the respondent cited the **National Assembly vs Hon. James Njenga Karume (2008) I KLR (EP)** where the Court of Appeal held that, where there is a clear procedure for redress of any particular grievance prescribed in the Constitution or an Act of Parliament, that procedure must be strictly followed.

6. She also cited **James Tunai Mrete & Others vs County Government of Kajiado & 22 Others (2014) eKLR** where the High Court held that the law did not give an option to a party to choose whether or not to file grievances with the Public Service Commission.

7. The claimant has opposed the Preliminary Objection and especially the contention by the Respondent that the Public Service Commission has the exclusive original jurisdiction to deal with the claimant's grievance. She further denied that this Court only enjoys an appellate jurisdiction over the dispute herein and that the suit is prematurely here.

8. The claimant submitted that only this Court and not Public Service Commission is created pursuant to Article 162 of the Constitution to determine disputes related to employment and Labour relations. She further submitted that section 12 of the Employment and Labour Relations Court Act (ELRCA) gives this Court exclusive original and appellate jurisdiction to determine all disputes referred to by Article 162 (2) of the Constitution including disputes relating to or arising out of employment between an employer and an employee.

9. She further submitted that the Act donates jurisdiction to this Court to make a declaratory order, award damages, order reinstatement of any employee within 2 years of dismissal and further to make any other reliefs it may deem fit to grant.

10. She further contended that the claim before the Court is brought under the provisions of the Employment Act 2007 which defines employer to include the Government and which donates jurisdiction to this Court to determine disputes related to termination of employment contract. She therefore maintained that the provisions of Employment Act are distinct from the County Government Act.

11. The claimant distinguished this case from the precedents cited by the respondent in that this suit is brought under the Employment Act which does not provide for reference of the dispute herein to the Public Service Commission. According to her the said precedents are not relevant to this case. She therefore prayed for the Preliminary Objection to be dismissed with costs.

Analysis and Determination

12. The issue for determination is whether this Court has jurisdiction to hear and determine the dispute in this suit.

Jurisdiction of this Court

13. Jurisdiction of any Court is donated either by the Constitution or a statute. In the case of this Court, the jurisdiction of this Court is derived from Article 162 (2) (a) and 165 (5) of the Constitution of Kenya and it is specifically provided for by section 12 of the Employment and Labour Relations Court Act, section 45 (5), 47, 50 and 87 of the Employment Act among other statutes.

14. Section 12 of the Employment and Labour Relations Court Act provides that:

(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162 (2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including – (a) disputes relating to or arising out of employment and an employee.

(2) An application, claim or complaint may be lodged with the Court by or against an employee,

an employer ... the cabinet Secretary or any office established under any written law for such purpose.

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders:

(iv) A declaratory order;

(v) An award of damages in any circumstances contemplated under this Act or any written law;

(vi) An order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose...

(vii) Any other relief as the Court may deem fit to grant”.

15. I have quoted extensively from the said statute to lay the law bear. The question that arises is whether the suit by the claimant fits within the disputes for determination by this Court within the contemplation of the aforesaid provision.

16. In this case the claimant has challenged termination of her employment contract by the respondent contending that the termination was in breach of section 41, 43 and 45 of the Employment Act and prayed for the reliefs provided for under section 49 of the Act including reinstatement to her employment without loss of benefits.

17. After careful consideration of the matters placed before the Court, I am of the considered view that the claim before the Court is in all fours with the express provisions of section 12 of the Employment Act. First, the dispute is between employer and employee and it relates to their employment contract. Second, the reliefs being sought are provided for under the provision of the said section 12 of the Act. Third, the 3 years have not lapsed after the dismissal of the claimant from her employment.

Adjournment or taking away of Jurisdiction

18. I have also carefully perused Article 234 of the Constitution and section 77 of the County Government Act and found nothing that takes away or adjourns the jurisdiction of this Court to determine the Employment and Labour Relations disputes between County Governments and their employees.

19. In my view and as held in my decision in **Philemon Mboya Kachila vs Board of Taita Taveta and Another in SLRCC 428 of 2016**, the provisions of Article 234 of the Constitution and section 77 (2) of County Government Act have merely provided an option to grievants to appeal to the Public Service Commission.

20. In my view that optional route does not in any way adjourn or terminate the jurisdiction of this Court over grievances emanating from employment and labour relations between County Governments and their employees.

21. In my understanding of section 3 (1) and (2) of the Employment Act, a County Government is just an employer like any other, unless excluded under section 3 (2) and (4) of the Act.

Section 3 of the Act provides:

(1) “This Act shall apply to all employees employed by any Employer under a contract of service.

(2) This Act shall bind the Government”.

Disposition

22. In consideration of the reasons and observations made herein above, the Notice of Preliminary Objection dated 12.5.2016 is dismissed with costs to the claimant.

Ruling dated, delivered and signed this 9th day of September 2016

O. MAKAU

JUDGE