



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 76 OF 2015

ABDIKADIR SULEIMAN..... CLAIMANT

VERSUS

COUNTY GOVERNMENT OF ISIOLO.....1ST RESPONDENT

GOVERNOR, COUNTY OF ISIOLO.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 31st July, 2015)

RULING

The claimant filed the memorandum of claim on 08.05.2015 through Mbogo & Muriuki Advocates. The claimant prayed for judgment against the respondent for:

- a. An order of reinstatement into the claimant's position of employment as the Chief of Staff and to remain in service of the respondents, and to perform the attached duties in accordance with the relevant provisions of the Constitution and other laws, unless he otherwise ceases to lawfully hold office in the said position.
- b. A declaration that the act of the 2nd respondent in relieving or removing the claimant of his duties is a breach of his constitutional right under Article 27, 28, 41, and 50 of Constitution of Kenya and that the same is null and void for all intents and purposes.
- c. General damages for unlawful dismissal.
- d. Kshs.5, 198,000.00 being dues payable to the claimant as tabulated at paragraph 11 above.
- e. Costs and interests.

The 1st and 2nd respondents filed the memorandum of response on 03.06.2015 through Kithi & Company Advocates. The respondent prayed that the claim be dismissed with costs.

At paragraph 20 and 21 of the memorandum of response the respondents pleaded that any person affected by the decision of the County Public Service Board or a person exercising disciplinary control over a public officer in the county government is required to appeal to the Public Service Commission as provided for in section 77 of the County Governments Act, 2012. Thus, it was urged for the respondents that section 77 of the Act restricted and ousted the jurisdiction of the court.

The respondents filed together with the memorandum of response the notice of preliminary objection dated 29.05.2015 praying that the claimant's suit be struck out or dismissed with costs to the respondent. The grounds of preliminary objection as set out in the notice were as follows:

- a. That the honourable court does not have jurisdiction to entertain the suit as canvassed or grant the

- prayers as sought by the memorandum of claim.
- b. The suit as canvassed before the honourable court is incompetent, fatally defective in law, incurable and cannot stand in law and therefore ought to be struck out.
 - c. That the respondents are non-suited and their names should be struck off.
 - d. That the suit is an abuse of the court process and cannot be heard or ventilated or heard by the court for that purpose.

The respondents filed on 21.04.2015 submissions on the preliminary objection. The parties' advocates were heard on 21.07.2015 in oral submissions on the preliminary objection.

The 1st issue for determination is whether section 77 of the County Governments Act, 2012 ousts or restricts the jurisdiction of the court in the circumstances of the present suit. Subsections to Section 77 of the Act on appeals to the Public Service Commission provide as follows:

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. **recruitment, selection, appointment and qualifications attached to any office;**
 - b. **remuneration and terms 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 removal from office;**
 - f. **pension benefits, gratuity and any other terminal benefits; or**
 - g. **any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.**
3. **An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of Commission, the circumstances warrant it.**
4. **The Commission shall not entertain an appeal more than once in respect of one decision.**
5. **Any person dissatisfied or affected by a decision made by the Commission on appeal in a decision made in a disciplinary case may apply for review and the Commission may admit the application if-**
 - a. **the Commission is satisfied that that there appear in the application new and material facts which might have affected its earlier decision, and if adequate reasons for the non-disclosure of such facts at an earlier date are given; or**
 - b. **there is an error apparent on record of either decision.**
6. **An application for review under subsection (5) shall be in writing and made within the time prescribed by the Commission in regulations governing disciplinary proceedings, but the Commission may entertain an application for review later if, in the Opinion of the Commission, the circumstances warrant it.**

It was submitted for the respondents that the claimant had been required to proceed on compulsory leave pending investigations about the claimant's performance so that the case was disciplinary in nature and the decision that the claimant goes on compulsory leave was in exercise of powers of disciplinary control so that the proper action was for the claimant to appeal to the Commission. Thus, it was submitted for the respondents that the legitimate action was for the claimant to appeal to the Commission and not to move the court as it was held in the case of James Akelerio Alias Muguu and Another –Versus- Moses Kasaine Lenolkilal and 3 Others [2014]eKLR. The respondents further relied upon the holding in The

Speaker of the National Assembly –Versus- The Hon. James Njenga Karume Civil Application No. 192 of 1992 (UR) where it was held that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. It was submitted that in the present case the first port of call for the claimant should have been the Commission, the suit was premature as the court lacked jurisdiction and the suit should be dismissed.

For the claimant it was submitted that the court enjoyed jurisdiction under section 12 of the Employment and Labour Relations Court Act and the employment relationship was not in dispute. It was submitted that on 4.05.2015 the claimant was orally dismissed by the 2nd respondent as pleaded in paragraph 7 of the memorandum of claim. The claimant filed the suit on 08.05.2015 and long before the alleged compulsory leave pending investigations. It was further submitted that the suit was about the manner in which the respondents had proceeded to dismiss the claimant unlawfully, illegally, unconstitutionally and against the law as pleaded more specifically in paragraph 8 of the memorandum of claim and as the claimant had prayed for a declaration that her fundamental rights and freedoms under the Constitution had been contravened. It was further submitted that section 77(1) used the word “**may**” suggesting that the claimant had an option to appeal to the Commission or take such other legitimate action such as filing the present suit. It was submitted that the claimant was questioning the illegal decision by the governor which could only be handled and resolved by the court and not the Commission.

The court has considered the submissions made for the parties. Article 234(2) (i) of the Constitution provides that the Public Service Commission is vested with the function and power to hear and determine appeals in respect of county governments’ public service. Article 262 defines “public service” to mean the collectivity of all individuals, other than state officers, performing a function within a state organ. Accordingly, and firstly, the court holds that the power of the Commission to hear and determine appeals in respect of county governments’ public service constitutionally applies only to public officers, and not state officers, in the service of the county governments or any other state organ. Secondly, the court holds that section 77 of the County Governments Act, 2012 amplifies and brings into operation Article 234(2) (i) of the Constitution.

In considering the constitutional and statutory provisions that empower the Commission to hear and determine appeals in respect of county governments’ public service, the subject matter is set out in section 77 of the Act but the decisions the Commission may make are not set out in the Act or the Constitution. It is this court’s opinion and holding that in appeals to the Commission, the Commission can only make decisions that the County Public Service Board or relevant lawful authority could have made or vary such decision by simply setting it aside or making a decision that was in the Board’s or the other relevant lawful authority’s jurisdiction to make. The court has guided itself that on appeal the appellate authority applies the same substantive law and facts as applied by the primary authority that made the decision appealed against and generally considers facts as they were presented before the primary authority so that an appellate authority, in absence of anything else, may only set aside the decision appealed against or substitute the decision with any of the remedies that the primary authority was empowered to make. In other words, the appeal process deals with the merits or substance of the case and not procedural or legal propriety of the case.

In disciplinary matters, section 76 of the County Governments Act, 2012 is elaborate that punishment contrary to the Constitution cannot be imposed against a public officer. In particular the section provides that the rules of natural justice must be observed, and the punishment cannot be contrary to provisions of the Constitution and Acts of Parliament. It is clear that the legitimacy of the procedure or punishment imposed as measured against the provisions of section 76 of the Act would be an issue of law and therefore not appealable to the Commission but subject to the jurisdiction of the court. This court’s opinion is that it is not for the County Public Service Board or the person exercising disciplinary control in the county government, as the case may be, to determine a dispute as to its or person’s compliance with section 76 of the Act, and similarly, the Commission would not have jurisdiction to decide such issue on appeal, which essentially would not be conceivable as a matter of a primary decision and therefore subject to the Commission’s appellate jurisdiction under section 77 of the Act. This court’s holding is that while making its primary decisions or decisions on appeals, the Commission like any other state organ or person under Article 10 of the Constitution must care and ask itself whether the decision is lawful or legitimate

in view of relevant constitutional and statutory provisions but the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions rests with the court as vested with the appropriate jurisdiction under Article 162 (2) (a) as read with Article 165(5) and (6) of the Constitution; Article 22(1), and section 12 of the Employment and Labour Relations Act, 2011.

In the present case the claimant has alleged that the oral dismissal was illegal, unlawful and unconstitutional. It is the holding of the court that the jurisdiction to entertain that allegation and to make a primary conclusive finding thereon is vested in the court and the Commission does not enjoy constitutional or statutory jurisdiction to determine that issue and to make appropriate remedy as is prayed for by the claimant in this case. The court considers that the line is thin but clearly sets apart the matters that can go to the Commission as of necessity in the first instance and those that may be urged before the court as of first instance without having to go through the Commission by reason of exhausting the prescribed alternative and statutory procedure and remedy. It is clear that legitimacy or lawfulness of the decisions is not one of the listed appealable subject matter under section 77 of the Act and it has not been shown that such would be a matter in the constitutional or statutory competence of the Commission to decide.

The court says it in other words as follows. The Constitution or legislation may provide that a person or public body or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions or powers as vested in the person or authority or public body by the Constitution or legislation. The Constitution or legislation may also vest in a person or authority or public body the power or function to consider or entertain given disputes or matters as of first instance or on appeal and to render decisions in that regard in accordance with the prescribed procedures. In the opinion of this court, such constitutional and legislative provisions shall not be construed as precluding a court from exercising the relevant jurisdiction in relation to any question whether that person or authority or public body has exercised the powers or functions in accordance with the Constitution or any other law. The court holds that such provisions do not oust or extinguish or adjourn the court's jurisdiction to hear and determine a dispute about the legality or the manner of the exercise of the constitutional or statutory powers and functions by the relevant person, public body or authority as may have been vested in the person, public body or authority under the Constitution or statute.

The court is alert that under Article 159(2) (b) justice shall not be delayed and under Article 159 (2) (e) the court is guided that in exercise of judicial authority, the purpose and principles of the Constitution shall be protected and promoted. Under Article 159 (1) judicial authority is vested in the judiciary and it is the opinion of the court that issues of legality of actions or omissions is the immediate and proper primary or original province and jurisdiction of the court and is not the penultimate or initially ceded jurisdiction of persons, public bodies and authorities outside the judiciary. In the opinion of the court, it would amount to delayed justice to tell the claimant thus, **“ The court knows your alleged case is that an illegality has taken place; you challenge the alleged illegality; on merits of the challenged decision you ought to appeal to the Commission; the Commission has no jurisdiction to consider issues of illegality as you have alleged in your case but it might consider it and may rule in your favour; and therefore, though this court has the primary jurisdiction to consider the issue of illegality as you have alleged, you ought to have gone to the Commission in the first instance just to see if the Commission might have considered the issue of illegality before you moved this court and your case is dismissed accordingly for failure to give the Commission chance to exercise the speculative and hopeful jurisdiction on that issue of alleged illegality.”** While making that finding the court considers that in any event there are no established time lines for appealing and making of the decision by the Commission and the likely consequence is that the claimant may be subjected to irreparable harm such as rendering the cause of action to challenge the alleged illegality time barred.

In the instant case, looking at the alleged claims of illegality, unconstitutionality, breach of constitutional rights and the remedies as prayed for, it is difficult to find that the cited alternative procedure and remedy under section 77 of the Act was available to the claimant. Even if it is said that it was a case of mixed jurisdiction of the Commission and the court, it is the court's opinion that the legitimate path was to invoke the court's jurisdiction to hear and determine the intertwined issues, that being the most efficient and effective manner of disposing the dispute.

In the circumstances of this case, the court returns that the provisions of section 77 of the County Government Act, 2012 did not oust or restrict the jurisdiction of the court for want of exhaustion of the procedure and remedies envisaged under the section.

The 2nd issue as stated in the respondents' submissions is whether the Employment and Labour Relations Court has jurisdiction to entertain and determine claims of breach of fundamental rights under Articles 22 and 23 or enforcement of the Constitution under Article 258 of the Constitution as pertains to employment and labour relations matters.

The Court of Appeal has resolved the issue in the case of **Prof. Daniel N. Mugendi –Versus- Kenyatta University and 3 Others, Civil Appeal No. 6 of 2012**. The court stated thus,

“The question now is whether the appellant should go back and ‘sever’ the composite petition alleging violation of his fundamental rights and breach of contract of employment. Much as severance would entail time and resources to effect the necessary amendments and make due motions, we are of the view that with necessary amendments, which appear imperative to make out a clear use of breach of rights being effected, the appellant can and should be heard by the Industrial Court on the two claims i.e. violation of rights and breach of contract of employment. The position that the Industrial Court can and should entertain the claim as laid by the appellant, is in line with the decision of Majanja, J. in Petition No. 170 of 2012 – United States International University(USIU) –Versus- The Attorney General & Others.”

That this court enjoys the jurisdiction to hear and determine employment and labour relations matters alongside claims of fundamental rights (and enforcement of constitutional and statutory provisions) ancillary and incidental to those matters was upheld in the ruling delivered by this court on 30.04.2014 in **Geoffrey Makana Asanyo –Versus- Nakuru Water and Sanitation Services Company and 6 Others [2014]eKLR**. The Court of Appeal held as much in **Judicial Service Commission –Versus- Gladys Boss Shollei & Another [2014]eKLR**.

The court followed the opinion in those cases in the ruling delivered on 15.05.2015 in **Geoffrey Mworio –Versus- Water Resources Management Authority and 2 Others [2015]eKLR**.

Again, in **Karisa Chengo and 2 Others –Versus- Republic [2015]eKLR** the Court of Appeal has stated thus,

“...By being of equal status, the High Court therefore does not have the jurisdiction to superintend, supervise, direct, guide, shepherd, and or review the mistakes, real or perceived, of the ELRC and ELC administratively or judiciously as was the case in the past. The converse equally applies. At the end of the day however, ELRC and ELC are not the High Court and vice versa. However, it needs to be emphasized that status is not the same thing as jurisdiction. The constitution though does not define ‘status’. The intentions of the framers of the constitution in that regard are obvious given the choice of the words they used; that the three courts (High Court, ELRC and ELC) are of the same juridical hierarchy and therefore are of equal footing and standing. To us it simply means that the ELRC and ELC exercise the same powers as the High Court in performance of its judicial function, in its specialised jurisdiction but they are not the High Court.”

As stated by the court earlier in this judgment, the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between employers and employees rests with this court as vested with the appropriate jurisdiction under Articles 159(1), 162 (2) (a) as read with Article 165(5) and (6) of the Constitution; Articles 22(1) and 258(1) of the Constitution, and the provisions of the Employment and Labour Relations Act, 2011. The court holds that the jurisdiction spreads to all issues in the employment relationship and related matters including the enforcement of the fundamental rights and freedoms under Article 22 of the Constitution and enforcement of the Constitution under Article 258 as far as the issues in dispute are, evolve, revolve or relate to employment and labour relations. The court holds that the compass or golden test for the court's jurisdiction is the subject matter in the dispute namely disputes relating to employment and labour relations as provided for Article 162 (a) of the

Constitution and as amplified in the Employment and Labour Relations Act, 2011 and not the remedies sought or the procedure of moving the court or the situ of the applicable law or any other extraneous considerations as may be advanced by or for a litigant.

In conclusion, the respondent's preliminary objection filed on 3.06.2015 is dismissed with costs and the parties are now invited to take directions on the hearing of the main suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 31st July, 2015**.

BYRAM ONGAYA

JUDGE