



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

PETITION NO. 11 OF 2015

HUSSEIN ROBA BORU.....PETITIONER

VERSUS

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

H.E. THE GOVERNOR OF ISIOLO.....2ND RESPONDENT

THE COUNTY ASSEMBLY OF ISIOLO.....3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 2nd October, 2015)

RULING

The 1st and 2nd respondents filed a notice of preliminary objection on 16.07.2015 setting out 5 grounds thus:

- a. The honourable court lacks jurisdiction to hear and determine the application and the petition.
- b. The application and the petition are an abuse of court process.
- c. The application and the petition amount to forum shopping, a practice barred by the law.
- d. The orders sought by the petitioner are incapable of compliance by the petitioners.
- e. The application is bad in law, incurably defective, incompetent misconceived and an abuse of court process.

On 16.07.2015 it was ordered that the applications on record are dispensed with as parties will take directions on hearing of the petition subject to the outcome of the preliminary objections. The court finds that the preliminary objections were thereby determined as relates to the applications and parties argued the objections as they related to the main petition.

The **1st ground** of objection is that the present petition is an abuse of court process and sub-judice in view of High Court Petition at Meru No.16 of 2015 filed for the petitioner against the same respondents. It is not disputed between the parties that objections about jurisdiction were raised for the respondents in the said pending petition at Meru prompting the petitioner to file a notice to withdraw that petition and to file the present petition in this court as the appropriate court. Parties took considerable time urging whether the petitioner had taken or had failed to take steps to perfect the withdrawal of the petition at Meru. In the opinion of this court that was procedural and technical consideration excusable under Article 159 2(d) of the Constitution. What is material before this court as a matter of substance is that the petitioner has on record before this court and the petition in Meru clearly expressed that he has abandoned the petition in Meru and is pursuing the petition before this court.

To that extent, the court finds that the present petition is not an abuse of court process as is not sub-judice as urged for the 1st and 2nd respondents. While making that finding, the court follows the opinion of the Court of Appeal in **Prof. Daniel N. Mugendi –Versus- Kenyatta University and 3 Others, Civil Appeal No. 6 of 2012**. Thus, until litigants became fully familiar with the jurisdiction of the high court and the courts of equal status, the suits should be redirected to the court with the appropriate jurisdiction. Thus, the petitioner's predicament in the instant case is excusable and the court finds that the petition is not an abuse of court processes as it has been recommenced in the court with appropriate jurisdiction.

The 2nd ground of objection is whether the petitioner should have appealed to the Public Service Commission before moving this court so that the petition is premature for want of exhaustion of the appeal process. The court has perused the petition. It is clear that the petitioner has pleaded that he is seeking to enforce fundamental rights and freedoms and other provisions of the Constitution. For that ground, the court upholds its opinion in **Abdikadir Suleiman –Versus- County Government of Isiolo [2015]eKLR** ruling of 31.07.2015 thus,

“...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.”

And further,

“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.”

Accordingly, the preliminary objection shall fail and parties are invited to take further directions on the hearing of the main petition. The 1st and 2nd respondents shall jointly and severally pay costs of the preliminary objection.

Signed, dated and delivered in court at Nyeri this Friday, 2nd October, 2015.

BYRAM ONGAYA

JUDGE