



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION 156 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF: ARTICLES 10, 22, 23, 162, 165 AND 259 OF

THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: CONTRAVENTION AND VIOLATION OF ARTICLES 10,

27 AND 41 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

-BETWEEN-

HEZRON KIHUMBA KAMOTHO.....PETITIONER/APPLICANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

Petitioner's Notice of Motion dated 13th August 2019

The Petitioner/Applicant, Hezron Kihumba Kamotho filed this application against the Respondent, Teachers Service Commission seeking for Orders that pending hearing and determination of the application and Petition, Conservatory Orders be issued suspending the enforcement of the letter dated 15th July 2019 and further prohibiting the Respondent from implementing, applying and/or executing the contents of the said letter. The Application is based on the following grounds:-

1. The Petitioner was employed as a Public Relations Officer on Permanent and Pensionable terms on 2nd June, 2002 and subsequently rose through the ranks to become the Assistant Deputy Director Public Relations, TSC Scale 11, Job Group P reporting to the Deputy Director (Public Relations) Scale 12, Group Q who was previously the Head of Public Relations Section.
2. Vide a letter dated 10th January 2014, the Respondent appointed the Petitioner as Head of Corporate Communications Division, which was at TSC Scale 12, Job Group Q. The said position comprised the Public Relations Section and Customer care Section thus the Petitioner had more responsibilities than the position that was held by his predecessor.
3. The Respondent has since then failed, neglected and/or refused to adjust the Petitioner's terms and conditions of service accordingly including failing to update his Job Group and not making any increments on his pay as per the Scheme of Service despite several requests from the Petitioner.
4. On 15th July 2019, the Respondent issued a letter to the Petitioner which inter alia gives the Petitioner the option of remaining on permanent and pensionable terms of service with current salary or the option to have his terms changed into contract and receive the salary provided for officers serving on contract. The Petitioner is expected to decide between the two options not later than 30th September 2019.

5. The Petitioner is unable to make an informed decision because the Respondent has failed, neglected and/or refused to adjust the Petitioner's terms and conditions of service accordingly and continues to pay the Petitioner an acting allowance despite the fact that the Petitioner has never been appointed in an acting capacity.

6. Despite numerous letters from the Petitioner requesting the Respondent to adjust the Petitioner's terms and conditions of service, the Respondent continues to ignore the Petitioner's requests and continues to pay the Petitioner an acting allowance to date despite having been appointed the Head of Corporate Communications in 2014.

7. Aggrieved, the Petitioner has filed this Petition owing to the fact that the Respondent has violated and infringed his rights and freedoms such as freedom from discrimination and right to fair labour practices particularized in Articles 10, 27 and 41 of the Constitution.

8. The Petitioner has also filed an application for Conservatory Orders to preserve the status quo and enable the court to grant an effective remedy at the full trial of the Petition. Unless conservatory orders are granted the Petitioner will be prejudiced.

9. The expedited decision of the Court in addressing this matter is in the interest of justice.

In the supporting affidavit, the Applicant avers that under his appointment letter dated 10th January 2014, he was required to perform the following duties and responsibilities:-

- a. Restructure and co-ordinate the activities of Corporate Communications Division which incorporates the Public Relations and Customer Care Sections.
- b. Design a media strategy and make recommendations on how the Respondent will engage with the media for purposes of positive visibility.
- c. Redesign a public complaints procedure to enable the Respondent develop strategies that will mitigate against such complaints in future.
- d. Initiate and review Corporate Communication and Customer Care Policy and design appropriate programmes and infrastructure to facilitate its implementation.
- e. Co-ordinate the preparation and writing of required speeches for different occasions.
- f. Research on various public communication issues and develop appropriate interventions.
- g. Monitor and evaluate customer service both in the County and the Headquarters.
- h. Advise the Respondent on communication and customer care trends.
- i. Manage Performance and undertake appraisal of staff in the Division.
- j. Co-ordinate the development, design, printing and distribution of the Image Magazine and update the Respondent's Newsletter.
- k. Ensure customers visiting the Respondent are treated with care and emerging issues are directed to the appropriate Director.

That after he was appointed Head of Corporate Communications Division, he expected an adjustment of his salary in line with his new official position, responsibilities and provisions of the Scheme of Service in place at the time. That when the adjustment of his salary was not forthcoming, he made verbal enquiries with the Director, Human Resource Management and Development and the then and current Secretary/CEO but still no adjustment was made. That he further requested the Respondent vide letters dated 17th March 2014 and 22nd October 2014 to adjust his terms of service in line with the new status of Corporate Communications as a division and the added responsibilities as the Head of the Division. He also informed the Respondent vide another letter dated 20th August 2018 that he has been receiving an acting allowance since 13th January 2014. He contends that receiving an acting allowance for over 5 years is irregular, unlawful and unconscionable and that the Respondent has acknowledged him as the Head of Corporate Communications in various formal communications within the secretariat, other government departments and with the general public.

He avers that the Respondent sought to sanitize its unlawful conduct vide letters dated 14th July 2016 and 21st November 2016 by purporting to effect an acting allowance on his alleged appointment to the position of Deputy Director. That this was irregular as he had never been demoted, he had never resigned and had never been re-assigned from his position as Head of Corporate Communications to that of Assistant Deputy Director. His advocates sent a demand letter to the Respondent on 9th April 2019 to adjust his terms of service in accordance with his letter of appointment dated 10th January 2014 but it reverted vide a letter dated 15th July 2019 requiring him to choose between permanent and pensionable terms and contract terms by 30th September 2019. He believes that the Respondent's aforementioned actions are devoid of any legal or constitutional basis and have resulted in his constitutional rights being infringed as detailed in the Petition.

The Respondent filed a Replying Affidavit dated 23rd August 2019 sworn by its Director Human Resource Management and Development, Josephine Mueni Maundu. She avers that she has been advised that the pleadings and documents filed in support of this application and the reliefs sought thereat are not tenable in law and that the prayers sought are completely unrelated to the grounds raised on the face of the

Application as well as in the Supporting Affidavit. That the said application must therefore fail as it has no feet to stand on. She further avers that the said letter dated 15th July 2019 is an offer of employment under contractual terms pursuant to the parties' freedom of contract and has no relation to the Applicant's promotion over five years prior or his allegations arising therefrom. That the Applicant has not particularized or demonstrated any impropriety in the said letter and as such there exists no justification to suspend its enforcement as prayed.

She continues to aver that the Applicant's only complaint being his inability to make a decision is a hypothetical situation devoid of any constitutional dispute for this Court to act upon. That the Applicant has filed this ordinary employment dispute as a constitutional petition with the intention of circumventing the law on limitation as set out at **Section 90 of the Employment Act** and the same being an abuse of court process, ought to be dismissed. That the Applicant does not stand to suffer any prejudice and/or irreparable damage should this application be dismissed for the reason that this Court can order the payment of any arrears in salary should the matter be decided in his favour as demonstrated by the prayers set out in the Petition. Further, the Applicant who is still employed by the Respondent continues to enjoy his salary and allowances as admitted in his pleadings and will suffer no prejudice should this application be dismissed.

Petitioner's Notice of Motion dated 23rd September 2019

The Petitioner/Applicant filed this application seeking Orders that pending the hearing and determination of the application and the Amended Petition, Conservatory Orders be issued restraining the Respondent, its agents and/or servants from recruiting, processing, interviewing, receiving applications and/or appointing any person for the position of Deputy Director Corporate Communications TSC Scale 12. That pending the hearing and determination of the application and the Amended Petition, Conservatory Orders be issued compelling the Respondent to cancel the advertisement with respect to the said position and further restraining it from demoting, dismissing and/or terminating the Applicant's employment from his current position as Deputy Director Corporate Communications. Further, that pending the hearing and determination of the application and the Amended Petition, Conservatory Orders be issued preserving the Applicant's position as Deputy Director Corporate Communications and any other position he is qualified to hold.

The Application is based on the following grounds: The Respondent advertised one vacancy for his current position of Deputy Director Corporate Communications through the My Gov. advertising agency platform published on the Daily Nation Newspaper of 17th September 2019 for which applications close on 9th October 2019. That the said advertisement is malicious, illegal, unlawful, unjustified and contrary to fair labour practices enshrined in the Constitution and that it will result to loss of his employment. That unless conservatory orders are granted he will be greatly prejudiced and that the expedited decision of this court in addressing the matter is in the interest of justice.

In his supporting affidavit, the Applicant highlights at *paragraph 10* the responsibilities he was tasked with upon his appointment as Deputy Director, Corporate Communications which he avers is per the TSC Secretariat Staff schemes of service. He further annexes documents marked **KK6 – KK10** being correspondence that affirmed his position as Deputy Director, Corporate Communications. He avers that the advertising and intended recruitment for a position he is occupying is an extreme violation of his right to fair labour practices.

The Respondent filed a Replying Affidavit dated 26th September 2019 sworn by Josephine Mueni Maundu who states the Amended Petition is incompetent and ought to be struck out as it is filed without leave of Court as required in law. She avers that the Applicant is seeking a raft of conservatory reliefs so as to injunct certain operations of the Respondent yet he is guilty of material non-disclosure. That the post of Deputy Director Corporate Communications did not exist until 2011 when it was created without the appointment of a substantive head, resulting to their staff member, Nkatha Murungi being reassigned duties of the said post. That the said Nkatha was thereafter reassigned to a different department owing to restructuring of the Respondent's operations and the Applicant was subsequently re-designated as Head of Corporate Communication then Assistant Deputy Director Corporate Communications, allocated duties of the Deputy Director Corporate Communications in a non-substantive capacity.

She continues to aver that the Applicant was paid special duty and acting allowances and was well aware of his interim role as communicated to him in the letter of 19th November 2014 after he had made inquiries on the same. That they also responded to him in their letter dated 30th August 2019 advising him of the need for a competitive process to fill the post and advising him to apply once the same was advertised. That the Applicant never challenged this response and was even part of the process of preparing the subject advertisement for vacancies by uploading the same to the necessary portal and has therefore been aware of the fact that he is not the substantive office holder. That his rightful substantive position is Assistant Director Corporate Communications which he holds to date and has not been barred from applying for the position of Deputy Director Corporate Communications alongside other eligible applicants. Further, that his inability to decide whether or not to apply for the advertised post is not a constitutional dispute for which this Court can act upon. She states the Applicant is attempting to procure this Court to confer upon him an appointment without subjecting himself to the Respondent's recruitment exercise and further scuttle their preliminary objection dated 22nd August 2019, which this court had earmarked for disposal.

That they have also advertised positions which have persons executing their roles in an acting capacity and the Applicant is not an isolated case and neither is he being discriminated against. That there is no threat of dismissal or termination of these persons. That the career guidelines for Secretariat staff draft which the Applicant seeks to rely on was circulated to him through his office but is yet to be operational. That there is no justification to suspend the advertisement process. That this application does not reveal any particular breach of fundamental rights and the Applicant has therefore not demonstrated any prima facie case to warrant an exercise of discretion in his favour.

The Respondent further filed a Preliminary Objection on 30th September 2019 opposing the Petitioner's application dated 23rd September 2019 and the entire proceedings in the Petition on the grounds that the cause of action in the Amended Petition is time barred vis-à-vis section 90 of the Employment Act. Further, that the Amended Petition on the face of it does not meet threshold test of constitutional proof set in **Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272**.

The Petitioner/Applicant filed a Supplementary Affidavit dated 30th September 2019 in response to the Respondent's replying affidavits and Grounds of Opposition. He avers that if the orders he seeks are not issued, the entire suit will be rendered nugatory as his constitutional rights under **Articles 27 and 41** continue to be infringed to date. That his claim is one of continuing injury and that the payment of arrears is not an alternative to the orders sought but are meant to address the Respondent's unreasonable, arbitrary and discriminatory decision to deny him

the salary mandated for a person in his position from the date of his promotion on 13th January 2014. That the Respondent's preference to have the matter resolved by way of payment of arrears further raises his contention that it seeks to alter his nature of employment through craft and innovation so as to circumvent the law. He further avers that a party is at liberty to amend pleadings before pleadings are closed and that in the instant case, no leave of court was required to file the Amended Petition.

The Applicant contends his appointment letter did not mention he was holding the position in acting capacity and that if it was so, senior officials of the Respondent would have addressed him as Acting Deputy Director, Corporate Communications in their correspondences. He denies that he has been involved in the process of preparing the subject advertisement for vacancies or uploading the same in the portal and avers that he only saw the advert of his position on the date it was published in the Daily Nation Newspaper. That he was rightly qualified for the said position and subjecting him to a fresh application is a violation of the right to fair labour practices and that the balance of convenience therefore warrants the granting of orders sought.

Oral Submissions

The Petitioner/Applicant's advocate, Mr. Wathuta argued in court that one of the violations under Article 41 is recruiting for a position an employee is holding and which is a degrading action. He referred this Court to the case of *Mark Ewoi & 4 others v County Government of Turkana* where the court held that the advertisement was null and void as the position was not vacant. That a similar situation was before this Court in 2015 in the case of *Atamba v Masinde Muliro University* where it was found that the claimant's rights under Article 28 and 41 were infringed by failure to inform her of changes in her position before advertisement. That in *David Ogega & another v Kisii County Public Service Board & another*, the Court restricted the respondent from advertising the position of the applicant. Counsel argued that with the documents produced in court showing the Petitioner signed as Deputy Director and was addressed as such in several correspondence, there is no doubt he was performing duties of the said position and that it is extremely important that the recruitment exercise is halted.

The Applicant's advocate further argued that the case of *Anarita* is on specificity and the Petition herein is very specific. That the said *Anarita* case is no longer the constitutional standard on specificity and he further referred the court to the decision in *Peter M. Kariuki v AG* on specificity. On the Petition herein being time barred, he referred the court to paragraph 3.4 of their Submissions and stated that Wasilwa J. addressed the issue of continuing injury and damage. That it is important before the Petition is heard, the subject matter is preserved and that the court in *Antoinette v ERC* dealt with a similar situation and issued orders stopping the recruitment. He urged the Court to grant conservatory orders of recruitment given the same closes on 9th October 2019.

Ms. Bonyo for the Respondent stated they sought to rely on their submissions filed on 11th September 2019 and their List of Authorities filed on 23rd August 2019. She argued that there is no proof of written confirmation of the Petitioner as the substantive office holder and that there is further no proof he has been barred from applying for that position. She referred the Court to exhibit *JMM 1 and 2* being extracts from payroll records which state the substantive position held by the Petitioner to be Assistant Deputy Director and argues that he cannot therefore denote he was performing duties of Corporate Director in an acting capacity. That the actions and omissions upon which the Applicant wishes to move this court is hypothetical in nature such as the allegation of impending termination and argues that the Amended Petition is an afterthought.

In attacking the authorities cited by the Applicant's advocate, the Respondent's advocate argued that the claimant in the *Atamba case* moved court by way of a normal employment claim and that it is also distinguished since at the time she moved the court, there was already change of qualifications of that post. That the 1st respondent in the *David Ogega case* sought to terminate the claimant's employment on the basis of unconscionable reasons that the term of his office was tied to the terms of government and that it was also a normal employment dispute. That in the *Antoinette case*, the respondent sought to convert the P&P to Contract terms which is not similar to the current position where the Applicant has been given an option to choose to remain on P&P or transit to Contract. She argued that this court can still handle issues of alleged breach of the constitution in a normal claim but the Applicant has moved the court by way of a Petition to specifically defend the express provisions of section 90 of the Employment Act. That the Applicant could have brought the suit at that time when he alleges he was promoted without commensurate pay.

She further referred the court to *page 12, paragraph 3.6 of their submissions* where they rely on *Elizabeth Mburu v Kenya Breweries Ltd* where this court observed that the claimant had attempted to circumvent the limitation period and the court was categorical that there is danger of abuse of the Constitution if all matters are framed as abuse of the Constitution. She submitted that this court cannot be asked to issue conservatory issues on what is optional and that the articles allegedly breached are void of particulars. That the Court of Appeal in *Mumo Matemu* restated the principle in the *Anarita Karimi case* and that in the case of *Legal Brains Trust v AG Republic of Uganda*, the East Africa Court of Justice was categorical that the court will not entertain hypothetical questions wherever real life experience existed. She asked for the dismissal of the applications before court and the entire Petition for being an abuse of the court process and for the court to grant them costs.

The Applicant's advocate then responded that **section 5(7) of the Employment Act** vests upon the employer the burden of proving there is no discrimination and argued that there was no evidence from the Respondent. He argued they have demonstrated that the Petition has met the constitutional threshold in their filed Authorities.

Determination

It is trite law that where a preliminary objection has been raised, especially where it is likely to resolve the entire suit before the court, it should be disposed of first and only if the preliminary objection is unsuccessful should the court proceed to hear the other issues in contention.

In the present case the respondent has raised a preliminary objection that has two facets: the first is that the suit herein does not raise any constitutional issues and has been filed as a petition only to circumvent limitation; the second is that after removing the cloak of the constitutional petition that the petitioner has clothed it with, the claim is statute barred under Section 90 of the Employment Act and therefore this court has no jurisdiction to entertain the same.

The first issue to determine is therefore whether this is a proper constitutional claim or is a simple employment dispute. To do this I will look at the constitutional violations alleged and the prayers sought by the petitioner. The petitioner alleges infringement of Articles 10(2)(b), 27(1), (2) and (3) and 41(1) and (2).

The acts of the respondent which he alleges constitute the violation are that the respondent failed to change the terms of his service and irregularly and unlawfully imposed an acting allowance on the petitioner's payslip. He further alleges that having been appointed as Head of Communications vide letter dated 10th January 2014, he is entitled to salary benefits attached to that position.

These acts complained of do not constitute violations of Articles 10, 27 and 41 of the Constitution as alleged. Article 10 provides for national values and principles of governance which have nothing to do with terms and conditions of service of an employee. Article 27 provides for equal protection of the law and freedom from discrimination. The acts complained of do not disclose any violation of the petitioner's right to protection of the law or discrimination.

Article 41(1) and (2) provides for fair labour practices and fair remuneration and reasonable working conditions.

Again, the facts as pleaded by the petitioner do not disclose any violation of Article 41 as he has not complained about any unfair labour practice nor remuneration or reasonable working conditions. His complaint is that he was promoted but has not been placed in the correct job group to which he was promoted.

There is another issue that the petitioner has not clarified; the relationship between the prayers in his application and the petition. The application seeks orders suspending a letter wherein the petitioner has been asked to choose whether to move to contractual terms of employment or to remain on permanent and pensionable terms of service. It is not clear from his pleadings how the issue of placement in the correct job group which has been pending since 2014 has suddenly become urgent because he has been asked to choose between remaining on his current terms of employment or move to fixed term contract.

As was stated by the court in the case of **Elizabeth Mburu –V- Kenya Breweries Limited** (supra), not all issues in employment disputes are constitutional issues. The court went further to state –

“There is a real danger of abusing the Constitution if all interactions and subsequent disputes are considered constitutional issues or matters requiring interpretation of the Constitution or requiring the enforcement or protection of fundamental rights under the Bill of Rights. It would be absurd to have each and every dispute elevated to the constitutional platform. It is apparent that the suit is one which relates to the pursuit of remedies in the nature of employee-employer disputes under this Court's jurisdiction both in its former sense and presently as constituted. Under the regime of laws applicable in 2004 when the suit was filed it was under the regime of the Employment Act cap 226 laws of Kenya. Under that regime of law, the limitation was expressly provided for in the statute and recourse is to the Limitation of Actions Act Section 4(1) which sets the time bar at 6 years for any acts under contract. Using the date the cause of action accrued in April 1994 the limitation would set in in the year 2000. The suit was filed 4 years out of time. The suit therefore is out of time and thus not one upon which a cause of action for redress on employment issues can be founded. The Claimant sought a clever way to put forward her case which was now time barred by appealing to the Court's constitutional jurisdiction.

*The attempt by the Claimant to elevate the contest to the constitutional platform is misplaced. It is clear from the Originating Summons filed the dispute is in the main on employment and this can be gleaned from the questions the Claimant sets out for determination in the Originating Summons. I am persuaded that on the basis of **Petronella Nellie Chirwa v. Transnet Ltd (2007) ZACC 23** where the Constitutional Court in South Africa held that a matter does not become a constitutional matter merely because the party calls it one. In the premises I would uphold the preliminary objection raised by Mr. Burugu. The suit is without any legs once we cut off the constitutional pins the Claimant has attempted to deploy to hold this case together. It is dismissed with costs to the Respondent.”*

These sentiments were also expressed in the case of **Braimoh Kotonya Odera –V- Barclays Bank of Kenya Limited (2018) eKLR; Hon. Uhuru Kenyatta –V- The Nairobi Star; Bernard Murage –V- Fine Serve Africa Limited and 3 Others: Rich Productions Limited –V- Kenya Pipeline Company and Another** to mention but a few. It is thus now established law, going by the string of cases in which courts have made pronouncements on the matter, that where a matter is provided for in legislation, a person seeking relief should approach the court through the legislative provisions and not through the constitution.

It is clear from the facts on the petition that the matters pleaded in the petition do not constitute violations of the constitution but are rather, administrative issues that do not even fall under employment legislation but are covered under the internal terms and conditions of service governing the employment of the petitioner. As was stated in the celebrated case of **Anarita Karimi Njeru** and expounded in **Mumo Matemu –V- Trusteed Society of Human Rights Alliance and 5 Others**, a party seeking relief under the constitution must state the alleged constitutional provisions violated and the acts or omissions complained of with reasonable precision.

As demonstrated above, the petitioner has failed to demonstrate in his pleadings how his constitutional rights have been violated by the respondent under the specific constitutional provisions that he has cited.

From the foregoing, it is clear that there is no constitutional violation disclosed in the pleadings of the petitioner and that this is a pure employment dispute that the petitioner has elevated to the constitutional pedestal.

Having found this, is the preliminary objection valid?

In his pleadings, the petitioner avers that he was promoted to the position of Head of Corporate Communications on 10th January 2014. He thus seeks orders among other prayers that *“This Honourable Court do issue an order compelling the respondent to confirm the petitioner's*

correct Job Group being TSC Scale 12, Job Group Q” and further that “This Honourable Court do issue an order compelling the respondent to pay the unpaid arrears (salaries and allowances) in the correct Job Group being TSC Scale 12, Job Group Q”. These prayers stem directly from the alleged promotion of 10th January 2014.

It is clear from the pleadings and prayers that the petitioner seeks accrued more than 3 years from the date of filing the petition on 14th August 2019.

The petitioner further urged the court to find that this is a case of continuing wrong as provided under Section 90. Promotion is an event not a continuing injury. The pleadings refer to a specific date, the 10th of January 2014.

A continuing wrong is an injury that is committed continuously, like overtime or under payment, where a new course of action arises every time the injury occurs and cumulatively amount to a wrong. In overtime, every time an employee works overtime and is not paid, a new injury occurs. The same as underpayment which accrues continuously for every month that the underpayment persists. The petitioner’s case of promotion is not a continuing injury.

The preliminary objection thus succeeds with the consequence that cause of action in the petition has been filed out of time and this court has no jurisdiction to entertain the same.

This being the case, there is no need to determine the applications dated 13th August 2019 and 23rd September 2019, which are accordingly dismissed together with the petition.

In view of the relationship between the petitioner and the respondent which still subsists, I will order that each party bears its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF NOVEMBER 2019

MAUREEN ONYANGO

JUDGE