REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

PETITION CASE NO. 3 OF 2017

MATTEW KAMANU MWAURA.....APPLICANT

V E R S U S

THE PERMANENT SECRETARY OFFICE OF THE PRESIDENT

PROVINCIAL ADMINISTRATION & 2 OTHERS.....RESPONDENTS

RULING

1. The respondents raised a preliminary objection on the following grounds:-

a) That the suit is time barred and offends mandatory provisions of **Section 90 of the Employment Act, 2007.**

b) That the petitioner is circumventing the Employment Act and the Labour Relations Act by relying on the constitutional provisions having realized the matter is statute barred under the parent Acts which give effect to constitutional rights.

c) That the suit is an abuse of the Court process.

d) That the suit is incompetent and ought to be struck out with costs.

2. The brief facts are that he petitioner Mathew Kamanu Mwaura filed this petition alleging that his retirement in the public interest as an Assistant Chief on 2/4/12 was unlawful and contrary to his constitutional rights guaranteed under **Article 27, 40, 47 & 236 of the Constitution**. He seeks a declaration that the arbitrary actions by the respondents were unconstitutional, unlawful and null and void and that they infringed his rights under the Constitution. A declaration that the respondents be ordered to pay him monies entitled to him from 2012 – 2019. The respondents be ordered to pay him general damages for violation of his rights to employment.

3. The respondent opposed the petition and filed a Notice of Pre-liminary objection. The applicant had also filed an application dated 5/7/2017 seeking leave to enter judgment in default against the respondents.

4. The parties agreed to file submissions. The issue which arise is whether the suit is time barred. In the Supporting Affidavit, the petitioner deposes that he was lawfully hired as an Assistant Chief of Mahigaini sub-location for a period of 20 years. On 19/3/2009 he was charged with the offence of incitement to violence in Cr. Case No. 325/09 for which he was later acquitted. Later on 2/4/12 he was relieved from service by the respondent citing public interests issues. As such the cause of action arose on 2/4/2012. This application was filed on 30/5/2017.

Section 90 of the Employment Act provides:

> *Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.*

Though the matter is filed as Constitutional Petition, there is no denial that the cause of action is related to a contract of employment. The petitioners' employment was terminated in 2012. Any action related to that termination was supposed to be filed within a period of three years. That is to say by 1/4/2015. No claim was filed within that period. The claim was therefore statute barred. The petitioner has not given any explanation as to why he did not file the claim within time. Failure to file the claim within the time limited for filing is not a mere technicality as it touches on substantive matter on the claim and a fundamental flow if not dealt with before filing the claim.

5. The petitioner did not seek leave to extend the period in which to file the case. The petitioner has not shown why he did not move the court

for appropriate remedy within the three years period which was available to him to file the claim.

6. Where a party has not come to court within time, the issue of court's jurisdiction arises as the court is supposed to deal with claims which are filed in compliance with the law. The Labour and Employment Court has held that **Section 90 of Employment Act** is the law that regulates limitations in employment contracts to 3 years. This was stated in ***Ndirangu –v- Henkel Chemicals E. A. Ltd (2013) eKLR*** where it was stated:

> **"Section 90 of the Act now regulates limitation time in employment contracts to three years ……. Section 4(1) of the Limitation of Actions Act is not applicable and therefore the claimant cannot be heard to argue that the limitation was six years."**

Further in Industrial Court **Cause No. 1201/2012 Banking Insurance and Finance Union (k) –v- Bank of India** the court stated:

> ***"The fact of the matter is that employment contracts like other commercial contracts were subject to the provisions of the Limitation of Actions Act Cap 22 of the Laws of Kenya at the time with regard to Limitations but presently the limitation period is governed by Section 90 of the Employment Act 2007 which has reduced the limitation period in employment matters to three (3) years."***

7. I am persuaded by this decisions as they have stated the correct position with regard to the issue of limitation period for filing claims based on employment contract. The claim by the petitioner is time barred. The Preliminary Objection has merits.

In ***Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969)EA 696.***

Pr. D-F *Law JA* as he then was had this to say***:-***

> ***....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.***

Sir Charles Newbold, P.; added the following:

> ***A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....***

The test to be applied in determining whether a Preliminary Objection meets the threshold or not is what **is** set out above in the **Mukisa Case** (supra), that is;

i) That the Preliminary Objection raises a pure point of law,

ii) That there is demonstration that all the facts pleaded by the other side are correct; and

iii) That there is no fact that needs to be ascertained.

This is a leading authority which gives the circumstances under which a pre-liminary objection maybe raised. The issue of a claim being filed out of the time provided in the statute is a point of law which when successfully raised has the effect of terminating the suit. The issue of the claim being time barred is based on facts which are not in dispute. The preliminary is on sound legal basis and has merits.

2. The petitioner is circumventing the Employment Act and the Labour Relations Act by relying on the constitutional provisions having realized the matter is statute barred under the parent Acts which give effect to constitutional rights.

Section 87 of the Employment Act deals with the issue of jurisdiction and provides:

> *(1) Subject to the provisions of this Act whenever—*
>
> *(a) an employer or employee neglects or refuses to fulfill a contract of service; or*
>
> *(b) any question, difference or dispute arises as to the rights or liabilities of either party; or*
>
> *(c) touching any misconduct, neglect or ill-treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.*
>
> *(2) No court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1).*

(3) This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute.

The petitioner herein filed a petition stating that he was lawfully hired as an assistant chief of Mahigaini Sub-location, Kirinyaga County. On or about 19/03/2009 he was charged with offence of incitement in **Criminal Case No. 325 of 2009** and was temporary relieved of his duties pending determination of the criminal case. Upon being acquitted, he sought to be reinstated back to employment but on or about 02/04/2012 he was unlawfully retired by the respondents citing public interest issues.

He therefore claims that his termination was unlawful and in contravention of the Constitution of Kenya and infringed on his rights pursuant to **Articles 27, 40, 47 and 236 of the Constitution**. He is seeking for declaration order that he be paid monies entitled to him from 2012-2019 and for general damages for violation of his constitutional right to employment.

As per the letter dated 21/06/2011 **"MKM 7"** whereby it was contemplated to retire him from service in the public interest, he was called upon to show cause in writing why the action should not be taken against him.

As per the letter dated 02/04/2012 **"MKM 8a"**, it is indicated that he would retire with effect from 01/05/2012 and he was required to forward documents to facilitate processing of benefits. He was also informed that he had a right to apply for review against that decision within one year. Apparently he did not seek review of that decision.

There was no unprocedural retirement since he was given a chance to respond why he should not be retired and they proceeded to facilitate his benefits. The petitioner is therefore seeking to circumvent. **The Employment Act** in view of the fact that the claim is time barred.

Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR

The Court of Appeal stated;

> **Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation……**
>
> **…..this Court has severally held that where a fundamental right is regulated by legislation, such legislation, and not the underlying constitutional right, becomes the primary means for giving effect to the constitutional rights……..**

Then there is the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR, where this Court again emphasized:-

> ***"…In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.****…"*
>
> **In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. The Constitution should not be turned into a thoroughfare for resolution of every kind of common grievance.**

8. The first stop for the petitioner was to file a claim in the Labour and Employment Court as provided under **Section 87 of the Employment Act**. This never happened. The petitioner came to this court to circumvent the **Employment Act** which could not accommodate him by the time he came to this court as he was out of time.

IN CONCLUSION:-

The petitioner is raising none existent Constitutional issues. He is trying to enforce employment contract which is regulated by **Employment Act**. By going behind the statute and seeking to rely on **Article 41 of the Constitution** on the right to fair labour practices which is given effect in various statutes of which **Employment Act** and **Labour Relations Act** are Primary. The primary statute should not be circumvented.

In Nairobi HC Petition No. 564 of 2004 Alphonse Mwangemi Munga & 10 Others –v- African Safari Club Limited (2008) eKLR Nyamu J (as he then was) at Paragraphs 1-3 at page 10 held as follows:-

> *"…..in all the above cases the courts dismissed the applications for not raising any constitutional issues. The Constitution is the Supreme Law of the land but it has to be read together with other Laws made by Parliament and should not be construed to be disruptive of other laws in the administration of justice and in this case we adopt and endorse the decision in the case of* ***Harrikisson –vs- Attorney General of Trinidad and Tobago (1980) AC 265*** *where a teacher was transferred to another school without being given 3 months' notice as required by the provisions of the Teachers Service Commission. He applied under section 6(1) of their constitution for redress (similar to our section 84) and the Privy Council in rejecting said thus at page 268 paragraph B-C.*

> *"….. the notion that whenever there is a failure by an organ of Government or a Public authority of public office to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed to individuals by Chapter 1 of the Constitution (our Chapter V)is fallacious. The right to apply to the High court under Section 6 (our Section 84) of the Constitution for redress when any human right or fundamental freedoms is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. The mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the section if it is apparent that the allegation Is frivolous, vexatious or abuse of the process of the court, as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."*

Nyamu J. further held that:

> *'……. In the instant case, we wish to emphasize the point that parties should make use of the normal procedures under various laws to pursue their remedies instead of all of them moving to the Constitutional court and making constitutional issues of what is not. They have as a result lost valuable time to pursue contractual claims and/or to have the Industrial Court settle the trade dispute(if any) relating to the matter. The upshot of this petition is that it is an abuse of the court process and it is hereby dismissed.'*

The petitioner ought to have persuaded his claim under the statutes which deals with employment matters. He slept on his rights and has come too late and to the wrong forum. This is not to be entertained as it trivialized the constitution matters.

The preliminary objection is based on **Section 90 of the Employment Act** which is couched in mandating terms. The claim by the petitioner is clearly time barred. The petitioner having realized that the claim would not go anywhere due to the operation of the law brought it as constitutional matter. The only reasonable conclusion is that the matter was filed as a Constitutional Petition to circumvent the **Employment Act**. It is clear that the petitioner's claim was filed out of time and offend the mandatory provision of the Employment Act. It is incompetent and a clear abuse of court process.

I order as follows:

1) The pre-liminary objection has merits.

2) The Petition and the Notice of Motion are in competent as the claim is time barred.

3) I order that the Petition and Notice of Motion be struck out.

4) Costs to the respondents.

Dated at Kerugoya this 26th day of July 2018.

L. W. GITARI

JUDGE

M/s Gathoga holding brief for:

Ondukena for Respondent.

Petitioner and His Advocate – Absent.