



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE 147 OF 2005

KENNETH NJIRIRI

MWANIKI.....PLAINTIFF

-VERSUS-

**THE HONOURABLE ATTORNEY GENERAL FOR AND ON
BEHALF OF**

- 1. THE PERMANENT SECRETARY OFFICE OF THE PRESIDENT.....1ST
DEFENDANT**
- 2. THE COMMISSIONER OF POLICE MOMBASA.....2ND
DEFENDANT**
- 3. THE PUBLIC SERVICE COMMISSION.....3RD
DEFENDANT**

RULING

1. The Plaintiff was a Chief Inspector of the Kenya Police Force, having been employed as a Constable on 10th March, 1984 by the Public Service Commission. He alleges that on or around 20th March, 2003 at the instigation of the Commissioner of Police, he was unlawfully and maliciously detained for fourteen days. He became ill, was hospitalised, and suffered mental anguish and other loss. On 27th July, 2005 he sued the Defendants for unlawful and malicious detention, withheld salary, and for a declaration that he is and has been a lawful employee of the Public Service Commission.

2. The Attorney General, on behalf of the Defendants, filed a defence on 7th October, 2005. He averred that the Plaintiff was dismissed from the public service for idleness and negligence in performance of his duties. His salary, if any, was withheld in accordance with service regulations. The defence also states that no notice to sue was served on the 3rd Defendant.

By an Amended Defence filed on 12th October, 2005, the Defendant averred that the Plaintiff did not comply with the mandatory provisions of Section 13A of Government Proceedings Act (Chapter 40); and that the suit for unlawful detention is statute barred by Section 3 of the Public Authorities Limitation Act (Chapter 39). The Defendants stated they would raise Preliminary objections on those points.

3. The Defendant/Applicants' Preliminary Objection is on the two points stated in the Defence as to:

- a) Limitation Under Section 3(1) Public Authorities Limitation Act (PALA) and
- b) Lack of Notice under Section 13A (1) Government Proceedings Act (GPA).

The parties filed written submissions on 30th April and 21st May respectively.

4. The first issue for determination in the Preliminary Objection is whether the Plaintiff issued a statutory notice in terms of Section 13A of the Government Proceedings Act.

Section 13A GPA provides as follows:

“No proceedings against the Government shall lie or be instituted until after the expiry of thirty days after a notice in writing has been served on the Government in relation to those proceedings.”

5. The Plaintiff, submits that a notice was issued as stated in Paragraph 13 of the Plaintiff. In addition, the Plaintiff's counsel annexed, with their submissions, a photocopy of a notice letter dated 10th July, 2004 addressed to the Attorney-General.

As this issue raises a question of fact, as to whether notice was given, it is not a proper issue for determination by Preliminary Objection. It must be proved by evidence.

Accordingly, I hereby strike the same out as unsuitable as a ground of the Preliminary Objection.

6. The second issue for determination is on Limitation. The Defendant asserts that the Plaintiff's suit is barred by virtue of Section 3(7) of the PALA. That section provides as follows:

“13(1) No proceedings founded on tort shall be brought against the government or a local authority after the end of twelve, months from the date on which the cause of action accrued.”

The state argues that no order extending time was given or availed, and yet the suit was filed 23 months after the cause of action accrued. Counsel cited ***Iga v Makerere University*** [1972]. E.A 65. There, the Court of Appeal held that a plaint barred by limitation is barred by law and must be rejected.

7. In reply on this point, the Plaintiff admits that the Plaintiff was brought out of time in terms of the statute.

However, the Plaintiff submits that the said section is null and void for being inconsistent with the express provisions of the Constitution and or for failure to satisfy the mandatory requirements of the Constitution. Counsel cites to HCC Number 1184 of 2003 ***Wachira Waheine vs AG*** (2010) e KLR.

8. Further, counsel refers to Article 24(1) of the Constitution by which a fundamental right or freedom in the Bill of Rights cannot be limited except by law, and even then, only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Taking into account the various parameters set out in Article 24(1) (a)-(e), Counsel argues that the court must construe any law in force before the promulgation of the 2010 Constitution with the alterations, adaptations and exceptions necessary to bring it into conformity with the Constitution.

9. Thus, according to counsel, the real questions now is:

Whether the limitation expressed by Section 3 PALA counsel considers that the limitation under PALA is:

- a) Only meant to protect the government from meeting its obligations to its subjects,
- b) Not premised on the possibility that the Defendant might suffer prejudice if the matter proceeds to trial outside the time stipulated in the statute, and, therefore
- c) the limitation does not satisfy the conditions of the Constitution.

10. The second limb of the Plaintiff's argument is that the limitation does not affect the entire suit of the Plaintiff. It would affect the Plaintiff's entitlement to an award of general damages for unlawful detention, but not the entire suit in respect of contractual matters.

In support of this point, the Plaintiff cited Iga vs Makerere University where Mustafa JA stated:

“The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time barred the court cannot grant the remedy or relief.”

Counsel argues that if the court were to find the claim for unlawful detention/confinement time barred, it should desist from awarding damages thereon, but award damages in respect of the other claims not affected by the limitation.

11. Having carefully considered the Preliminary Objection on this point and the parties submissions thereto, I find as follows:

The Respondent's argument is that the time bar under Section 3a PALA is void for being inconsistent with the 2010 Constitution in pursuant to Article 24(1). In support thereof Counsel cited the civil case Number 1184 of 2003 Wachira Waheina vs AG (2010) e KLR. I make the following observations. The Wachira case concerned an action brought specifically as a constitutional reference under Section 84 of the previous constitution. There, the Applicant alleged breach of his fundamental rights under Section 84 of the previous Constitution. Here, the Plaintiff has a dual cause of action for unlawful and malicious detention incorporating exercise of illegal powers, and also an action for breach of employment contract. The former involves a constitutional type action and the latter a contractual labour action. Indeed, prayers (a) and (d) in the plaint are in relation to the contractual action; whilst prayers (b) and (c) relate to breaches of fundamental rights.

12. It is true that Article 24(1) of the Constitution prohibits the limitation, by law, of a right or fundamental freedom except under and in accordance with several conditions stipulated therein. However, that provision was not applicable at the time the alleged breaches occurred, or when the suit was filed. Nothing in the Constitution 2010 permits its retroactive application so as to avail to the Plaintiff herein in respect of past actions. Further, whilst under the Constitution 2010 an application for enforcement of a fundamental rights may be brought even informally, it should nevertheless be made under rules made by the Chief Justice providing for court proceedings under the Constitution. No invocation or any such rules has been asserted or even alluded to in this case.

13. Rerverting to the Waheina case, I have no difficulty accepting that the previous Constitution did not permit the limitation of fundamental rights by debarment on grounds of time lapse. However, the previous Constitution did require that any constitutional application for enforcement of fundamental rights had to be made via a constitutional application pursuant to Section 84 of that constitution. That was not done in this case. Accordingly, the Plaintiff's action incorporated in its plaint are not properly before the court, and can only be considered as actions elected and intended by the Plaintiff, to be determined as actions under tort or contract.

Given the aforesaid, Section 3 of Chapter 39 PALA applies to the action herein and may properly be invoked to bar the actions as filed out of time.

14. With regard to the Plaintiff's actions under labour law in relation to his employment contract, I have no hesitation in agreeing with the Plaintiff that the actions under contract must be treated separately. And

they are not time barred. Counsel for Applicant herein did not respond to that argument, and I may take it that he had no argument against it. Accordingly, with regard to the actions relating to the Plaintiff's employment contract, I find and hold that the same may continue under this suit, as there is no time bar in respect thereof.

15. On costs, it is my considered view that the same should abide the outcome of the suit.

Orders accordingly.

Dated, signed and delivered this 26th Day of June 2012

R.M. MWONGO
JUDGE

Read in open court

Coram:

1. Judge: Hon. R.M. Mwongo
2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d).....