



REPUBLIC OF KENYA



**Nzaro v Said (Petition E001 of 2022) [2024] KEELRC 13652 (KLR) (6 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13652 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI**

**PETITION E001 OF 2022**

**AK NZEI, J**

**MAY 6, 2024**

**BETWEEN**

**STEVE KALAMA NZARO ..... PETITIONER**

**AND**

**SEIF MOHAMMED SAID ..... RESPONDENT**

**RULING**

1. Before me is an employment suit that has been clothed and presented as a constitutional petition. The suit was instituted by the Petitioner vide a petition dated 4<sup>th</sup> July 2022 and filed at Malindi ELRC Sub-Registry on 29<sup>th</sup> July 2022. In it the Petitioner pleads, inter-alia, that he was employed as a caretaker by the Respondent in February 2005, to take care of Plot No. 159A Malindi, but was not issued with a contract and/or a letter of appointment and was never issued with a payslip, hence he did not understand the breakdown of his salary. The Petitioner further pleads that he worked for over ten (10) years without pay, and that as he continued working for the Respondent, he sustained an injury that led to loss of his sight.
2. The Petitioner further pleads that he continued working without pay until 2020 when the Respondent, without any justification, served him with an eviction notice, and that the Respondent's actions amounted to summary dismissal and/or unlawful termination of employment. That the termination was unfair and inhumane as it was not based on cogent grounds or reasons, and the Respondent did not comply with statutory procedural requirements on termination of employment, and did not given the Petitioner an opportunity to be heard.
3. Reliefs sought by the Petitioner include payment of unpaid wages, and/or salary arrears, among others.
4. The Respondent entered appearance on 16<sup>th</sup> September 2022 and filed a detailed replying affidavit on even date. The Court gave directions on hearing of the petition, but before hearing could commence, the Respondent filed a Notice of Preliminary Objection on 5<sup>th</sup> May 2023, dated 2<sup>nd</sup> May 2023, objecting to the Petitioner's suit on the following grounds:-



- a. that the suit is statute-barred by dint of Section 90 of the *Employment Act* (No. 11 of 2007).
  - b. that the suit is statutorily time-barred by dint of Section 4(1) of the *Limitation of Actions Act* (Cap 22 Laws of Kenya).
  - c. that this Court is denied (sic) jurisdiction to admit, to hear and to determine the matter by virtue of the provisions of Section 90 of the *Employment Act*.
  - d. that the petition does not raise any constitutional issue.
5. Counsel for both parties filed written submissions on the preliminary objection pursuant to the Court's directions in that regard, which I have considered.
6. As already stated in this Ruling, the petition herein is, indeed, an employment suit. The Petitioner's cause of action is shown to have arisen from an employer-employee relationship between himself and the Respondent, and the Petitioner is seeking a benefit out of his service with the Respondent. An employment suit is an employment suit, and the nature of the cause of action cannot change due to the name assigned to the pleadings. Citing the Court of Appeal's decision in Josephat Ndiragu Vs-henkel Chemicals Limited, the Court in the case of Francis Atonya Ayieka -vs Kenya Police Service & Another [2017] eKLR stated as follows:-

“...The cause of action arose in employment where the Petitioner is seeking a benefit out of his employment and or service with the Respondent. Whether a Memorandum of Claim was filed or a Petition, the Cause of action does not change due to the name assigned to the pleadings.

A litigant should not avoid the provisions of the *Employment Act* regarding unfair termination or wrongful dismissal by going behind the statute and seeking to rely directly on Article 41 of *the Constitution* on the right to fair labour practices. The purpose of *the Constitution* is that the right to fair labour practices is given effect in various statutes of which the *Employment Act* and the *Labour Relations Act* are primary.

The primary legislation should not be circumvented by seeking to rely directly on a Constitutional provision. Both the *Employment Act* and the *Labour Relations Act* give effect to Constitutional rights.”

7. In his petition, which I dare say is quite muddled up and may require amendments if the Petitioner considers that appropriate. The Petitioner states at paragraphs 36,37,38,39 and 40 that his employment was unlawfully and unfairly terminated by the Respondent in the year 2020. The suit herein was filed on 29<sup>th</sup> July 2022. This was clearly within the three (3) years limitation period stipulated in Section 90 of the *Employment Act* 2007 which states as follows:-

“Notwithstanding the provisions of Section 4(1) of the *Limitation of Actions Act*, 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 net after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

8. It is my finding that the Petitioner's employment suit herein is not statute barred. Consequently, the Preliminary Objection dated 2<sup>nd</sup> May 2023 I without merit, and is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 6<sup>TH</sup> MAY 2024**



**AGNES KITIKU NZEI**

**JUDGE**

Order

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

.....Petitioner

.....Respondent

