Mitei v National Social Security Fund Board of Trustees (Civil Appeal 310 of 2017) [2022] KECA 974 (KLR) (26 August 2022) (Judgment)

Neutral citation: [2022] KECA 974 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 310 OF 2017

DK MUSINGA, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA

AUGUST 26, 2022

BETWEEN

LUKA CHEBII MITEI ..... APPELLANT

AND

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES ..... RESPONDENT

(An appeal from the ruling and order of the Employment and Labour Relations Court at Nairobi (Wasilwa, J.) dated 29th June 2017 In Nairobi Petition No. 33 of 2017)

JUDGMENT

Judgment of A. Mbogholi Msagha, J.A.

1. The appellant filed a Notice of Motion and a Petition at the Employment and Labour Relations Court dated 12th April 2017 seeking orders that his dismissal be declared, illegal, null and void ab initio and of no legal effect. The appellant also sought orders of reinstatement without any loss of benefits or in the alternative, payment of a sum of Kshs 3.7 million variously particularised.

2. The appellant averred that he was interdicted without due process on 10th June 2010 by the respondent's Acting Human Resource Manager on account of impropriety, and finally summarily dismissed on 16th July 2010 on the ground of gross misconduct under the *Employment Act*. That he was arraigned at Kapsabet Principal Magistrates' Court on 24th September 2010 and charged with two counts of stealing by person employed in public service, and one count of stealing by servant. That he was acquitted on Counts 1 and 3, and convicted on Count 2. The appellant appealed vide Eldoret High Court Criminal Appeal No. 139 of 2012 and cleared of the charges vide a judgment dated 28th February 2017.

3. The respondent filed a Preliminary Objection to the Notice of Motion and Petition dated 7th April 2017 on the grounds that, the court lacked jurisdiction to entertain the application and petition on the grounds that, it was barred by limitation under Section 90 of the *Employment Act*; the matter was res judicata as the appellant had earlier filed a Memorandum of Claim in the Industrial Court Cause No. 1315 of 2010 which sought similar prayers; and the suit was vexatious and an abuse of the court process as the reliefs sought had been canvassed and determined in Industrial Court Cause No. 1315 of 2010 and, further, under Section 12 of the *Employment and Labour Relations Court Act* and Rule 17 (10) of the ELRC (Procedure) Rules 2016, the prayer for reinstatement can only be considered within 3 years from the date of the alleged breach.

4. In her ruling, the learned judge noted that Cause No.1315 of 2010 was withdrawn on 5th April 2017 and was never determined by court, and said that it was also a claim brought under the *Employment Act* for wrongful termination as opposed to the Petition which sought constitutional declaration. The learned judge therefore held that the Petition was not res judicata.

5. On the issue of limitation of time, the learned judge held that whereas there is no limitation of time in respect of constitutional petitions alleging breach of fundamental rights, the Courts should go an extra mile and determine whether there are any valid underlying reasons that occasioned the delay. That the appellant failed to institute his Petition in time since his dismissal in 2010, a delay of 7 years which was an inordinate delay in employment contracts. That despite being served with the Preliminary Objection, the appellant failed to file a response and explain why he filed the Petition late. The learned judge therefore allowed the Preliminary Objection and dismissed the Petition.

6. Dissatisfied with the ruling, the appellant filed the present appeal on the grounds that the learned judge erred in law and in fact in:

    a. Upholding untenable preliminary objection in terminating the petitioner's notice of motion together with his entire petition in contravention of Article 159 of *the Constitution* of Kenya, 2010.

    b. Failing to exercise constitutional powers conferred to her under Article 62 of *the Constitution* of Kenya, 2010.

    c. Invoking the provisions of the *Employment Act*,2007 in disposing the petitioner's petition prematurely.

    d. Not finding out that there was no inordinate delay in filing the petition before the honourable court as the applicant's Eldoret High Court criminal appeal case No. 139 of 2012 was determined on 28/02/2017.

    e. Demonstrating bias by violating rules of natural justice in denying the petitioner his constitutional rights provided for under Articles 47 and 50 of the Kenyan Constitution, 2010.

7. In written submissions, the appellant submitted that Section 90 of the *Employment Act* does not override the provisions of *the Constitution*, particularly Article 159 (2) (b) and (d) which confer power to Courts not to delay justice and to administer justice without undue procedural technicalities. That the application of the said section in constitutional matters was a misdirection on the part of the judge.

8. The appellant further submitted that in many decisions emanating from the Constitutional Division of the superior court, there is no limitation in constitutional matters. That it is also settled law that prosecution of criminal cases takes priority over civil proceedings for the reason that the liberty and, in his case, the employment rights of the petitioner were at stake. That under Article 162 (2) of *the Constitution*, the Employment Court has the jurisdiction to handle employment matters including

petitions, and blocking aggrieved parties in pursuit of justice through different modes of filing cases amounts to denial of justice.

9. On the issue that there was an inordinate delay in filing the petition, the appellant submitted that there was no inordinate delay as the cause of action arose on 28th February 2017 after the conclusion of the High Court appeal, and both the application and petition were filed on 12th April 2017, a difference of 1 month and hence there was no delay on the part of the appellant in moving the Employment Court.

10. The appellant finally submitted that his petition was not heard on merits thereby amounting to a clear denial of fair hearing under Articles 47 and 50 of *the Constitution*. That the learned judge misdirected and breached the outlined principles of natural justice by denying the appellant opportunity to present his case.

11. In submissions filed for the respondent by the Federation of Kenya Employers, it was the respondent's submission that it was not in dispute that the appellant was dismissed on or about 16th July 2010. That the petition was filed after 3 years since the cause of action arose, contrary to Section 90 of the *Employment Act*; there was nothing constitutional that was raised and it was a normal claim disguised as a constitutional petition. That the appellant had argued in his petition that the respondent had violated his rights by terminating his services while the criminal case was ongoing, which was not a constitutional issue, but rather normal legal issues that could have been dealt by way of filing a claim.

12. It was the respondent's submission that the learned judge was right in dismissing the petition as the relief the appellant was seeking was purely under the *Employment Act* which imposed a limitation of 3 years. That the appellant had not sought leave nor explained in his petition the reason for the delay.

13. The respondent further submitted that, the appeal is about the interpretation of Section 90 of the *Employment Act*. The respondent cited *E.Torgbor v Ladislaus Odongo Ojuok [2015] eKLR* where this Court followed the finding of the Employment Court in *Maria Machocho v Total (K) Industrial Cause No. 2 of 2012* that, in the case of actions based on breach of contract of service or arising out of the *Employment Act*, no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract, six years after the cause of action arose or any application to extend such time for the bringing of the action.

14. Even though there is no limitation period for bringing an action alleging violation of a party's constitutional rights and freedoms, the court is entitled to consider whether the claim was lodged within a reasonable time. This Court in *Wellington Nzioka Kioko v Attorney General* [2018] eKLR cited with approval the finding of Majanja, J. in *James Kanyita Nderitu vs A.G and Another Petition No. 180 of 2011* as follows:

> "Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under ... *the constitution*, is entitled to consider whether there has been inordinate delay in lodging the claim. The Court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of it manifestations, should be vexed by an otherwise stale claim. Just as a petitioner is entitled to enforce its fundamental rights and freedoms, a respondent must have a reasonable expectation that such claims are prosecuted within a reasonable time."

15. In *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR, this Court observed:

> "We reiterate the position that where there has been inordinate delay in bringing an action for violation of fundamental rights, appropriate facts must be placed before the court to

> enable the court exercise its discretion judicially, in accepting or rejecting the explanation for the delay, with the benefit of all information regarding the particular circumstances before it...

Delay is an anathema to fair trial which is one of the key fundamental rights provided to all litigants under Article 50 of *the Constitution*. Furthermore, it would be an abuse of the court process and contrary to the constitutional principles espoused in Article 159 that requires justice to be administered without delay, to allow a party who alleges violation of constitutional rights, to bring their action after undue inordinate delay, without any justifiable reason. For this reason we find that the appellants' action was properly dismissed."

16. In the present case, the cause of action clearly arose when the appellant was dismissed on 16th July 2010. The cause of action did not arise after he was cleared of all criminal charges in the High Court appeal on 28th February 2017 as argued by the appellant. The appellant filed the petition in 2017, a delay of 7 years after the cause of action arose. Even though the learned judge appeared to allude to the 3 year limitation period for bringing an action under the *Employment Act* by holding that the petition should have been filed by 2013, she correctly observed that the appellant did not offer any explanation for the delay in the petition or supporting affidavit. The learned judge therefore rightly held that the delay was inordinate and the petition stood dismissed on this point alone.

17. There is also some merit in the argument raised by the respondent that the action brought by the appellant was a normal claim disguised as a constitutional petition. The reliefs sought by the appellant in the petition (namely reinstatement or payment of Kshs. 3.7 million comprising service pay, 3 months' notice, unpaid salary increments, pension benefits and 12 months damages for unfair termination) are remedies that are only available under Section 49 of the *Employment Act*, and pursuant to the limitation period imposed under Section 90 of the Act. The remedies were already properly sought in Cause No. 1315 of 2010 which the appellant withdrew in favour of filing a constitutional petition seeking the same reliefs. This misstep by the appellant is brought into focus by the finding of this Court in *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR:

> "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."

18. After considering the record before us, the rival submissions and the authorities cited, I am unable to fault he trial judge in her appreciation of the issues and the conclusions reached. In fact, the actions of the appellant on border abuse of the court process. There is no merit in this appeal. As D. K. Musinga, the President of the Court, and Dr. K. I. Laibuta, J.A. agree, this appeal is hereby dismissed with costs.

Concurring Judgment of Musinga, (P)

I have had the advantage of reading in draft the judgment of Mbogholi, J.A. I am in full agreement with his reasoning and conclusions and, therefore, have nothing useful to add.

Concurring Judgment of Dr. K. I. Laibuta, J.A.

I have had the advantage of reading in draft the judgment of Mbogholi, J.A. I am in full agreement with his reasoning and conclusions and, therefore, have nothing useful to add.

DATED AND DELIVERED AT NAIROBI THIS 26 TH DAY OF AUGUST, 2022

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPPEAL

D. K. MUSINGA, (P)

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR