Nyatangi v National Treasury & Planning & 2 others (Petition E188 of 2022) [2024] KEELRC 338 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 338 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E188 OF 2022

SC RUTTO, J

FEBRUARY 23, 2024

BETWEEN

ADAMS NYATANGI ..... PETITIONER

AND

THE NATIONAL TREASURY & PLANNING ..... 1ST RESPONDENT

PUBLIC SERVICE COMMISSION ..... 2ND RESPONDENT

OFFICE OF THE HON. ATTORNEY GENERAL ..... 3RD RESPONDENT

RULING

1. What comes up for determination is the 1st and 3rd Respondent's Notice of Preliminary Objection dated 3rd October 2023 premised on the following grounds:

    i. That the Honorable Court lacks the jurisdiction to hear and determine the present Petition in light of the legal provisions stated hereunder.

    ii. That the suit is time-barred and offends mandatory provisions of section 90 of the *Employment Act*, 2007.

    iii. That the Petitioner was dismissed from employment on 18th January 2018 and filed his petition 4 years later.

    iv. That the cause of action challenged is based on a contract of employment between the Petitioner and the 1st Respondent dated 7th February 1990, therefore the Petitioner ought to have filed an ordinary claim to ventilate his grievances as opposed to filing a constitutional petition.

    v. That this is the jurisprudence that has been adopted by this Honorable Court and other superior Courts.

vi. 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.

vii. That the suit is an abuse of the Court process.

viii. That the Petition as drawn is therefore defective, bad in law and should be struck out.

2. Upon being served with the Notice of Preliminary Objection, the Petitioner filed a Replying Affidavit in which he contends that the said Objection lacks merit.

3. He further avers that he was dismissed from service with effect from 18th January 2018 on account of gross misconduct.

4. The Petitioner contends that he was never invited for a disciplinary hearing prior to his dismissal. That he was not served with the recommendation of any disciplinary committee recommending his dismissal on account of gross misconduct. Vide a letter dated 7th December 2018, he appealed against the dismissal to the Public Service Commission.

5. He was invited to appear before the Ministerial Human Resource Advisory Committee (MHRMAC) on 29th May 2019.

6. On 29th May 2019, he appeared before the Ministerial Human Resource Management Advisory Committee (MHRMAC) wherein he was issued with a copy of a printout containing questions he was expected to address before the Committee.

7. He further deposes that during the meeting, the Committee assured him that they would dismiss him if he did not produce copies of documents from the Naivasha Registry to support his averments. He explained to them that he could not come with copies of documents because he had not been given a prior notification that he was required to avail copies of the documents from the Naivasha offices.

8. It is the Petitioner's view that from the conduct of the MHRMAC meeting, his termination was predetermined. The committee was fully aware that he had not brought any document and used that as an opportunity to grill him on whether he had any evidence before them that he did not sanction the flagged transaction. He further contends that he was not given sufficient time to answer the questions and when he protested, he was stifled.

9. He further avers that on diverse dates, he visited the Naivasha Office but his efforts to access the said documents were frustrated.

10. Before he could avail the documents, he received communication from the National Treasury and Planning vide the letter dated 26th February 2020 that his appeal had been dismissed.

11. He is advised by his advocates on record which advice he believe to be sound that there is no time limit for filing a constitutional petition.

12. According to the Petitioner, his Petition is not time-barred as the decision to dismiss him was upheld on 26th April 2022 after his application for review was dismissed.

13. He could not file any suit against the Respondents herein during the pendency of the appeal and the subsequent application for review because the outcome had a substantive effect on the said dismissal.

14. The orders he is seeking in his Petition are only available in a Constitutional Petition and cannot be issued in an ordinary claim as the Petition is majorly based on the constitutional violations by the 1st and 2nd Respondents.

15. The Preliminary Objection was canvassed through written submissions which I have considered.

Analysis and Determination

16. The Court singles out the following issues for determination:

    i. Whether the provisions of Section 90 of the *Employment Act* are applicable herein and whether limitation of time applies to constitutional petitions with regard to employment.

    ii. Whether time stopped running pending the Petitioner's Appeal and Review.

Whether the provisions of Section 90 of the *Employment Act* are applicable herein and whether limitation of time applies to constitutional petitions with regard to employment.

17. It is common ground that the Petitioner was dismissed from employment on 18th January 2018 whereas he instituted the instant Petition on 7th November 2022. It is thus evident that the intervening period is 4 years and 9 months.

18. With regards to limitation of time in employment matters, Section 90 of the *Employment Act*, provides as follows: -

    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.

19. What this means is that the court does not have the right or power to entertain an action arising out of the *Employment Act* or on a contract of service as the one herein, three years after the cause of action arose.

20. In the instant case, the Petitioner has argued that there is no limitation period for filing a constitutional petition. It is his position that that none of the remedies sought is available in a normal claim.

21. The Respondents on the other hand argue that the Petitioner is circumventing the *Employment Act* by relying on the constitutional provisions having realized that the matter is statute barred.

22. In light of the opposing arguments, the question that begs for an answer is whether limitation of time is applicable in constitutional petitions with regard to employment matters.

23. Revisiting the Petition, it is evident that the Petitioner's case stems from his contract of service with the 1st Respondent. In the Petition, the Petitioner has averred that his right to a fair hearing under Article 50 was violated as he was not given a chance to defend himself against the allegations that had been brought forth against him.

24. As stated herein the Petitioner's case is based on his contract of service with the 1st Respondent and specifically, the manner in which the disciplinary process was undertaken and his eventual dismissal from employment.

25. It thus follows that the Court in determining the question of violation of the Petitioner's rights, will have to apply the provisions of Sections 41, 43 and 45 of the *Employment Act*. For instance, the main constitutional violation flagged by the Petitioner is his right to a fair hearing. In this regard, Section 41

of the *Employment Act* is very pertinent seeing that it is the key statutory provision that spells out the parameters of a fair process in termination of employment.

26. Further, the Petitioner has sought to quash the dismissal in its entirety. In this regard, I cannot help but question how the Court will arrive at such a determination without evaluating the facts and evidence against the provisions of Sections 43 and 45 of the *Employment Act*.

27. The bottom line is that the primary statute in determining the instant dispute is the *Employment Act*.

28. My position is fortified by the determination of the Court of Appeal in the case of Gabriel Mutava & 2 others v Managing Director, Kenya Ports Authority & another [2016] eKLR, where it was held that:

> " 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... Constitutional Litigation is not a panacea for all manner of litigation, we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes...In this country, we have all along had legislation governing employment, the latest being the *Employment Act*, 2007. When the appellants filed their Petitions, the pre-2007 *Employment Act*, was in force. It is on this Act that the appellants should have anchored their claim."

29. It is therefore my firm position that the Petitioner ought to have anchored his claim under the *Employment Act* as opposed to moving the Court through a constitutional petition.

30. I further associate myself with the sentiments of the Court (Mbaru J) in the case of Peter Ndegwa Nderitu v Teachers Service Commission [2019] eKLR in which the learned Judge reckoned as follows:

> " The ultimate remedy sought by the petitioner in his petition is that his disciplinary matter was not given a fair hearing....However best the petition is framed, employment and labour relations rights articulated under the petition, though framed in a different name from that of a Memorandum of Claim, the orders sought relate to what an employee claiming under the *Employment Act*, 2007 should apply."

31. I am in further agreement with the determination in the case of Mukhtar Salat Mohamed v National Police Service Commission & 3 others [2021] eKLR, where the Court (Nzioki J) held that:

> " Before he moved this Court the Petitioner must have been alive to the provisions governing his conduct and as such the alleged infringement of his rights did not occur outside the scope of his employment with the National Police Service. I am persuaded that the Petition was crafted to attempt to circumvent the provisions of the law on limitation."

32. Therefore, it is my finding that the Petitioner ought to have moved the Court under the *Employment Act* as the violations he complains of could very well be addressed thereunder.

33. This brings me to the question of time bar. As stated herein, the cause of action arose on 18th January 2018, when the Petitioner was dismissed from employment. Therefore, time started running from that date until 18th January 2021, when the window was closed. As the Petitioner filed the instant Petition on 7th November 2022, it is quite clear that he moved the Court outside the statutory limitation period set out in the *Employment Act*. In the circumstances, his suit was time-barred as at 7th November 2022.

The fact that he has moved the Court through a constitutional petition does not render limitation of time immaterial or turn back the hands of time.

34. As was held by the Court (Radido J) in Simon Titus Yandi v National Police Service Commission & Attorney General [2020] eKLR:

> " It does not matter that a cause of action raises serious questions of violation of fundamental rights and freedoms, a party should always move Court at the earliest opportunity, for even inordinate delay may disentitle a party from relief/remedy.
>
> The cause of action was given the guise of Petition to circumvent the objections based on limitation as a jurisdictional concern."

35. I align myself to the above proposition and find that the Petitioner was bound to move the Court within the period stipulated under Section 90 of the *Employment Act*. Therefore, I do not agree with the Petitioner that there is no limitation period for filing a constitutional petition especially one that stems from a contract of service regulated under the *Employment Act*.

36. That is not to say an aggrieved party is not entitled to move the Court by way of constitutional petition. Indeed, this Court has jurisdiction to address the constitutional violations. Be that as it may, the same should not be used to sidestep limitation of time.

Whether time stopped running pending the Petitioner's Appeal and Review.

37. The Petitioner has further submitted that he was bound to exhaust all the statutory processes before approaching the Court. According to the Petitioner, he filed the Petition a few months after his Application for review was dismissed and the dismissal was confirmed vide a letter dated 26th April 2022. Thus, did time stop running during the pendency of the Petitioner's Appeal and review?

38. As stated herein, the cause of action arose when the Petitioner was dismissed from employment on 18th January 2018. It is that date when the Petitioner became entitled to complain against the Respondents by moving the Court appropriately. The fact that he was pursuing an appeal and review did not stop time from running.

39. On this issue, I wholly subscribe to the position taken by the Court (Ndolo J) in the case of Benjamin Wachira Ndiithi v Public Service Commission & another [2014] eKLR, where the learned Judged expressed herself as follows:

> " The fact that an employee whose employment has been terminated seeks a review or an appeal does not mean that accrual of the cause of action is held in abeyance until a final verdict on the review or appeal. In the instant case, the Claimant's termination from the 1st Respondent's employment took effect on 1st October 2000 as communicated by letter dated 29th September 2000. It follows therefore that the cause of action upon which the Claimant's claim is based accrued on 1st October 2000 and that is the date when time began to run as against the Claimant's claim.".

40. A similar finding was arrived at by the Court (Wasilwa J) in the case of Bramwel Okunda Mayienga v Teachers Service Commission [2018] eKLR, thus:

> " I would like to point that the review/appeal process by the Respondent is an administrative independent process and the Courts process will not stall or be paused by reasons of the said appeal being filed. The dismissal was affected on 2012. That is when time started running.

> The other internal administrative processes were to continue and indeed continued but the dismissal had already been effected. The Claimant should have filed his claim by 25th April 2015. He failed to do so and only came to Court on 15/6/2017. He came albeit too late and that is the position of the Court."

41. Therefore, it did not matter that the Petitioner was pursuing an appeal or review. Time continued to run as the decision to dismiss him from service had already been entered and he had been notified as much.

42. It is also noteworthy that the appeal and review process set out in Sections 74 and 75 of the *Public Service Commission Act* is not a prerequisite to moving the Court. This is unlike the position under Section 87(2) of the *Public Service Commission Act*.

43. The total sum of my consideration is that the Preliminary Objection dated 3rd October 2023 is upheld and the Petition filed on 7th November 2022, is hereby struck out for being time barred.

44. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

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STELLA RUTTO

JUDGE

**Appearance:

For the Petitioner Mr. Ngeno

For the 1st and 3rd Respondents Ms. Aluoch

For the 2nd Respondent Ms. Iseme

Court Assistant Millicent Kibet

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE