



**Ritho v Teachers Service Commission (Petition E005 of 2024)
[2024] KEELRC 2799 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2799 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
PETITION E005 OF 2024
ON MAKAU, J
NOVEMBER 14, 2024**

BETWEEN

JOSEPH MURIITHI RITHO PETITIONER

AND

TEACHERS SERVICE COMMISSION RESPONDENT

RULING

Introduction

1. This ruling relates to the Respondent’s Notice of Preliminary Objection dated 22nd May, 2024 which raises the following grounds: -
 - a. The petition is time barred by dint of section 90 of the *Employment Act*.
 - b. The petition does not meet the competence threshold of Constitutional pleadings espoused in *Anarita Karimi Njeru v Republic* (1979) eKLR.

Background

2. The petitioner was employed by the respondent as a teacher until 10th December 2020 when he was dismissed for gross misconduct. He applied for review of the said dismissal through internal mechanism but the same was dismissed on 9th March 2022. He was aggrieved and filed the petition herein on 9th February 2024 seeking the following reliefs: -
 - i. A declaration that the Petitioner’s termination violated the petitioner’s rights under Article 41&42 (1), 47 and 50(2)(a) of *the Constitution* of Kenya, 2010.
 - ii. General damages for violation of constitutional rights.
 - iii. An order for the Respondent to pay the petitioner compensation particularized as follows;



- a. Compensation for unlawful termination -Kshs.38,200 x 12=Kshs.458,400/-
 - iv. An order reinstating the claimant to his position with full benefits including his name in the teacher's register.
 - v. Any other orders that the court deems fit to grant.
3. The respondent filed a Replying Affidavit sworn on 22nd February 2024 by its HR Director Ms Evaleen Mitei. In brief, she denied the alleged violations; admitted that the respondent dismissed the petitioner but averred that the dismissal was justified and a fair procedure was followed. In addition to the said Response, the respondent filed the instant objection.

Submissions

4. The respondent submitted that the petition is founded on the Employment Act or otherwise falls within the realm of the Act. As such it was argued that section 90 of the Act expressly limits the period of three years within which causes of action arising from the Act or relating to contract of service are to be commenced.
5. It was submitted that the petitioner has pleaded that his dismissal was done effective 26th November 2020 but the suit was on 30th May 2024, about 4 years from the date of the impugned dismissal. Consequently, it was argued that the petition is time barred by dint of section 90 of the Employment Act. Reliance was placed on several precedents including Attorney General v Andrew Maina & another (2016) eKLR.
6. As regards the 2nd ground of the objection, it was submitted that petition does not plead with reasonable precision the provision of the Constitution which is alleged to have been violated and the manner in which it was violated. Besides, it was submitted that the petition violates the doctrine of avoidance by elevating a mere claim of dismissal from employment to a Constitutional issue.
7. Consequently, it was argued that the petition ought to be struck out as there are remedies availed to the petitioner under legislation. For emphasis, reliance was placed on several precedents including Anthony Miano & others v Attorney General & others (2021) eKLR.
8. On the other hand, it was submitted for the petitioner that the suit is not time barred. It was contended that the decision to dismiss was through a letter dated 10th December 2020 while the decision on his review was communicated vide the letter dated 9th March 2022. Therefore, the suit was filed within the statutory period of three years.
9. Besides, it was submitted that there is no limitation period with respect to allegations of breach of human rights and fundamental freedoms. Reliance was placed on Calvin Ouma Magare & 18 others v Director of Public Prosecutions & 4 others (2022) eKLR.
10. Finally, it was submitted that the petitioner meets the threshold of constitutional pleadings as enunciated in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR. It was submitted that the petition has set out the Articles of the Constitution that is alleged to have been violated and the manner in which they have been violated in the process of his dismissal. Therefore, the court was urged to dismiss the objection with costs for lack of merits.

Analysis and determination

11. The issues for determination are: -
- a. Whether the suit is time barred.



- b. Whether the petition meets the competence threshold of a Constitutional pleading.

Time barred suit

12. There can be no doubt that the petition is founded on contract of employment between the parties herein and that is why in the first place, it is filed in this court. Section 90 of the [Employment Act](#), 2007 provides that: -
- “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.”
13. The petitioner contended that he had a right of appeal and review before the respondent which proceeded up to 9th March 2022 when the same was dismissed. Therefore, according to him time started running from the date when the final decision was communicated on 9th March 2022.
14. A cause of action in common parlance refers to the right of a party to file a case in court. In this case, the cause of action arose on 10th December 2020 when he was dismissed. The petitioner has not demonstrated that he was bound by internal mechanism that prevented him from filing suit to challenge his removal from the register of teachers and dismissal from employment. He also did not demonstrate that all the remedies he is now seeking were availed to him in the internal mechanism. He has further not demonstrated that the said appeal mechanism took more than three years to exhaust. Having considered all the foregoing matters, I find that the petitioner filed his suit outside the statutory period of three years provided under section 90 of the [Employment Act](#), 2007.
15. The delay in filing the suit within the statutory period was either deliberate or due to the petitioner’s negligence because even from 9th March 2022 when his appeal was dismissed, there was still more than a year before the limitation period lapsed on 10th December 2023. He is therefore to blame for the failure to file his suit on time.
16. He submitted that his petition is founded on violation of his fundamental rights and freedom under [the Constitution](#) and therefore there is no limitation period to the same. The respondent maintained that the petition is a mere claim for unlawful dismissal which is being elevated to a constitutional question.
17. Having considered the pleadings and the rival submissions, I agree with the respondent. The petition is a mere case of unlawful dismissal being covered with the mask of Constitutional petition in order to circumvent the statutory time bar. I need not say more. The petition is statute barred under section 90 of the [Employment Act](#), 2007.

Competence threshold

18. The High Court set out the manner in which constitutional petitions ought to be drawn in *Anarita Karimi Njeru v Republic*, supra thus: -
- “...if a person is seeking redress from the High court on a matter which involves a reference to [the Constitution](#), it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”



19. More recently, the Court of Appeal affirmed the said threshold in the Mumo Matemu case, supra when it stated that: -

“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

20. Guided by the above precedents, I have perused the petition carefully and satisfied myself that the petition does not meet the threshold espoused by the two precedents. All that the petitioner has done is to cite the Articles of *the Constitution* which form the foundation of the petition without demonstrating how the said provisions were violated by the respondent.

21. It is clear from the facts relied upon from paragraph 11 to 27 of the petition, the dispute pleaded is about unlawful termination of employment contrary to section 45 of the *Employment Act*, 2007 and Article 41 of *the Constitution* of Kenya, 2010 for which he prays for compensation equaling to twelve months salary. Consequently, I find that the petition does not meet the competence threshold enunciated in Anarita Karimi Njeru case.

22. Besides, I agree with the respondent that the petition violates the doctrine of avoidance which require that a party should first exhaust the remedy in all other mechanisms provided by statute before resorting to Constitutional process.

23. In Anthony Miano & others v Attorney General & another (2021) eKLR Mrima J held that: -

“The doctrine of Constitutional avoidance, therefore deals with instances where a constitutional court will decline to deal with a matter because there exists another remedy provided in law which the aggrieved party is yet to utilize. That is also referred to as the doctrine of exhaustion.”

24. I agree with the above decision and find that the petitioner did not utilize the remedy provided by the *Employment Act*. He slept on his right to move the court under that statute until the statutory period lapsed and then morphed and elevated his claim to constitutional question so as to defeat section 90 of the *Employment Act*, 2007.

25. Having taken into account the matters above, I must conclude that the objection by the respondent has merits and it is allowed as prayed. As such, the petition is struck out with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NYERI THIS 14TH DAY OF NOVEMBER, 2024.

ONESMUS N MAKAU

JUDGE

Order



This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

