



**Mapesa v Teachers Service Commission & another (Employment and Labour Relations  
Petition E014 of 2022) [2023] KEELRC 3475 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3475 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA**

**EMPLOYMENT AND LABOUR RELATIONS PETITION E014 OF 2022**

**JW KELI, J**

**APRIL 20, 2023**

**IN THE MATTER OF ARTICLES 1,2,19,20,21,22,23,27(1) (2),28,35, 41  
(1),47(1),50(1),159,162(2)(A) 237 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS  
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**IN THE MATTER OF : SECTION 41,43,45,&49 OF THE EMPLOYMENT ACT**

**IN THE MATTER OF: THE CONTRAVENTION OF SECTIONS 3,4,6,7(20 (B) (C) (E)  
(H) (J) AND (N) AND 7 (3) OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015**

**IN THE MATTER OF: SECTIONS 30,33,34,OF THE  
TEACHERS SERVICE COMMISSION ACT, 2012**

**IN THE MATTER OF: THE CONTRAVENTION OF REGULATIONS 139,145,146,  
(2) (A) ,148,149,150,153(2),154 (1),(156) (8) AND 158 (9) OF TEACHERS  
SERVICE COMMISSION CODE OF REGULATIONS FOR TEACHERS, 2015**

**IN THE MATTER OF: THE INTERDICTION AND DISMISSAL OF THE PETITIONER**

**BETWEEN**

**MARK WECHULI MAPESA ..... PETITIONER**

**AND**

**TEACHERS SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**



## RULING

1. The petitioner vide petition dated 19<sup>th</sup> December 2022 sought various reliefs among them an order of declaration that the 1<sup>st</sup> Respondent's action of suspending, interdicting and dismissing him was a violation of his right to be treated with dignity and right to fair administrative action that is lawful and reasonable under Articles 27,28,41 and 47 of *the Constitution*, order restraining the respondents from interfering with his employment, order for immediate and unconditional reinstatement and in the alternative payment for the remaining 19 years to retirement, general damages and costs.
2. The Respondent under the Notice of Preliminary Objection dated 6.2.2023 stated that the suit is time barred under Section 90 of the *Employment Act* and Section 4 (1) of the Limitations Act. That the Petitioner having realized the case was statute barred sought to circumvent the provisions of Section 90 of the *Employment Act* which limits employment claims to 3 years.
3. The notice of preliminary objection was opposed by the Petitioner vide replying affidavit dated 21<sup>st</sup> February 2023. The petitioner averred inter alia that the response was not to his petition, that when on interdiction in 2017 he heard rumors of dismissal and was informed by Mr. Shitimi he heard the school principal say he was dismissed vide letter dated 10/10/2016 following which he applied for review. That during the review hearing on 16<sup>th</sup> November 2021 that is when he got a dismissal letter dated 2<sup>nd</sup> December 2016. That in less than a year of getting the letter he filed the instant petition hence 3 years had not lapsed.
4. The application was canvassed by way of written submissions. The petitioner's written submissions drawn by Masiga, Wainaina & Associates Advocates were dated 13<sup>th</sup> March 2023. The respondent's / objector written submissions were drawn by Flora Manyasa for the 1<sup>st</sup> Respondent and dated 6<sup>th</sup> March 2023.

### Decision

5. The Petitioner in his replying affidavit to the preliminary objection stated he was dismissed from service on 10<sup>th</sup> October 2016 which he states he learned of from rumours but nevertheless lodged review application with employer based on the rumour. That at the hearing held on 16<sup>th</sup> November 2021 by the employer he learnt of letter dated 2<sup>nd</sup> December 2016 purporting to dismiss him from service of the respondent.
6. The court finds that the said replying affidavit to the objection was based on falsehood as under his own exhibits MWM – 6 dated 20<sup>th</sup> November 2017 the Petitioner stated in the letter that, "I acknowledged possession of the dismissal letter dated 10.10.2016 following my interdiction on 7th April, 2016..."
7. The court finds that the alleged constitutional violations addressed fair labour practices and rights of employees which the *Employment Act* addresses adequately and provides the sought remedies under section 49 of the Act. The remedy sought of reinstatement under the said Petition can only be granted under the *Employment Act* applying the criteria under section 49 (4) of the Act.
8. The court finds the constitutional Petition qualified as a normal employment claim and it was the opinion of the court it was disguised as a petition to defeat the statutory limit of 3 years under Section 90 of the *employment Act* for filing claim arising out of termination of employment.
9. The court noted that the petitioner in replying affidavit to the objection stated there was no response to the petition as the replying affidavit of Evaleen Mitei under paragraph 3 referred to supporting affidavit



of Michael Mapesa Wechuli. The court noted the respondent's affidavit by Evaleen Mitei named the petitioner as Mark Mapesa Wechuli and stated the petition was of 19<sup>th</sup> December 2022. The court found the reference to Michael was a mere clerical mistake and that the import and tenor of the said affidavit was response to the instant petition.

10. The court finds the notice of preliminary objection was merited and holds that the Petition was a normal claim framed as constitutional Petition only in heading which the court finds was calculated to defeat the mandatory statutory time limit for filing claims under Section 90 of the Employment Act to wit: "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." - The court did consider the legal submissions by the petitioner to effect the date of dismissal was not clear and when the letter of dismissal was delivered. The court found MWM – 6 to be admission by the Petitioner of receipt of the dismissal letter. The letter was received within statutory time. The court finds it has no jurisdiction to handle employment claims outside the 3 years statutory time limit under Section 90 of Employment Act. The court upholds decision in Peter Obiero -vs- Kenya Ports Authority ( 2016) e KLR where the court rejected elevation of employment contracts to constitutional petitions holding the Constitution should not be invoked to defeat limitation of time under relevant statutes. The court finds the instant petition fits that category. The instant Petition was filed on 20<sup>th</sup> December, 2021. It was brought outside the 3 years seeking remedies under Section 49 of the Employment Act. The court finds it has no jurisdiction to grant the reliefs sought on account of the claim being statutory time barred. The Preliminary objection dated 6.2.2022 is upheld and petition dated 19.12.2022 is dismissed for bringing an employment claim which was time barred.
11. To temper justice with merely the court makes no order as to costs.
12. It is so ordered

**DATED, SIGNED AND DELIVERED IN BUNGOMA OPEN COURT ON 20<sup>TH</sup> DAY OF APRIL 2023.**

**JEMIMAH KELI,**

**JUDGE.**

**In the presence of:-**

Court Assistant: Lucy Macheso

Petitioner: Masiga

Respondent: Manyasi

