



Wanjau v Dedan Kimathi University of Technology (Employment and Labour Relations Petition E007 of 2022) [2023] KEELRC 846 (KLR) (13 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 846 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS PETITION E007 OF 2022
ON MAKAU, J
APRIL 13, 2023**

BETWEEN

JACKSON WANJAU PETITIONER

AND

DEDAN KIMATHI UNIVERSITY OF TECHNOLOGY RESPONDENT

RULING

1. This ruling relates to the respondents notice of preliminary objection dated November 17, 2022 which seeks for striking out of the petition herein on the following grounds:-
 - a. The court lacks jurisdiction to determine the petition as claim is time barred under section 90 of the *Employment Act*.
 - b. The petition does not meet the threshold for a constitutional petition.
 - c. The petition is bad in law, frivolous, vexatious and a gross abuse of the court process.

Submissions

2. It was submitted for the respondent that the objection meets the threshold of points of law as held in the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696.
3. On merits it was submitted that paragraph 1 of the petition states that the petitioner was a part-time lecturer at the respondent university from March 2018 to January 30, 2019 when he was constructively dismissed. It is therefore the respondent's case that the suit relates to contract of employment, and under section 90 of the *Employment Act*, it ought to have been commenced within 3 years from January 30, 2019. However, the suit was filed on September 29, 2022 and therefore it was filed 8 months outside the prescribed statutory period. Accordingly, it was submitted that the court has no jurisdiction over the stale claim.



4. It was further submitted that the respondent has not made any acknowledgment of the debt or made any payment in respect of it and therefore provisions of section 23(3) of the Limitation of Actions Act does not apply to the instant petition. For emphasis, reliance was placed on the case of Rift Valley Railways (K) Ltd v Hawkins Wagunza Musonye & Another (2016) eKLR where the Court of Appeal held that there are no exceptions to section 90 of the Act.
5. As regards the competence threshold, it was submitted that the petition does not meet the threshold of a competent constitutional claim since it does not plead with precision the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it.
6. Further it was submitted that the filing of a petition instead of a memorandum of claim was meant to circumvent the limitation time. It was contended that the prayers sought are not provided for in the constitution but under section 49 of Employment Act. Reliance was placed on Mathew Kamanu Mwaura v Permanent Secretary Office of the President, Provincial Administration & 2 others (2018) eKLR and Peter Ndegwa Nderitu v Teachers Service Commission (2019) eKLR where it was held that the petitioner filed petitions to circumvent the fact that the claims were time barred under section 90 of the Employment Act. The respondent has urged this court to follow the said precedents and dismiss the petition for being time barred and an abuse of court process.
7. The petitioner, admitted that his employment with the respondent ended in January 2019 and ideally the timelines of instituting a claim in respect of his employment contract lapsed in January 2022. However, it was submitted that on April 30, 2021 the petitioner served a demand letter to the respondent for his unpaid remunerations amounting to Kshs 1,489, 200.00 and on May 7, 2021 the respondent unequivocally acknowledged that the petitioner had rendered services to the university. Further, the letter required the petitioner to handover documents to enable the respondent to process the claim.
8. It was further submitted that, pursuant to section 23 of the Limitation Actions Act, the acknowledgment that the petitioner rendered his services and thus the debt owed to the petitioner was revived upto May 7, 2024. Consequently, the suit having been filed in September 2022 is not time barred.
9. As regards the threshold for constitutional petition, it was submitted that the petition herein meets the competence threshold as set out by the court in the case of Anarita Karimi Njeru v Republic (1979) eKLR. It was submitted that the petition pleads the provisions of the constitution which were violated and the manner in which they were violated by the respondent. The Articles violated include 27 which guarantees right to equality and freedom from discrimination, and Article 47 which guarantee right to fair administrative action. Therefore, he prayed for the objection to be dismissed and the petition be heard on merits.

Determination

10. The issues for determination are:
 - a. Whether objection raised pure points of law.
 - b. Whether claim is time barred.
 - c. Whether the petition meets the threshold for a Constitutional claim.



Threshold for Preliminary Objection

11. The courts have repeatedly held that a preliminary objection must be one that raised pure points of law, which if allowed it would terminate the suit. In the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd*, supra, the court held that:-

“....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

12. In the instant case, the objection is premised majorly on ground that the claim is time barred. Consequently, the court is satisfied that the objection by the respondent raises a pure points of law.

Time barred suit

13. There is no dispute that the suit herein is grounded on contract of employment and there is no dispute that the cause of action arose on January 30, 2019. The petitioner admits that the time within which to file suit with respect to that cause action lapsed in January 2022. However, he contends that the claim was acknowledged by the respondent by a letter dated May 7, 2021 which was written in response to his demand letter dated April 30, 2021.

14. There is no dispute that section 90 of the *Employment Act* limits the time within which to commence a claim based on employment contract. Section 23 (3) of the *Limitation of Actions Act* provides that:-

“Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefore acknowledge the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgment or the last payment.”

15. Section 24 of the Act provides for the formalities as to acknowledgment and part payments. Every acknowledgment must be in writing and signed by the person making it. The acknowledgment of payment must be made by the person owed or his agent.

16. The letter dated May 7, 2021 states as follows:-

RE: Demand For Dues Owed To Dr Jackson Wanjau For Services Rendered As Part-time Lecturer

Reference is made to the above –mentioned matter and to your letter of April 21, 2021.

We acknowledge receipt of the above letter and we address you as here below.

We confirm that your client rendered teaching services at the University. However, the University requires further information and documents from your client to enable it to process his claim. Kindly, therefore, favour us with the following:-

- i. Appointment letter, contract for the units taught,
- ii. Duly filled claims,
- iii. Particulars of the demanded amounts- principal amount, interest, and travelling and accommodation.

Yours faithfully



Legal Officer

17. I have carefully considered the content of the above letter and cannot discern any unequivocal acknowledgment of the petitioners claim for the dues demanded. The letter merely acknowledges that that the petitioner was a former part-time lecturer but does not admit any debt. In fact the letter requests for prove of the demanded dues by asking the petitioner to avail supporting documents and particulars of the claim. Consequently, section 23 of the *Limitation of Actions Act* does not apply to this case.
18. Without any valid acknowledgment of the petitioners claim under section 23 above, the accrual date for the cause of action remained January 30, 2019. Three years within which to file suit in that respect lapsed on January 29, 2022 and therefore the suit having been filed on September 29, 2022 is stale and time barred. The corollary to the above is that the court lacks jurisdiction to determine the stale claim.

Constitutional claim

19. The petitioner cites Article 27 and 47 of the *Constitution* as the provisions violated by the employer. He further cites section 3 (3), 9,5 and 43 of the *Employment Act*, section 3,4, 5,6 and 7 of *Fair Administrative Actions Act* as statutory provision violated by the employer. Finally he sets out particulars of loss and damage including loss of income from March 2018 to January 30, 2019, loss of expectation to pursue his career and remain in employment as a lecturer or in any other capacity, and loss of legitimate expectation to earning a salary for the services rendered to the respondent's institution.
20. The foregoing summary of the pleading point to the fact that the claim is purely employment dispute which can be remedied under the *Employment Act* as a normal suit for compensation. This view is fortified by the fact that the substantive reliefs sought are liquidated damages grounded on the contract of service. At the risk of repeating myself, the reason why the petitioner filed a petition referring to provisions of the *constitution*, was to circumvent the limitation period under section 90 of the *Employment Act*. Consequently, the court finds that the petition does not meet the threshold of a claim for relief under the *constitution* as enunciated in the *Anarita Karimi Njeru* case.
21. In the end, having found that the petition contains a purely employment claim which is time barred, I proceed to strike out the same with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 13TH DAY OF APRIL, 2023.

ONESMUS N MAKAU

JUDGE

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties 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

