



**Watuku v Principal Secretary Ministry of Health (Petition
E129 of 2021) [2023] KEELRC 1388 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1388 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E129 OF 2021**

J RIKA, J

MAY 31, 2023

BETWEEN

GEORGE KAHURA WATUKU PETITIONER

AND

PRINCIPAL SECRETARY MINISTRY OF HEALTH RESPONDENT

RULING

1. This Petition was filed on August 16, 2021.
2. The Petitioner states that he was employed by then Ministry of Health, and posted to Kangundo District Hospital on September 12, 1995, as a Clinical Officer.
3. He was subsequently transferred to various other stations.
4. He states that he was suspended on February 21, 2001, but received no further communication from the Respondent on his employment status.
5. He petitions the Court to find, award and declare: -
 - a. Declaration that the conduct of the Respondent is contrary to and inconsistent with the Provisions of Article 10 of the Constitution.
 - b. Declaration that the Respondent violated the constitutional rights of the Petitioner, in particular Articles 20[1] and [2], 24[1], 25[a] and [b], 28, 29[d] and [f], 35, 41, 47, 48, and 50 [3] of the Constitution.
 - c. Certiorari to remove into this Court for purposes of being quashed, the decisions of the Respondent contained in various letters dated February 21, 2001, titled 'Discipline,' requiring the Petitioner to show cause why disciplinary action including dismissal from service, cannot be taken against the Petitioner for gross misconduct.



- d. Mandamus to compel the Respondent to reinstate the Petitioner as a Clinical Officer, with full salary and benefits as per Job Group P, under the Civil Service Salary and Allowances for the year 2020, from February 2001, until determination of this Petition and thereafter, on a monthly basis.
 - e. Adequate damages in compensation for violation of Constitutional rights.
 - f. Any other suitable relief.
 - g. Costs to the Claimant.
6. The Respondent has filed a Notice of Preliminary Objection, which is the subject of today's Ruling. There are 4 Grounds stated in the Notice: -
- I. The Petition is time-barred under Section 90 of the *Employment Act*.
 - II. The Petition is made to circumvent mandatory law on limitation of actions.
 - III. The Petition is in abuse of the Process of the Court having been presented about 20 years, from the date the cause of action accrued. Equity aids the vigilant.
 - IV. The Petition is vexatious and frivolous.
7. It was agreed by the Parties that the Preliminary Objection is considered and determined based on the Parties' submissions. They confirmed filing and service of their submissions at the last appearance before the Court, on March 17, 2023.

The Court Finds: -

8. The Petition herein, is an employment Claim, which is couched as a Constitutional Petition.
9. The Petitioner states in the title to the Petition, that the Petition is among others, "In the matter of the *Employment Act*, 2007."
10. If the Petition is in matter of the *Employment Act* 2007, it must be obvious from the outset, that it is barred under Section 90 of the *Employment Act*, 2007.
11. The Claimant left employment in 2001. He ceased to earn monthly salary then. He has not rendered any service from 2001. He seeks among others, the remedy of reinstatement. Reinstatement is a remedy for unfair termination. If he considered himself to be on suspension, he would be pleading for lifting of the suspension. It would be absurd to consider him to be an Employee of the Respondent, having left the employment place, in 2001.
12. He is disputing letters to show cause, suspension and disciplinary processes, that took place over 20 years ago. Did he have to wait for promulgation of a new Constitution, to present the Petition in 2021, about 20 years after he left employment? There was a Constitution in place, and Employment and Labour Relations Statutes, in place, before the *Constitution* of 2010 and the *Employment Act*, 2007, through which the Petitioner could have approached the bench.
13. The Court is convinced that it does not have jurisdiction to grant reinstatement, 22 years after the Petitioner left employment. It would be most absurd, to grant the Petitioner back pay, for a period of 22 years during which he has not rendered any service to the Public, to be paid from the Public Coffers.
14. The Petition is not only barred under Statute; it falls flat on its face, under the doctrine of *laches*. The doctrine is based on the latin maxim, "*vigilantibus non dormientibus, jura subveniunt*," [the law will



not help those who sleep on their rights]. The principle recognizes that an adversary can lose evidence, witnesses and fair chance to defend oneself, after a long passage of time, from the date the cause of action arose. Article 50 [1] of the *Constitution* grants every person the right to have any dispute, that can be resolved by the application of the law, decided in a fair and public hearing before a Court, or if appropriate, another independent and impartial tribunal. There was inordinate delay in presentation of the Petition. The Petitioner has always known that the Respondent suspended him, but did not communicate his dismissal for over 22 years. He could have taken active steps to bring the dispute to Court, within a reasonable time from the date of suspension. Delay was inordinate and unreasonable. The Petitioner did not have to wait for a new Constitution, for his cause of action to crystallize. To require the Respondent to go full throttle in responding to the Petition, would amount to subjecting the Respondent to an unfair trial.

It Is Ordered : -

- a. The Preliminary Objection is sustained.
- b. The Petition is declined.
- c. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES VIA E-MAIL, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 31ST DAY OF MAY, 2023.

JAMES RIKA

JUDGE

