



Ndueyira v Inspector General of Police & 3 others (Employment and Labour Relations Appeal E038 of 2020) [2023] KEELRC 2092 (KLR) (18 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 2092 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E038 OF 2020**

**K OCHARO, J
MAY 18, 2023**

BETWEEN

CALISTUS WANJALA NDUHEYIRA PETITIONER

AND

INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

DEPUTY INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

NATIONAL POLICE SERVICE COMMISSION 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

RULING

Introduction

1. Through a notice of preliminary objection dated October 2, 2020, the 1st, 2nd and 4th respondents raised a preliminary objection to the petitioner’s Petition herein citing the following grounds:
 1. That the suit is time barred and offends the mandatory provisions of section 3(2) of the *Public Limitations Act* which states that no action founded on contract shall be brought against the Government or local authority after the end of three years from the date when the cause of action accrued.
 2. The suit further offends section 3(1) of the *Public Authorities Limitations of Actions Act* which states that no proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months.
 3. That it further offends the mandatory provisions of section 90 of the *Employment Act, 2007* Laws of Kenya.



4. That the Petitioner was dismissed on February 4, 2014 and the petition was filed in August 2020 barely six and a half years after the cause of action.
5. That the suit is an abuse of the court process.
2. By way of a preliminary objection the 3rd respondent assails the petition upon the following grounds:
 - a. That the Petition goes against the tenets of section 12(3) of the *Employment and Labour Relations Court Act*, 2011.
 - b. That the petition is scandalous, frivolous and vexatious.
 - c. That the petition offends section 4(1)(a) of *Limitation of Actions Act* (cap. 22).
 - d. That the Petition is incompetent and should be dismissed.
 - e. That the petition is an abuse of the court process, lacks merit and is ill advised.
3. Parties have filed their respective submissions with the owners of the Preliminary Objection filing for and the Petitioner against.

3rd Respondent's submissions

4. The 3rd Respondent identifies two issues for determination on the preliminary objection, thus:
 - i. Whether the petition before this court has been filed within the stipulated time.
 - ii. Whether the petitioner is entitled to the reliefs sought.
5. It is submitted that the matter herein is an employment dispute which has been camouflaged as one anchored on a constitutional violation in an attempt to defeat the application of the *Limitation of Actions Act* and the *Public Authorities Limitation of Actions Act*. The court should be able to see the matter as such and defeat this move by the petitioner. To buttress this point, it places reliance on the holding in:

Benjamin Wachira Ndiithi v Public Service Commission & another (2014) eKLR, thus:

“I agree with the claimant that employment contracts may embody constitutional rights under the *Constitution* I do not think that this elevation by itself jettisons the law on limitation as far as enforcement of these rights are concerned. In my view therefore, employment contracts remain subject to limitation either under section 4(1) of the *Limitation of Actions Act* or under section 90 of the *Employment Act* 2007 depending on the effective date of the contract being enforced.”

6. The 3rd respondent submits further that in employment matters the cause of action arises on the date of termination, and in this matter, the February 4, 2014. It matters not that the employee has engaged post-termination internal mechanisms to challenge the decision to terminate. It puts reliance on the holding in *Benjamin Wachira Ndiithi vs Public Service Commission & another* (2014) eKLR, that:

“This court has however taken a different view on this matter in the case *Hilarion Mwogbolo v Kenya Commercial Bank* (2013) eKLR to the effect that accrual of the cause of action in a claim emanating from an employment contract takes effect from the date of termination as stated in the letter communicating the termination. 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 appeal or review.

In the instant case, the claimant's termination from the 1st respondent's employment took effect on October 1, 2000 as communicated by letter dated September 29, 2000. It follows therefore that the cause of action upon which the claimant's claim is based accrued on October 1, 2000 and that is the date when time began to run as against the claimant's claim."

7. The 3rd respondent submits further that the *Employment Act* is not applicable in the instant matter but the *Limitation of Actions Act* and *Public Authorities Limitations of Action Act*, as the employment in issue relates to Police Service. To support this, it places reliance on the case of *Daniel Kago Gachanja v Inspector General & 2 others* (2020) eKLR where the court stated:

"The relevant Law is section 3(2) of the *Public Authorities Limitation of Actions Act* which provides:

"No proceedings founded on contract shall be brought against the Government or Local authority after the end of three years from the date on which the cause of action accrued."

The proceedings herein are founded on contract and were brought against the government after the end of three years from the date when the cause of action accrued. The claimant pleaded in paragraph 2.25 of the claim that he was dismissed from the police force on 30/09/2008. He further pleaded in paragraph 2.30 of the claim that on January 11, 2010, he received communication from the respondent - that his appeal against the dismissal have been dismissed by the Public Service Commission.

From January 11, 2010 the limitation period of three years ended on January 11, 2013. However, the claimant brought this suit on January 29, 2018, which was more than 5 years after the expiry of the limitation period.

It is trite that the issue of limitation is not a mere technicality but it goes to the jurisdiction of the court."

8. By dint of the provisions of section 3(2) of the *Public Authorities and Limitations of Actions, Act* the Petitioner's Petition is time barred. The petitioner therefore is not entitled to any of the reliefs sought, as the court does not have jurisdiction to avail the same, by reason of the foregoing premises.

The Petitioner's Submissions

9. The Petitioner contends that the respondents' objections are all on sinking grounds as they are founded on section 90 of the *Employment Act*, yet the *Employment Act* does not apply to employment of police officers such as the petitioner. To buttress these submissions, he placed reliance on the provision of section 3(2) (6) of the *Employment Act*.
10. He argues that the petition herein raises constitutional issues anchored on constitutional rights and freedoms as guaranteed in the various provisions of the *Constitution* That he has cited. Article 22 of the *Constitution* bestows upon him the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of rights have been violated and or are threatened.
11. The *Constitution* does not prescribe the limitation period within which a petition under article 22 may be instituted and therefore it cannot be open to anyone to apply provisions of statutes to impose a limitation.



12. He further submits that section 7 of the sixth schedule to the Constitution on transitional and consequential provisions stipulates:

“7(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions to bring it into conformity with this constitution.”

The Limitation of Actions Act, Public Authorities Limitations Act, and the Employment Act must be read and construed with alterations, adaptations, qualification and exceptions necessary to bring them into conformity with the Constitution Pre-Constitution 2010 statutes must be held and interpreted with alterations to the effect that their prescribed limitation periods do not apply to actions for redress of violation of constitutional rights.

13. To support their submissions, the petitioner cites the holding in Wachira Webeire v Attorney General (2010) eKLR, where the High Court stated:

“We find that, although there is need to bring proceedings to court as early as possible in order that reliable evidence can be brought to court for proper adjudication, there is no limitation period for seeking redress for violation of the fundamental rights and freedoms of the individual under the Constitution of Kenya . Indeed, section 3 of the Constitution, provides that the Constitution shall have the force of the law throughout Kenya and if any other law is inconsistent with the Constitution the Constitution shall prevail. In our view, the provision of the Public Authorities Limitations Act limiting the period of initiating actions against Public authorities is inconsistent with the Constitution, to the extent that it limits a party’s rights to seek redress for contravention of his fundamental rights. The Public Authorities Limitations Act cannot override the Constitution and it cannot therefore be used to curtail rights provided under the Constitution We therefore find and hold that the petitioner’s claim arising from violation of the constitutional rights is not statute barred.”

14. To buttress his submissions the petitioner further relied on the holding in Dominic Arony Amolo v Attorney General (2003) eKLR, thus:

“That unless the Constitution itself limits the prosecution of those rights, no statute should by implication bar it. Here the law of limitation has not reserved for itself the liberty to circumvent the prosecution for these fundamental rights.

I refer to the opinions to buttress my view that a claim based on fundamental rights require special consideration and as they are embodied in our Constitution it is not permissible for the court to whither them away under consideration of historical civil liberties.

The learned state counsel says the Limitation of Actions Act applies but does not with respect say which legal wrong it is as would fit under Limitation Act. It is neither a contract nor tort. It is in actual fact simply a claim under the provisions of the Constitution It cannot be categorized with those wrongs and claims limited under cap 22.”

15. The petitioner urged the court to take note that through its letter dated January 15, 2014, the 3rd respondent assured him that it was to get back to him on a decision on his appeal against his dismissal from employment. However, as at the time of filing the petition in 2020, the 3rd respondent had not reverted back with the “final decision.”



16. The respondent's failure to revert back with its "final decision" is not only a violation of the petitioner's rights to a fair administrative action that is expeditious but also constitutes a continuing injury for purposes of section 90 of the *Employment Act*.
17. The petitioner further submits that whereas there is no limitation with respect to institution of constitutional litigations, courts are obligated to consider whether the delay in the institution is unreasonable. In the circumstances of the instant matter, the delay in filing the petition was not inordinate. The delay is attributable to the respondents.
18. The preliminary objection lacks merit and it should be dismissed with costs.

Analysis and Determination

19. From the material placed before me, the following two issues present themselves for determination:
 - a. Whether the statutes can bar adjudication on bill of rights and fundamental freedoms.
 - b. Whether the petitioner's petition herein raises constitutional issues that can be properly adjudicated under a constitutional litigation.

Whether statutes can bar adjudication on bill of rights and fundamental freedoms.

20. The cornerstone of the respondents' preliminary objection is the argument that the petitioner's petition herein is time barred by operation of the provisions of the *Public Limitations Act* section 3(2), *Limitation of Actions* section, section 4(1), and *Employment Act*, section 90. These statutory provisions impose limitations of time for seeking of judicial redress, concerning various actions. This court is impelled therefore to delve into answering the question, whether in interpreting the constitutionally entrenched provisions of the Bill of Rights and fundamental freedoms it is in any way circumvented by legislative statutory stipulations like the ones herein above brought forth. Of course, the parties have taken diametrically opposite positions on this.
21. The court notes that the petitioner alleges contravention of various provisions of the *Constitution of Kenya*, 2010, namely article 10, 23, 28, 35(1), 41, 47(1) (2), 50, 73, 75, 232, 236, 244(c) and 246(3) (b). Article 22 of the *Constitution* provides for enforcement of the Bill of Rights, thus:
 1. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.
 2. In addition to a person acting in their own interest court proceedings under clause (1) may be instituted by:
 - a. A person acting on behalf of another person who cannot act in their own name;
 - b. A person acting as a member of or in the interest of a group or class of persons;
 - c. A person acting in the public interest of one of more of its members.



22. Article 258 of the [Constitution of Kenya 2010](#), provides for enforcement of the [Constitution](#), that:

- “(1) Every person has a right to institute court proceedings claiming that this Constitution has been contravened, or is threatened with contravention.
2. In addition to a person acting in his own interest court proceedings under clause (1) may be instituted by –
- a. A person acting on behalf of another person who cannot act in their own name;
 - b. A person acting on a member of or in the interest of a group or class of persons;
 - c. A person acting in the public interest; or
 - d. An association acting in the interest of one of or more of its members.”

23. The two provisions provide a pedestal for institution of proceedings with the subject matter(s) violation or threatened violation of the Bill of Rights and fundamental freedoms and or contravention or threatened contravention of the [Constitution](#). No doubt, the petition herein finds base in article 22 and 258 of the [Constitution](#). It alleges violation of the petitioner’s fundamental rights and a breach of the [Constitution](#).

24. Article 22(3) of the [Constitution](#) enjoined the Chief Justice to make rules providing for the court proceedings contemplated under article 22(1) and (2), the Sub-Article provides:

2. The Chief Justice shall issue rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that:
- a. The rights of standing provided for in clause (2) are fully facilitated.
 - b. Formalities relating to the proceedings, including commencement of proceedings are kept to the minimum, and in particular that the court shall if necessary, entertain proceedings on the basis of informal documentation.
 - c.
 - d.
 - e.

25. In adherence to the command encapsulated in the sub-article the Chief Justice made the rules, the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\), Practice and Procedure Rules 2013](#), famously known as the “Mutunga rules”. Undoubtedly neither the rules nor the pedestal Articles referred to hereinabove, provide for limitation of time for institution of proceedings contemplated under articles 22 and 258 of the [Constitution](#).

26. At this point this court states thus, if it was the intention of Kenyans that there be a limitation, nothing would have been easier than the intention being manifested in the [Constitution](#) itself and expressly so and or through the command under article 22(3), that the rules by the Chief Justice do incorporate a limitation of actions in regard to matters litigable under the [Constitution](#).



27. Within the constitutional provisions, this court discerns not any room for implying that the limitation of actions imposed by the legislative statutes hereinabove mentioned can be read into the Constitution and limit the time within which the proceedings under articles 22 and 258 of the Constitution can be commenced.
28. In my view, limitations obtaining in legislative statutes, which the Constitution has not expressly pronounced as applicable to matters under the it cannot be read into the Constitution and allowed to be applicable. The only limitations that would be applicable to the Constitution are those expressly provided for, or by a statute whose enactment has been sanctioned by the Constitution, in line with the provisions of article 24.
29. The Constitution has primacy (subject to its provisions) over all other laws which so far as is inconsistent with its provisions, must yield to it, so declares article 2(4).

The statutory provisions, that impose limitation of actions, could as regards proceedings contemplated under article 22 and 258 of the Constitution, which otherwise provides no limitation of time, would be inconsistent to the Constitution to the extent that they provide for the limitation. Addressing this point, the Privy Counsel in Grenada in, *Gairy and another v Attorney General of Grenada* (2002) AC 167, stated that:

“the Constitution has primacy (subject to its provisions) over all other laws which so far as is inconsistent with its provisions, must yield to it. To read down its provisions so that they accord with pre-existence rules or principles is to subvert its purpose. Historic Common Law Doctrines restricting liability of the crown or its amenability to suit cannot stand in the way of effective protection of fundamental rights.”

30. In *Dominic Arony Amolo v the Attorney General* (2003) eKLR, though decided under the old Constitution, the court held and I agree that:

“The Judicial elevation talked of here sprang from the decision of the Canadian Supreme Court in the case of the *Queen v Drybones* (1970) SCR 282 where the court interpreted section 2 of the Bills of Rights (similar to our Section 3 with regards to fundamental Rights). The court said that the courts should refuse to apply any law coming within the legislative authority of Parliament which infringes the Bill of Rights unless the Parliament has declared that it should so operate.

In Kenya, the context is clearer. Here, the Fundamental Rights are themselves in the Constitution and the Constitution says that any inconsistent provision of any law is void to the extent of its inconsistency to barring itself or limiting time in an Act a feature of inconsistency; Here unless the Constitution itself limits the prosecution of those rights no statutes should by implication bar it. Here the law of limitation has not reserved for itself the liberty to circumvent the prosecution of fundamental rights”.

31. It is by reason of the foregoing premises that the Court holds that it is not persuaded by the respondents’ submissions and authorities they have cited.
32. I consequently come to the conclusion that the limitation of time imposed by the Public Authorities Act, the Limitation of Action Act, Cap 22 Laws of Kenya sub-section 90 of the Employment Act do not bar proceedings contemplated under Articles 22 and 258 of the Constitution



Whether the Petitioner’s petition herein raises constitutional issues that can be properly adjudicated under a constitutional litigation

33. The respondents argued that the matter presented before this court is basically an employment dispute that has been disguised as a constitutional violation matter clearly to avoid the application of the Limitation of Actions Act and the Public Authorities Limitation of Actions Act. To support this, point the holding in Benjamin Wachira Ndiithi v Public Service Commission & another (2014) eKLR was cited thus:

“I agree with the claimant that employment contract may embody constitutional rights under the Constitution, I do not think that this elevation by itself jettisons the law on limitation as far as enforcement of these rights are concerned. In my view therefore, employment contract remains subject to limitation either under section 4(1) of the Limitation of Actions Act or under section 90 of the Employment Act, 2007 depending on the effective date of employment contract being enforced.”

Having found as I have hereinabove, I find that the decision does not come to the aid of the preliminary objection.

34. Further, I have carefully considered the violations of fundamental rights alleged, the breach of the Constitution alleged and the reliefs sought, I find that the reliefs sought depend on the Constitutional issues raised. This makes the matter one that can be properly litigated on, through constitutional litigation and one that comfortably avoids the jaws of the doctrine of constitutional avoidance.

35. By reason of the foregoing premises this court finds the preliminary objection raised by the respondents lacking in merit. It should be and is hereby, dismissed.

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF MAY, 2023.

OCHARO KEBIRA

JUDGE

In Presence of:

Ms Chebet for 3rd Respondent

Mr. Were for Khaemba for the Petitioner

No appearance for 1st and 2nd Respondents

