Ali v Director General, National Youth Service & another (Petition E125 of 2022) [2023] KEELRC 1426 (KLR) (17 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1426 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E125 OF 2022

NZIOKI WA MAKAU, J

MAY 17, 2023

IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS UNDER

ARTICLES 19, 20, 21, 22, 23, 31, 47, 48, 49, 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE PETITIONER AND JURISDICTION IN CASE OF DISPUTES BETWEEN EMPLOYER AND EMPLOYEE AND IN THE MATTER OF UNFAIR TERMINATION UNDER SECTIONS 47 AND 87 OF THE EMPLOYMENT ACT NO. 11 OF 2007 LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION BY

BETWEEN

RASHID DIKA YUSSUF ALI ..... PETITIONER

AND

DIRECTOR GENERAL, NATIONAL YOUTH SERVICE ..... 1ST RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY OF PUBLIC SERVICE, YOUTH & GENDER AFFAIRS ..... 2ND RESPONDENT

RULING

1. The respondent/applicant raised a preliminary objection on the following grounds: -
    1. That the suit is time barred and offends mandatory provisions of section 90 of the *Employment Act*, 2007.

2. That the petitioner is circumventing the *Employment Act* and the *Labour Relations Act* by relying on the constitutional provisions having realized the matter is statute barred under the parent Acts which give effect to constitutional rights.

3. That the suit is an abuse of the court process.

4. That the suit is incompetent and ought to be struck out with costs.

2. The respondents submit that the issues for determination are two. Firstly, whether the suit is time barred and secondly, whether the petitioner has circumvented the *Employment Act* and the *Labour Relations Act*. On the first issue as to whether the suit is time barred, the preliminary objection is premised on the ground that the suit is time barred and offends mandatory provisions of section 90 of the *Employment Act*, 2007. The respondents submit that the circumstances in which a preliminary objection may be raised was explained by the Court of Appeal in the *locus classicus* decision in *Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd* [1969] EA 696 as follows:

> " A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

3. The respondents submit that the petitioner herein was dismissed from service on or about October 23, 2017 as admitted at paragraphs 5 and 7 of the petition. They submit that therefore, the cause of action arose on October 23, 2017 and that this petition was filed on the e-filing portal on June 25, 2022. It is submitted that its clear that the suit is statute barred under section 90 of the *Employment Act* which states 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."

4. The respondents submit that in the present case, no leave to extend the period within which to file the case was sought prior to its filing. The respondents submit that the cause of action arose to June 25, 2022 and that when the matter was filed in court, the period that has lapsed in between is a record over 4 years and 8 months. It is submitted that the 3 years for purposes of section 90 of the *Employment Act* lapsed on October 22, 2020. The respondents submit that the petitioner has not made any explanation/justification as to why he did not move this court for appropriate remedy within the prescribed period and no leave was sought to file the suit out of time. They submit that in the case of *Banking Insurance and Finance Union (K) v Bank of India* [2013] eKLR this court while dealing with the issue of limitation stated:

> " The fact of the matter is that employment contracts like other commercial contracts were subject to the provisions of the Limitations of Actions Act cap 22 of the Laws of Kenya at the time with regard to limitations but presently the limitation period is governed by section 90 of the *Employment Act* 2007 which has reduced the limitation period in employment matters to three (3) years."

5. The respondents cite the case of *Ndirangu v Henkel Chemicals (EA) Ltd* [2013] eKLR, where Radido J. held that:

> "...section 90 of the Act now regulates limitation time in employment contracts to three years...section 4(1) of the *Limitation of Actions Act* is not applicable and therefore the claimant cannot be heard to argue that the limitation was 6 years."

6. The respondents submit that in the case of *Attorney General & another v Andrew Maina Githinji & another* [2016] eKLR, while setting aside the ruling of the Employment Court (Ongaya J), Waki and Kiage JJA, in a majority decision held as follows:

> "I have considerable sympathy for the reasoning in all the above cases which leads me to the conclusion that the cause of action in this case did not arise after the conclusion of the criminal case against the respondents. The respondents had a clear cause of action against the employer when they received their letters of dismissal on October 2, 2010. They had all the facts which had been placed before them in the disciplinary proceedings and they could have filed legal proceedings if they felt aggrieved by that dismissal, but they did not".
>
> "Having found that the cause of action arose on February 2, 2010 and that the claim was filed on June 16, 2014, it follows by simple arithmetic that the limitation period of three years was surpassed by a long margin. This claim was time barred as at February 1, 2013, and I so hold".

7. The respondents submit that the language of Parliament is mandatory as the word used is "shall" and that this court therefore has no discretion to entertain this matter. Furthermore, this is not a mere technicality but a jurisdictional issue. The respondents submit that the role of this court is to interpret the law and that the court does not enact laws as it is the mandate of Parliament. In its role to interpret the law, some parties will adversely be affected like in the instant case but this is the law. The respondents submit that the petitioner has not shown any continuing injury or damage to warrant the court to review the mandatory time by a consideration of the continuing injury or damage, this court lacks the jurisdiction to entertain this matter for being time barred at the time of filing. The respondents submit that this claim is statute barred and this honourable court is not clothed with jurisdiction to entertain it or at all. The respondents pray that the same be dismissed with costs.

8. As to whether the petitioner has circumvented the *Employment Act* and the *Labour Relations Act*. The respondents submit that there has always been the notion that there is no limitation to violations of fundamental rights under the *Constitution* so much that some parties have resorted to using the *Constitution* as a general substitute to litigate on everything and anything. The respondents submit that there are parties that are using the *Constitution* as procedural and substantive law and making constitutional issues where there are none and that this is exactly what the petitioner herein is doing having slept on his right and only woken up more than 4 years and 8 months down the line to claim that his dismissal was contrary to the provisions of the *Constitution* as cited therein yet the petitioner is merely seeking to enforce employment contract which is regulated by the *Employment Act* and other Labour Laws enacted by Parliament. The respondents submit that the petitioner is being clever when moving court through a constitutional petition having realized that the defence of time bar under section 90 of the *Employment Act* had caught up with him. They opine that the Petitioner is circumventing the *Employment Act* and the *Labour Relations Act* by relying on the constitutional provisions having realized the matter is statute barred under the parent Acts which give effect to

constitutional rights. They cite the case of *Josephat Ndirangu v Henkel Chemicals (EA) Ltd* (supra) where Radido J. held at paragraphs 20, 21 and 22 as follows:

> " ...In my view a litigant should not avoid the provisions of the *Employment Act* regarding unfair termination or wrongful dismissal by going behind the statute and seeking to rely directly on article 41 of the *Constitution* on the right to fair labour practices. The purpose of the *Constitution* is that the right to fair labour practices is given effect in various statutes of which the *Employment Act* and the *Labour Relations Act* are primary.
>
> 'The primary legislation should not be circumvented by seeking to rely directly on a constitutional provision. Both the *Employment Act* and the *Labour Relations Act* give effect to constitutional rights.
>
> 'It is clear in my mind that the claimant filed the petition after realizing that the cause he had filed was under legal attack and there was not any legal defence to the attack on the ground of time bar".

9. The respondents cite the case of *Uhuru Muigai Kenyatta v Nairobi Star Publications Limited* [2013] eKLR, where Lenaola J. (as he then was) cited with approval the holding in *Re Application by Bahadur* [1986] LRC (Cost) 297 at 298, where the court in Trinidad and Tobago held as follows:

> " The *Constitution* is not a general substitute for the normal procedures of invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper course is to bring the claim under that law and not the *constitution*."
>
> "...where there is a remedy in civil law, a party should pursue that remedy. My mind is clear however that not every ill in society should attract a constitutional sanction. Such sanctions should be reserved for appropriate and really serious occasions. It is important to recognize that even if a case does raise a Constitutional matter, the assessment of whether the case should be heard by this court rests instead on the additional requirements that this court must be in the interest of justice and not every matter will raise a Constitutional issue worthy of attention."

10. The respondents also cite *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR, where the Court of Appeal stated;

> " Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the constitutional court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation.....
>
> .....this court has severally held that where a fundamental right is regulated by legislation, such legislation, and not the underlying constitutional right, becomes the primary means for giving effect to the constitutional rights.....".

11. The respondents submit that in *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR, where this court again emphasized: -

> " ...In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an

Act of Parliament, that procedure should be strictly followed....” In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. The *Constitution* should not be turned into a thoroughfare for resolution of every kind of common grievance”.

12. The respondents submit that the test whether a petition raises a constitutional issue was also discussed in *Four Farms Limited v Agricultural Finance Corporation* [2014] eKLR as follows:

> “ ...where there is a parallel remedy, Constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a rule, there must be some feature, which at least arguably indicates that the means of least redress otherwise available would be adequate. To seek constitutional relief in the absence of such feature would be a misuse and an abuse of the court process.”

13. The respondents submit that the court in *Elizabeth Mburu v Kenya Breweries Ltd* [2014] eKLR held as follows:

> “ Not all issues in the employment dispute are constitutional issues. There is a real danger of abusing the *Constitution* if all interactions and subsequent disputes are considered constitutional issues or matters requiring interpretation of the
>
> Constitution or requiring the enforcement or protection of fundamental rights under the bill of rights. It would be absurd to have each and every dispute elevated to the constitutional platform. It is apparent that the suit is one which relates to the pursuit of remedies in the nature of employee-employer disputes under this court’s jurisdiction both in its former sense and presently as constituted”.

14. The respondents submit the the Court of Appeal in *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR pronounced itself as follows: -

> “ The article 41 rights are enacted in the *Employment Act* and *Labour Relations Act*. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1st respondent filed a petition directly relying on the provisions of the *Constitution* for enforcement of contractual rights governed by the *Employment Act* without seeking a declaration of invalidity of the provisions of the *Employment Act* or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of the *Constitution*.
>
> We adopt and uphold the general principle in the persuasive authority in *Barbara De Klerk* (supra) that where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the *Constitution* without challenging the legislation in question. That principle has been reinforced by the Supreme Court in *Communications Commission case* (supra).
>
> In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the *Constitution*. Accordingly, the petition being incompetent, the

court acted in excess of jurisdiction and erred in law in determining the petition. That finding disposes of the entire appeal including the cross-appeal filed by the 2nd respondent."

15. The respondents submit in conclusion that the petitioner is making constitutional issues where there are none and that the suit is statute barred. They pray the court finds that the suit is time barred and offends the mandatory provisions of section 90 of the *Employment Act*, 2007 and that the petitioner is circumventing the *Employment Act* and the *Labour Relations Act* by relying on the constitutional provisions having realized the matter is statute barred under the parent Acts which give effect to constitutional rights. The respondents submit that the suit is an abuse of the court process and incompetent and that the same be struck out with costs to the respondents.

16. The petitioner opposed the respondents' preliminary objection dated October 31, 2022 on the following facts/grounds: -

    i. The suit as filed is not time barred under section 90 of the *Employment Act*, the petitioner was terminated on the October 23, 2017, filed an appeal on January 12, 2018, within the timelines, which appeal was determined by the 1st respondent on the June 16, 2021, hence time runs from June 16, 2021 and not October 23, 2017 as the disciplinary process had not been concluded for the petitioner to seek court relief.

    ii. This suit is not incompetent as submitted by respondents and is properly before this court, the petitioner has sought at paragraphs 13 and 14 of the petition particularized the constitutional violations meted against him and has sought this honourable court's consideration and grant the said reliefs. Nothing has been circumvented by the petitioner as alleged, neither has any particular circumvented been laid out, the respondents having not filed any response to the petition.

17. In support of the above submission, the petitioner relies on the case of *Martin Lemaiyan Mokoosio & another v Reshma Praful Chandra Vadera & 3 others* [2021] eKLR where Odunga J. (as he then was) stated;

> ''The mere fact that a matter that ought to have been brought as an ordinary civil suit was framed as a constitutional petition, did not thereby deprive the court of jurisdiction to entertain the same. The court could frown upon that cause and could even strike it out for being an abuse of the process but that did not make it a jurisdictional issue."

18. The petitioner submits that the preliminary objective be dismissed with costs as it does not meet the criteria of *Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd* [1969] EA 696 as most of the facts have to be ascertained in this petition.

19. The court has considered the submissions of parties and the law in coming to this decision. This is clearly one of the cases that can be distinguished from the case of *Attorney General & another v Andrew Maina Githinji & another* (supra) as we cannot on one hand be telling parties that they must have conclusive determination of the process at the workplace and on the other hand deny them the opportunity to articulate their cases when the process at the workplace takes longer than is permitted under article 47 of the *Constitution* (fair administrative action that is just and expedient). In the *Attorney General & another v Andrew Maina Githinji & another* case, the claimant was an accused person in a criminal trial and did not move the court in time in the mistaken belief that time was not running unlike in this case where there was an administrative process that barred the petitioner from approaching the court. As such, I hold that the petition is properly before the court the cause of action having arisen in this particular circumstance on June 16, 2021. He could as well have filed an ordinary

claim and the answer would have been the same. In the final analysis, having found there is no merit in the preliminary objection, the respondents preliminary objection stands dismissed with costs being in the cause.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MAY 2023

NZIOKI WA MAKAU

JUDGE