



**Fondo v Shah; Commission of Administrative Action & 3 others (Interested Parties)  
(Petition E015 of 2023) [2023] KEELRC 2451 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2451 (KLR)

**REPUBLIC OF KENYA**

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

**PETITION E015 OF 2023**

**AK NZEI, J**

**OCTOBER 12, 2023**

**IN THE MATTER OF: ARTICLES 10,19(2), 20(1)(2) (3) & (4) 21(1) & (2)  
22,23,42(1) & (2), 165(3)(B) AND 258 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: UNCONSTITUTIONAL TERMINATION OF EMPLOYMENT**

**AND**

**IN THE MATTER OF: BREACH OF THE PETITIONER'S CONSTITUTIONAL RIGHT  
AS ENshrined IN ARTICLE 41(1), (2) (A) OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

**KAHINDI FONDO ..... PETITIONER**

**AND**

**NITIN SHAH ..... RESPONDENT**

**AND**

**COMMISSION OF ADMINISTRATIVE ACTION ..... INTERESTED PARTY**

**MOMBASA COUNTY LABOUR OFFICE ..... INTERESTED PARTY**

**MOMBASA DISTRICT LABOUR OFFICE ..... INTERESTED PARTY**

**MOMBASA DISTRICT COMMISSIONER ..... INTERESTED PARTY**

**RULING**

1. *Vide* a Petition dated 15/6/2023 and filed in this Court on 19/6/2023, the Petitioner pleaded that he was employed by the Respondent as a house servant from 2/2/1997, earning ksh. 3,100, and eventually ksh. 5,800 per month at the time of his unlawful termination. That on or about 17/1/2009,



- the Respondent summarily dismissed the Petitioner from his job without valid reasons and without following due procedure, despite the Petitioner having worked hard.
2. The Petitioner further pleaded that the Respondent promised to settle and/or pay his terminal dues, but kept on delaying and/or postponing the settlement; and that the time for filing a claim against the Respondent lapsed while the Petitioner was waiting for the Respondent to pay.
  3. The Petitioner invoked the provisions of Articles 10,19(2), 20(1), (2), (3) & (4), 21(1) & (2), 22,23,41(1) & (2), 165(3)(b) and 258 of the Constitution of Kenya 2010, and sought the following reliefs.
    - a. a declaration that the Petitioner's fundamental rights were contravened and grossly violated by the Respondent.
    - b. a declaration that the Petitioner is entitled to the payment of damages and compensation for the violation and contravention of his fundamental rights under the aforementioned provisions of the Constitution of Kenya.
    - c. a declaration that the Petitioner is entitled to compensation for the unlawful termination of his employment.
    - d. any other or further orders, writs and directions as this Court may consider appropriate to grant.
    - e. that costs of the Petition be provided for.
  4. The Petition was filed contemporaneously with an urgent Notice of Motion dated 15/6/2023 whereby the Petitioner sought the following orders:-
    - a. that pending the hearing and determination of the Petition inter partes, the Court be pleased to order the Respondent to give the Petitioner a certificate of service.
    - b. that costs of the Petition be provided for.
  5. The application is premised on the Petitioner's supporting affidavit sworn on 14/6/2023, in which the averments made in the Petition are replicated.
  6. On 27/6/2023, the Respondent filed a notice of preliminary objection and called for both the Petition and the notice of motion to be struck off with costs on grounds:-
    - a. that by dint of Section 90 of the Employment Act 2007, this Court lacks jurisdiction to hear and to determine the suit herein in view of the facts:
      - i. that the cause of action arose on 17/1/2009 and consequently, the 3 years period contemplated in Section 90 of the Employment Act lapsed on 17/1/2012.
      - ii. that the Petition was filed on 17/6/2023, almost 12 years after the lapse of the 3 years period contemplated in Section 90 of the Employment Act.
    - b. that the Petitioner's claim is time-barred and offends the mandatory provisions of Section 90 of the Employment Act 2007.
    - c. that the Petitioner's Petition is an abuse of the Court's process, and ought to be dismissed with costs.
  7. It is to be noted that parties are always bound by their pleadings, and that the nature of any claim filed in Court can only be discerned from the pleadings filed by the parties thereto. In the present



case, although the Petition herein is styled and presented as a Constitutional Petition, the same is, in my view, a camouflaged application by the Petitioner for leave to file an employment suit out of time. I say this because the declaratory orders sought, if granted, will definitely lead to the filing of an employment suit/claim. Further, from the wording of the Petition herein, what the Petitioner is seeking to enforce are purely employment rights. Employment and labour rights are enshrined in Article 41 of the Constitution of Kenya 2010; which the Petitioner has invoked, and are enacted in the Employment Act and the Labour Relations Act. A party cannot found an employment or labour relations suit on the Constitution without seeking a declaration of invalidity of the provisions of the said Acts, or alleging that the remedies provided for therein are inadequate.

8. The Court of Appeal stated as follows in the case of Summmaya Athman Hassan -vs- Paul Masinge Simidi & Another [2019] eKLR:-

“The Article 41 rights are enacted in the Employment Act and the Labour Relations Act. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1<sup>st</sup> 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 interpretation or application of the Constitution. We adopt and uphold the general principle in the persuasive authority in *barbara de klerk (supra)* that where 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.”

9. The Petitioner in the present case is seeking to enforce employment rights derived from an employer-employee relationship and/or employment contract that is alleged to have existed between the Petitioner and the Respondent from 2/2/1997 to 17/1/2009. In seeking to enforce such rights, the Petitioner cannot be allowed to dodge the provisions of the Employment Act and to seek to found his alleged cause of action directly on the Constitution. The Petitioner has not challenged the validity of the Employment Act or any provisions therein, and it is not permissible for him to found his alleged cause of action directly on the Constitution.

10. Section 90 of the Employment Act provides as follows:-

“Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act, 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.”

11. It is pleaded in the Petitioner’s Petition that the Petitioner was summarily dismissed on 17/1/2009 without valid reasons and without due procedure. The summary dismissal is the act that gave rise to the Petitioner’s cause of action, and that happened over fourteen years ago. It is not clear why the Petitioner elected to sleep on his rights for this long. Unfortunately for him, Section 90 of the Employment Act does not provide for extension of time where the time provided therein for bringing an action has lapsed. Any action or proceedings brought after the lapse of the time provided for in the Section is incompetent and can only be struck off. It matters not whether such proceedings are commenced by way of a memorandum of claim, a Petition or even a miscellaneous cause.



12. It was held as follows in *Francis Atonya Ayeka -vs- Kenya Police Service & Another* [2017] eKLR:-

“...the cause of action arose in employment where the Petitioner is seeking a benefit out of his employment and or service with the Respondent. Whether a Memorandum of Claim was filed or a Petition, the Cause of action does not change due to the name assigned to the pleadings.

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 practice. The purpose of *the Constitution* is that the right to fair labour practice 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.”

13. In view of all the foregoing, and having considered written submissions filed by Counsel for both parties, I do agree with the Respondent that the Petitioner’s Petition herein contravenes Section 90 of the *Employment Act* and is statute-barred. Consequently, both the Petition and the Notice of Motion dated 15/6/2023 are hereby struck off.

14. Each party will bear its own costs of the Petition.

15. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 12<sup>TH</sup> OCTOBER 2023**

**AGNES KITIKU NZEI**

**JUDGE**

Order

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

**Appearance:**

.....for Petitioner

.....Respondent

