



**Motende v Teachers Service Commission & another (Petition  
E016 of 2023) [2023] KEELRC 3033 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3033 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E016 OF 2023  
S RADIDO, J  
NOVEMBER 29, 2023**

**BETWEEN**

**JOHN ONGERA MOTENDE ..... PETITIONER**

**AND**

**TEACHERS SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. On or around 5 November 2018, John Ongera Motende (the Petitioner) was arrested by the Police allegedly for having unlawful possession of Kenya National Examinations Council examination papers.
2. Upon learning of the arrest, the Teachers Service Commission (the Commission) issued a show-cause letter dated 7 November 2018 to the Petitioner.
3. The show-cause was followed with a letter dated 19 November 2018 inviting the Petitioner to appear before a disciplinary panel on 28 November 2018.
4. The Commission thereafter wrote to the Petitioner a letter of interdiction dated 29 November 2018. The interdiction letter requested the Petitioner to make a written response to the allegations. The Petitioner responded to the allegations on 21 December 2018.
5. The Commission then invited the Petitioner to appear for hearing through a letter dated 21 February 2019 and the hearing was set for 19 March 2019. The Petitioner attended the hearing.
6. On 9 May 2019, the Commission wrote to the Petitioner to inform him of the decision to dismiss him.
7. The Petitioner applied for a review of the decision on 26 November 2021. The review did not succeed.
8. On 8 June 2023, the Petitioner filed the instant Petition asserting that the termination of employment violated his rights to fair administrative action and was unfair.



9. The reliefs sought by the Petitioner were:
- i. A declaration that the termination from service of the Petitioner by the 1<sup>st</sup> Respondent was irregular, illegal, unlawful and amounted to unfair labour practices and contrary to sections 41, 43 and 44 of the [Employment Act](#), chapter 226 Laws of Kenya.
  - ii. Rescission of the termination letter and effective re-instatement of the Petitioner to employment with the 1<sup>st</sup> Respondent herein on similar terms and/or privileges.
  - iii. Payments on account of salary in lieu of notice, service pay, terminal benefits and compensation for loss of employment on account of 12 months' salary.
  - iv. Payment of salary in lieu of leave days earned but not taken.
  - v. Refund of Petitioner's pension contributions for years worked.
  - vi. Costs and interest.
10. Upon service, the Commission filed a Notice of Preliminary Objection on 27 September 2023, contending that:
- i. The Petition is time-barred and offends the mandatory provisions of section 90 of the [Employment Act](#), 2007.
  - ii. The suit does not meet the threshold of a constitutional Petition and only seeks to circumvent the [Employment Act](#), 2007.
  - iii. The suit is incompetent and should be struck out with costs.
11. The Court gave directions on 5 October 2023. As a result, the Commission filed its submissions on 23 October 2023 and the Petitioner on 20 November 2023.
12. The Court has considered the Petition, Notice of Preliminary Objection and the submissions.

#### **Petition does not raise Constitutional questions**

13. The cause of action being agitated by the Petitioner fall within the realm of employment contract law. The remedies sought are all provided in the general law of employment, the [Employment Act](#), 2007.
14. The Court has relooked at the Petition and it does not reveal or disclose any dispute which requires an interpretation of the [Constitution](#) to resolve.
15. The High Court outlined the contours of a constitutional issue in the case of [Hakiziman Abdoul Abdulkarim v Arrow Motors EA Ltd & Ors](#) (2017) eKLR wherein it stated:
- A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.
16. In [Turkana County Government & 20 Ors v Attorney General & Ors](#) (2016) eKLR, the Court held that:
- claims of statutory violations cannot give rise to constitutional violations.
17. This Court has no difficulty in concluding that the Petitioner needlessly and improperly invoked the Court's constitutional jurisdiction. The probable reason will be apparent shortly.



## Limitation

18. The Petitioner was dismissed through a letter dated 9 May 2019. In his submissions, the Petitioner cited the case of *Elias Kibathi & Ar v the Attorney General* (2021) eKLR to argue that the appropriate limitation period was the 6 years prescribed by section 4(1) of the *Limitation of Actions Act* and therefore he moved the Court within time.
19. In the aforesaid case, the Court declined to declare section 90 of the *Employment Act*, 2007 unconstitutional.
20. The Petitioner's cause of action arose in the course of an employment relationship. The applicable Act is therefore the *Employment Act*, 2007 and not the *Limitation of Actions Act*.
21. Under section 90 of the *Employment Act*, 2007, the Petitioner should have moved the Court to allege unfair termination of employment within 3 years, that is, on or before 18 May 2022.
22. He did not. The mere fact that a review was pending before the Commission did not extend the accrual of the cause of action. The legal injury or wrong suffered by the Petitioner was on a date well known to him (see *Attorney General & Ar v Andrew Maina Gitbinji & Ar* (2016) eKLR on when a cause of action accrues).
23. The Petitioner should have moved the Court within the prescribed time of 3 years but he did not. That explains why he opted to move the Court through a Petition. The Petitioner was invoking the Court's constitutional jurisdiction to avoid any challenges based on statutory limitation law.
24. That was in abuse of the court process as it was meant to circumvent the law on limitation.

## Conclusion and Orders

25. The Notice of Preliminary Objection is upheld with the result that the Court orders the Petition struck out with costs.

**DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 29<sup>TH</sup> DAY OF NOVEMBER 2023.**

**RADIDO STEPHEN, MCIArb**

**JUDGE**

Appearances

For Petitioner Onchwangi & Co. Advocates

For 1<sup>st</sup> Respondent Ms Manyasa, Advocate, Teachers Service Commission

For 2<sup>nd</sup> Respondent did not participate

Court Assistant Everlyne

