



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

PETITION NO. E007 OF 2021

(FORMERLY KISUMU ELRC PETITION NO. E039 OF 2021)

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 19,20,21,22,23,26,27,28,41,46,47 & 50

IN THE MATTER OF THE VIOLATION OF THE FUNDAMENTAL

RIGHTS AND FREEDOM

IN THE MATTER OF THE EMPLOYMENT ACT, 2007 LAWS OF KENYA

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS

AND FUNDAMENTAL FREEDOM) , PRACTICE AND PROCEDURE RULES, 2013

IN THE MATTER OF THE CHALLENGE OF THE UNLAWFUL DISMISSAL

OF THE PETITIONER FROM THE EMPLOYMENT OF THE RESPONDENT

BETWEEN

MAXWELL SIFUNA.....PETITIONER/APPLICANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

1. The Ruling is on the Notice of Preliminary Objection by the Respondent filed by Edwiy Musundi dated 31st August 2021 against Petition dated 21st May 2021 on the following grounds:-

- a. This court lacks jurisdiction under the law to entertain interrogate and determine the Petition as the same is time barred, the substratum thereof having been filed outside the provided time limit.
- b. The Petition herein is filled out of time allowed under Section 90 of the Employment Act, hence the court lacks the requisite jurisdiction to entertain the matter in its present form.
- c. The petition herein as filed does not meet the threshold of a constitutional petition.
- d. The Petition is bad in law, frivolous, vexatious and amounts to gross abuse of the court process.

2. The Petitioner filed a Replying Affidavit sworn on the 26th October 2022 in response to the Preliminary Objection dated 31st August 2021. The Petitioner admits that his letter of dismissal from employment is dated 19th January 2017 and states that he filed Appeal annexure MS1 (c) dated 5th June, 2017. That the Respondent invited him to hearing of appeal vide letter dated 15th October 2018. The Respondent upheld the decision to dismiss him vide letter dated 21st December 2018 (MS3). The Petitioner states that since he had appealed the clock stopped until the aforementioned dates as parties were still engaged in other non – adjudicatory dispute settlement

mechanism before coming to court and relied on the decision of Justice Rika in *Hawkins Wagunza Musonye -vs- Rift Valley Railways Kenya Limited (2015) Eklr* to effect that these non – adjudicatory mechanisms have also been viewed as common place in labour disputes and anchored on Article 159 of the Constitution.

3. The Petitioner submits that the aforesaid appeal decision, of 21st December 2018, restarted the clock meaning the substratum thereof was filed within time and within the confines of Section 90 of the Employment Act. The Petitioner states that prior to being posted to Nyakiya Secondary school he had an underlying condition of high blood pressure and mental lapses as well as asthma and had been advised to avoid dusty, smoking, and strong perfume environment (MS4 (a) (b) (c) & (d)) and thus the Respondent failed to provide reasonable working condition for him in addition to sending him to area with limited health facilities which he says is a direct infringement of his Constitutional Rights under Articles 41 and 43 of the Constitution making his case not only a Constitutional Petition but a Public Interest matter.

4. The court ordered that the Notice of Preliminary objection be canvassed first by way of written submission. The Petitioner through the law firm of Ndalila & Company Advocates filed submissions on the 20th January 2022. The Respondent through Edwiiq Musundi filed its submissions on 20th January 2022.

DETERMINATION OF THE NOTICE OF PRELIMINARY OBJECTION

Whether the Petition is filed out of time allowed under Section 90 of the Employment Act hence lack of Jurisdiction to entertain the matter in present time.

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

“Notwithstanding the provisions of Section 4 (1) of the Limitation of Actions Act (Cap 22) no court action or proceedings based on or arising out of this Act or contract of Service in General shall or be instituted unless it is commenced within three years next after the act, neglect or default complained on . In the case of continuing injury or damage within twelve months next after the cessation thereof”.

6. The Claimant was dismissed for service vide a letter dated 19th January 2017. Three years ended on 19th January 2020 or thereabouts. The Claimant filed the Petition on the 4th June, 2021 over a year post the timeline under Section 90 of the Employment Act.

7. The Petitioner appealed against the dismissal on 12th April, 2017 (MSI E) and followed up the appeal vide letter dated 5th June 2017 (MS N (a) on 15th October 2018 he was invited for hearing of appeal. On 21st December 2018 , the Respondent communicated to the Respondent that the dismissal was upheld. The Petitioner argues that the clock stopped ticking on appeal. Thus his Petition is within timelines of Section 90 of the Employment Act and relies on the decision of Justice Rika in *Hawkins Wagunza Musonye -vs Rift Valley Railways Kenya Ltd (2015) eKLR* where the court held that Section 90 is not discretionary and is a jurisdictional law. Justice Rika in that case held that the parties having been negotiating and even a discharge voucher being prepared the clock had stopped. That the breakdown of the negotiations restarted the clock.

8. The Petitioner further relies on the decision of Justice Marete in *Kenya Union of Commercial Food and Allied workers -vs- Water Resource Management Authority and Another 2015 eKLR* where the Preliminary Objection was dismissed because the facts of the case required inquiry to make finding on grounds in the Preliminary Objection. The court finds in the said decision the decision by Justice Rika (*supra*) was distinguished. Justice Marete also noted his view on *Hilarion Mwabolo -vs- 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 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 review or appeal”.

9. This court is inclined to agree with the above position by Justice Marete on cause of action having accrued from date of the letter communicating dismissal from service in the instant case.

To that extend, the Petition which challenges the dismissal from service is brought outside the timeline under Section 90 of the Employment Act. The court finds Section 90 of the Employment Act to be juridical law not discretionary. The court upholds decision of Court of Appeal In *Nairobi Civil Appeal NO. 111 of 2017 Anaclat Kalia Musau -vs Ali & 2 others (2020) eKLR* and finds the Petition to be time barred.

Whether Court lacks jurisdiction under the law to entertain, interrogate and determine the Petition as the same is time barred, the substratum thereof having been filed outside the provided time limit.

10. The Respondent submits that the Petitioner filed a petition instead of a Claim in order to circumvent the limitation of time. That the Employment Act regulates the right to fair administrative action and fair hearing and the Petitioner, therefore, should not be allowed to avoid the provisions of the Employment Act by merely quoting constitutional provisions. The Respondent to buttress, their submissions relies on the Court of Appeal decision in *Gabriel Mutava & 2 Others -vs- Managing Director Kenya Ports Authority and Another (2016) eKLR* to wit “ Time and again it has been said 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”.

“Back home and in string of cases, 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 granting to constitutional rights and relies on

the case of *Daniel N. Muganda -vs- Kenyatta University & 3 others* (2013) eKLR where court made similar holding.

11. The Respondent further relies on decision in *Mombasa ELRC Petition 1 of 2013 Josphat Ndirangu -Vs Henkel Chemicals (EA) Limited* (2013) eKLR where the court held, “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 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 the constitutional rights”.

12. The Respondent to buttress its submissions further relies on decision of Justice Mbaru in *Petition No. 11 of 2018 Peter Ndegwa Nderitu -vs- Teachers Service Commission* (2019) eKLR on effect of filing Petition instead of claim in employment dispute the court stated, inter alia, “ the ultimate remedy sought by the petitioner in his Petition is that his disciplinary matter was not given a fair hearing and as a result the decision should be quashed so that he can be reinstated back to the register of teachers and to his position as teacher with payment of his salary and benefits from 11th June 2012. Such remedies are available under Section 49 of the Employment Act, 2007 read together with Section 12 (3) of the Employment and Labour Relations Court Act 2011.. it is not the filing of a petition which can extend time for the remedy of reinstatement. Such a remedy is set out under statute and cannot be circumvented through filing petition instead of memorandum of claim. Despite the Petitioner citing the violation of his rights under various articles of the constitution and supporting the faults of the petition with a chronology of violations against hi, the remedies sought can only issue within the framework of the provision of section 90 of the Employment Act 2007”. The Respondent further relies on decision in *Nairobi High Court Petition No. 564 of 2004 Alphonse Mwangeni Munga & 10 others -vs- African Safari Club Ltd* to emphasize similar holding as per above cited decisions.

13. The Petitioner on other hand pleads that its petition meets the threshold as held in the care of *R -vs Anarita Karimi Njeri cited with approval in Kosolu Buru Issack -vs- Ministry of Interior and Coordination of National Government & 3 others* 9 (2021) eKLR where it was explained:- “ that a party wishing to file a constitutional reference claim must plead with precision, the provision of the constitution which he alleges to have been breached and the manner in which the same has been breached. It must be appreciated that the Kenya Constitution has included labour rights in the Bill of Rights and therefore the duality of the procedure for accessing this court cannot be ignored. The Petitioner further submits that this foregoing holding is supported by Article 22 (1) of the Constitution which provides as follows:- *Every person has a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or threatened*”.

14. The Petitioner further submits that he has pleaded the provisions of the Constitution and the manner in which they were breached being Articles 19,20,21, 22,23,26,27,28,41,46,47&50 of the Constitution of Kenya which provide for right and fundamental freedom, application of Bill of rights, implementation of rights and fundamental freedoms, the authority of the court to uphold and enforce Bill of Rights, Right to life, equality and freedom for discrimination , human dignity, labour relation, consumer right, fair administrative action and fair hearing which were mostly pleaded with precision. The court does not find how consumer rights are relevant to the case.

15. The Petitioner seeks reliance on the case of *Martin Lemaiyan Mokoosio & Another -vs- Restuma Praful Chandaria Vadera & 3 others* (2021) eKLR to effect that a constitutional court has jurisdiction to hear a matter notwithstanding how the matter was pleaded.

16. The Petition dated 21st May 2021 seeks the following orders:-

- a. A declaration do issue, that the Respondent did not follow due process in dismissing the Petitioner/Applicant , and therefore the dismissal is null and void.
- b. A declaration do issue that the said dismissal of the Petitioner/Applicant from employment amounted to breach of the petitioner’s constitutional rights under Article 27(1) 27 (2) 28,41, 47 (1) and 50 of the constitution.
- c. A declaration do issue that the termination of employment against the Petitioner was discriminative, malicious, unlawful, unfair, unprocedural and fundamental violation of the rights of the Claimant.
- d. An order of Judicial review in the nature of certiorari directed to the Respondent quashing the decision made by itself on the 19th January 2017,
- e. An order of Judicial Review in the nature of mandamus directed to the Respondent compelling it to reinstated the Petitioner/
- f. An order of Judicial Review in the nature of mandamus directed to the Respondent compelling it to make payments to the Petitioner equivalent to the salary the Petitioner would have been paid while still under Employment .
- g. An order of Judicial Review, in the nature of prohibition do issue forthwith to prohibit the Respondent either by itself, servant and any other officer acting under its authority from carrying out a process to remove the petitioner from employment without complying with law, the constitution , due process awarding the Petitioner a hearing.
- h. Costs of this Petition
- i. Any other relief a meanable in the circumstances.

17. The court is of the opinion that the prayers sought flow from the Petition. The court finds all the said prayers, outlined above, are related to fair labour practices and the remedies under Section 49 of the Employment Act. For example, order of reinstatement is provided for as a

remedy for wrongful dismissal under Section 49 (3) (a) of the Employment Act.

19. The court in determining whether the prayers sought under the Petition can be granted will have to apply the provisions of Section 41, 43 and 45 of the Employment Act. The Court agrees with the decision of Justice Mbaru in *Petition NO. 11 of 2018 Peter Ndegwa Nderitu -vs- Teachers Service Commission (2019) eKLR*. That the ultimate remedy sought by the Petitioner in his Petition is that his disciplinary matter was not given a fair hearing and as a result the decision should be quashed so that he can be reinstated back to service and salary payment for the period he would have been in employment. Such remedies are only available under Section 49 of the Employment Act 2007 read together with Section 72 (3) of the Employment and Labour Relations Act 2014 .

19. The preamble title of the Petition states it is in the matter of the violation of the fundamental right and freedom in the matter of the Employment Act, 2007 Laws of Kenya, in the matter of the Constitution of Kenya (protection of rights and fundamental freedom) , practice and procedure rules, 2013 and in the matter of the challenge of the unlawful dismissal of the Petitioner from the employment of the Respondent. The title itself would appear to betray the Petitioner disguise of bringing a petition for a claim for dismissal from employment.

20. The court further agrees with Justice Mbaru in the *Peter Ndegwa Nderitu case(supra)* that the filing of a constitutional Petition cannot extend the time for the remedy of reinstatement or compensation for unfair dismissal. The court further agrees with Justice Mbaru that despite the petitioner citing the violation of his rights under various Articles of the Constitution , including one on consumer rights, and supporting them with facts of the Petition with a chronology of events of the alleged violations against him, the remedies sought can only be issued within the framework of the provisions of Section 90 of the Employment Act , 2007.

21. It is the finding of the court that this was a classic claim for unfair dismissal disguised as a constitutional Petition to avoid the limitation of time under Section 90 of the Employment Act 2007 thus an abuse of court process.

22. The provision of Section 90, Employment Act, 2007 on limitation of time is a juridical issue and not discretionary. The court has no choice but to down its tools in the matter. The court has no jurisdiction to issue prayers sought under the petition for the claim is time barred. The Petitioner was dismissed from service on the 19th January 2017 and filed the Petition on the 4th June 2021 outside the mandatory 3-year limitation period under Section 90 of the Employment Act, 2007.

23. Consequently, the Notice of Preliminary Objection dated 31st August, 2021 is upheld. The Petition dated 21st May, 2021 is hereby struck out with costs to the Respondent .

It is ordered accordingly

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF MARCH, 2022

J. W. KELI,

JUDGE.

In the Presence of :-

COURT ASSISTANT : BRENDA WESONGA

For Petitioner: Konara Holding Brief For Ndalila

For Respondent: -Mulaku Holding Brief For Musundi