



**Muthengi v Teachers Service Commission (Petition E071 of 2021)  
[2022] KEELRC 1202 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1202 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E071 OF 2021**

**JK GAKERI, J**

**MAY 31, 2022**

**BETWEEN**

**JOHNSON MWENDWA MUTHENGI ..... PETITIONER**

**AND**

**TEACHERS SERVICE COMMISSION ..... RESPONDENT**

**RULING**

1. Before me for determination is preliminary objection dated 3<sup>rd</sup> June, 2021 by the Respondent.
2. The preliminary objection is based on the grounds that:
  - (a) This Court has no 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 claim herein is filed 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 is bad in law, frivolous vexatious, and amounts to gross abuse of the Court process.
3. The brief facts are that the Petitioner Johnson Mwendwa Muthengi filed this petition alleging that his interdiction on 16<sup>th</sup> June 2020 by the District Education Officer, Kitui West was unfair because he was not supplied with the statements/letters containing the allegations, or given a chance to cross-examine witness and prepare his defense. The Petitioner further states that the interdiction letter recommended that his name be removed from the register of teachers on allegations of having had carnal knowledge of his pupil named Joyce Mukuta Muusya in standard eight in the school compound on 14<sup>th</sup> July, 2010 between 4.00 pm and 5.00 pm in the Head Teacher's office as well as on 3<sup>rd</sup> August, 2010 between 9.00 am and 10.00 am in the Deputy Head Teacher's office.



4. The Petitioner avers that he was invited for a meeting on 16<sup>th</sup> September, 2010 at 2.30 pm without notice of the agenda and was ambushed with the allegations whose particulars had not been furnished in advance.
5. It is the Petitioner's case that the process he was taken through was contrary to the constitutional rights guaranteed under Article 19, 20, 47, 48 and 50 of the *constitution*. The Petitioner prays for:
  - (i) A declaration that the investigations, the interdiction process, the subsequent hearings and resultant removal from the register of teachers and dismissal violated the Petitioner's rights under Articles 47, 48 and 50 of the *constitution* and thus null and void.
  - (ii) An order quashing or setting aside the Petitioner's interdiction by the District Education Officer, Kitui West District the disciplinary proceedings of 23<sup>rd</sup> March, 2011 and subsequent letters dated 23<sup>rd</sup> March, 2011 removing the Petitioner from the register of teachers and dismissing him.
  - (iii) An order reinstating the Petitioner to the register of teachers and to the position of Head Teacher without loss of benefits, promotion and incremental credits within the next three months from the date of the award.
  - (iv) An order directing the Respondent to calculate and pay the Petitioner's salaries and allowances for the entire period he was on interdiction and disciplinary process.
  - (v) An order for compensation for violation of the Petitioner's rights.
  - (vi) Payment of 12 months' salary as compensation for unlawful dismissal.
6. The Respondent opposed the petition and filed a notice of preliminary objection. The Respondent filed its replying affidavit in response to the petition.
7. Surprisingly, although the parties agreed and were directed to file and serve submissions for purposes of disposing of the preliminary objection, as early as 3<sup>rd</sup> February, 2022, the filing and confirmation by the Respondent was not confirmed until 26<sup>th</sup> April, 2022 when a ruling date was given.
8. In its submissions, the Respondent urges that the petition is time barred by virtue of the provisions of section 90 of the *Employment Act* 2007.
9. That the Petitioner waited for 10 years since his dismissal to file the petition to fault the disciplinary process yet the cause of action arose on 23<sup>rd</sup> March, 2011 when he was dismissed, the appeal process notwithstanding. Reliance made on the decision in *David Muchira Mathenge v Kenya Power & Lighting Co. Ltd* [2018] eKLR where the suit had been filed out of the time. That even if it was assumed that the cause of action arose when the appeal was determined, the petition would still be time barred under Section 90.
10. In the Respondent's submission that the Petitioner filed a constitutional petition instead of a claim to circumvent the limitation of time. The decisions in *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR and *Peter Ndegwa Nderitu v Teachers Service Commission* [2019] eKLR among others are relied upon to urge that the substratum of the petitions is an employment claim clothed as a constitutional petition. In addition, the remedies sought are available under the *Employment Act*, 2007.
11. It is the Respondent's submissions that the petition raises no substantive constitutional issues.



12. On jurisdiction, the Respondent urges that jurisdiction is the entry point into any Court proceedings and is a threshold issue. The decisions in *Owners of the Motor Vessel "Lillian S." v Caltex Oil Kenya Ltd* [1989] eKLR, *Anacet Kalia Musau v Attorney General & 2 Others* [2020] eKLR and *Boniface Waweru Mbiyu v Mary Njeri & another* [2005] eKLR are relied upon to urge that jurisdiction goes to the root of administration of justice and that the Court has no jurisdiction to entertain the suit since it is statute barred and its decision would be in vain were it to entertain the suit.
13. Finally, it is submitted that the suit herein is bad in law and contravenes Section 87 of the *Employment Act*, 2007 as the issues raised by the petition are those referred to in Section 87 and should have been filed in the Employment and Labour Relations Court.
14. It is the Respondent's submission that the petition was deliberately filed as such to evade the provisions of the *Employment Act* and is a waste of the Courts time. The sentiments of *Crabbe JA Menta v Shah* [1965] EA 321 quoted in *Kenya Civil Aviation Authority v WK & 2 others* [2019] eKLR are relied upon to urge that the suit is stale.

### **Analysis and determination**

15. The issues for determination are
  - i) Whether the preliminary objection raises a pure point of law;
  - ii) Whether the Petitioner is seeking to circumvent the provisions of the *Employment Act*, 2007.
16. As to whether the preliminary objection raises a point of law the starting point is to examine the foundation of the preliminary objection. By letter dated 23<sup>rd</sup> March, 2011, signed on behalf of the Secretary, Teachers Service Commission the Petitioner was removed from the register of teachers in Kenya. The letter explained the basis of the removal. The Petitioner appealed the decision by letter dated 8<sup>th</sup> April, 2011 but the appeal was unsuccessful. The same was communicated by a letter dated 2<sup>nd</sup> December, 2016. The Court is in agreement with the Respondent's submission that even assuming that the Petitioners cause of action arose on the date of dismissal of the appeal, the issue of limitation of time arises.
17. Section 90 of the *Employment Act* provides 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.
18. Needless to emphasise and as submitted by the Respondent, although the suit is filed as a petition, its substratum is the contract of employment between the Petitioner and the Respondent. But more significantly, the actual complaint is fair hearing in the termination of employment. The Petitioner's employment was terminated on 23<sup>rd</sup> March, 2011 or 2<sup>nd</sup> December, 2016. The claim is therefore stale and no cogent explanation has been placed before the Court to justify the inordinate delay in seeking the reliefs sought herein. Relatedly, the Petitioner did not apply for leave to file the suit out of time.
19. It requires no gain saying that Section 90 of the *Employment Act*, 2007 prescribes the limitation period in employment contracts and any claim, action or proceeding arising out of the Act or contract of employment must be instituted within 3 years. This position was emphasised in *Josephat Ndirangu*



*v Henkel Chemicals (EA) Ltd* [2013] eKLR as well as in *Banking Insurance and Finance Union (K) v Bank of India* [2013] eKLR. In Nduma J. stated as follows;

“The fact of the matter is that employment contracts like other commercial contracts are subject to the provisions of the Limitations of Actions Act, Cap 22 of the Laws of Kenya at the time with regards to limitations put presently the limitation period is governed by section 90 of the *Employment Act*, 2007 which had reduced the limitation period in Employment to three (3) years”.

20. From the foregoing, it is trite law that the law governing limitation of actions in employment matters is section 90 of the *Employment Act*, and because the Petitioner’s claim was not filed within the prescribed duration, the same is statute barred.

21. Undoubtedly, the Respondent’s preliminary objection raises a point of law which is consistent with the test formulated by the Court of Appeal in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distribution Ltd* [1969] EA 696 where Law JA stated as follows:

“..... A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued may dispose of the suit examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

22. According to Sir Charles Newbold P –

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of jurisdiction discretion ....”

23. The Court is bound by these principles of law and it satisfied that the preliminary objection in this petition meets the threshold prescribed by the Mukisa Case. There is no dispute that the Petitioner is challenging the manner in which his employment was terminated in 2011. Relatedly, it is not in contest that the petition herein was filed in May 2021 more than 10 years after the termination of employment. It is the finding of the Court that the preliminary objection is well grounded and merited.

24. In *Analet Kalia Musau v Attorney General & 2 Others* [2020] eKLR the Court of Appeal expressed itself as follows;

“The solitary issue in this appeal is, whether the suit before the High Court was statutorily time barred. To demonstrate that time limitation is a jurisdictional question and that if a matter is statute barred a Court has no jurisdiction to entertain it, we cite the decision of the Supreme Court in the case of Nasra Ibrahim Ibren V. Independent Electoral and Boundaries Commission & 2 others, Supreme Court Petition No. 19 of 2018, where that Court stressed the fact that jurisdiction is everything and that a Court may even raise a jurisdictional issue suo motu....”

25. There is nothing useful to add on this issue.



26. As to whether the Petitioner is by this petition attempting to circumvent the provisions of the Employment Act, 2007, the Court is guided by the decision cited by the Respondent as illustrated below.
27. On Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another (*supra*) after a review of decisions by Courts in Kenya, United Kingdom, Trinidad and Tobago and South Africa such as *Harrikissoon v Attorney General* [1980] of Trinidad and Tobago (1980) A.C 265 (PC), *Re Application by Babadur* [1986] LRC (Const) 297, *Naptosa and others v. Minister of Education Western Cape and others* (2001) BLLR 338 and Daniel N Mugendi v Kenyatta University & 3 others [2013] eKLR, *S v Mblungu* 1995 (3) SA 867 CC, the Court expressed itself as follows:
- “Time and again it has been said that where there exist other sufficient and adequate avenue to resolve a dispute, a party ought not 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 other than trivialize constitutional litigation..... The constitution should not be turned into a thorough fare for resolution of every kind of common grievance. The duty of the employers to act fairly is now recognised in the Act as well as the constitution. The Court is mandated further by the constitution and the Act to resolve all employment disputes expeditiously and its procedures have been rendered less technical. We are saying all these in answer to the appellants’ submissions on the twin question of the applicability of the rules of natural justice and the constitution to the dispute. This was purely a labour dispute that could have been resolved by the application of the Employment Act ....”
28. In Daniel N Mugendi v Kenyatta University & 3 others (*supra*), the Court of Appeal had this to say:
- “Citing the case of *Alphonse Mwangemi Munga & Others v African Safari Club Ltd* [2008] eKLR, the learned judge was persuaded that the Constitution had to be read together with other laws made by Parliament. It should not be so construed as to be disruptive of other laws in the administration of justice and that accordingly parties should make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the constitutional Court and making constitutional issues of what is not. With all the foregoing, the learned judge concluded that the claim placed before her by the appellant was based on employment – a matter that should have instead been taken to the Industrial Court which had constitutional and statutory jurisdiction over such matters and not the High Court in the form of a constitutional reference...”
29. The Court is bound and guided by these pronouncements. I will now proceed to apply the foregoing principles to the facts of this case.
30. In the instant case the Petitioner, the Head Teacher at Muthale Primary School was interdicted by a letter dated 16<sup>th</sup> June 2010 signed by one George B. Okeyo, the District Education Officer allegedly for having canal knowledge of a pupil at the school. On 23<sup>rd</sup> September, 2010, he wrote a defence to the Secretary, Teachers Service Commission (TSC) faulting the interdiction process.
31. By letter dated 21<sup>st</sup> February, 2011, the TSC invited the Petitioner to a disciplinary hearing at the DEO’s Office Kitui Central on 23<sup>rd</sup> March, 2011 at 8.00 am. The letter did not inform him that he had the right to be accompanied by a fellow teacher.



32. By letter dated 23<sup>rd</sup> March 2011 the Petitioner was notified the decision of his removal from the register of teachers which effectively terminated his employment with the TSC.
33. The Petitioner filed an appeal via letter dated 8<sup>th</sup> April, 2011. From the contents of the letter, it is unclear what he was appealing against as the letter does not make reference to the removal from the register of teachers or the “verdict” appealed against.
34. By letter dated 8<sup>th</sup> November 2016, the TSC invited the Petitioner for a hearing scheduled for 23<sup>rd</sup> November 2016.
35. The Petitioner was notified of the outcome by letter dated 2<sup>nd</sup> December, 2016 that the dismissal had been upheld.
36. Intriguingly, none of these decisions or letters precipitated action from the Petitioner until the petition herein was filed in May 2021, four years after the appeal was dismissed.
37. The Petitioner faults the dismissal process at the interdiction and the Teachers Service Commission level which it characterises as unfair for having violated the provision of the *Fair Administrative Actions Act* and articles 19, 20, 47, 48 and 50 of the *Constitution* of Kenya 2010.
38. In sum, the Petitioner is challenging the grounds reason for termination and the procedure which are comprehensively provided for by the *Employment Act*, 2007.
39. In a similar vein, the reliefs sought are the typical for unlawful or unfair summary dismissal or termination of employment, including those available under the Section 49 of the *Employment Act*.
40. In *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR the Court emphasized that:
 

“.....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....”
41. From the facts enumerated above, it is clear that the Petitioner’s case is an employment dispute with the TSC and the entry point should have been the terms and conditions contract of employment.
42. The Petitioner should have instituted a cause for the relief sought in the petition. He did not do so until May 2021.
43. It is the finding of the Court that the petition is filed by the Petitioner for purposes of circumventing the provisions of the *Employment Act* as the limitation period had lapsed and the only way he could ventilate his cause was by way of a petition.
44. In addition, the Court is unable to decipher any constitutional issue or question not capable of being adjudicated upon in the context of the elaborate statutory provisions of the *Employment Act*, the statute the Petitioner seeks to out manoeuvre.
45. Finally, in *Alphonse Mwangemi Munga & Others v African Safari Club Ltd* [2008] eKLR Nyamu J. had this to say:
 

“In the instant case we wish to emphasize the point that parties should make use of the normal procedures under various laws to pursue their remedies instead of all of them moving to the constitutional Court and making constitutional issues of what is not. They have as a result lost valuable time to pursue contractual claims and/or to have the Industrial Court settle



the trade dispute (if any) relating to the matter. The upshot of this petition is that it is an abuse of the Court's process and it is hereby dismissed.”

46. There is no gainsaying that the Petitioner slept on his rights for too long and proposes to prosecute an employment claim camouflaged as constitutional petition, a practice which Courts detest as it trivializes constitutional issues.

### **Conclusion**

47. The Respondent's preliminary objection is grounded on Section 90 of the *Employment Act*, which prescribe the limitation period for actions or proceedings based on or arising from the *Act* or contracts of service generally. The Petitioner seeks to enforce an employment claim out of time by disguising it as a petition. This is not tenable.
48. In the final analysis, the preliminary objection is merited and the petition dated 7<sup>th</sup> May 2021 is struck out.
49. Parties to bear own costs.
50. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF MAY, 2022**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this+ Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

