Charana v Inspector General National Police Service & another (Cause E474 of 2021) [2022] KEELRC 13188 (KLR) (11 November 2022) (Ruling)

Neutral citation: [2022] KEELRC 13188 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E474 OF 2021

SC RUTTO, J

NOVEMBER 11, 2022

BETWEEN

SHADRACK MIKEN CHARANA ..... CLAIMANT

AND

THE INSPECTOR GENERAL NATIONAL POLICE SERVICE .... 1ST RESPONDENT

THE HON. ATTORNEY GENERAL ..... 2ND RESPONDENT

RULING

1. The claimant instituted the instant suit through an undated memorandum of claim filed on June 15, 2021 through which he avers that he joined the Kenya Police Force in February, 1989. That on May 23, 1991, he accidentally and unintentionally shot a fellow police officer on sentry duties. That the said police officer passed on hence he was arraigned in court and charged with manslaughter. That he was later sentenced to a period of five years in prison and thereafter released on presidential amnesty.

2. That upon his release, he reported to his station and sought to be allowed to continue serving. That the Officer Commanding Police Station (OCPD) in charge of his previous station commenced disciplinary proceedings against him and placed him on suspension on March 25, 1998.

3. That the said OCPD later recommended to the Provincial Police Officer (PPO), to allow him continue serving in the police force. That the PPO approved the same and recommended as much to the Kenya Police Headquarters for implementation. That the recommendation was not implemented and he has on several occasions written to the previous holders of the Office of Commissioner and the Inspector General and has not received any response.

4. He further averred that he has not been dismissed or awarded any form of punishment. Subsequently, the claimant has sought several reliefs against the Respondents including a declaration that his

termination was illegal and unlawful, one month's salary in lieu of notice, compensatory damages, salary from 1991 until 2021.

5. Upon being served with the claim, the respondents filed a notice of preliminary objection dated January 31, 2021. The objection was later amended on March 30, 2022 and is couched as follows:

> " Take notice that the 1st and 2nd respondents shall, on or before the hearing of the claimant's statement of claim, raise a preliminary objection to be heard on the following grounds: -
>
> 1. That the court lacks jurisdiction to admit, hear and determine this claim as it has been filed by the claimant outside the mandatory statutory limitation period prescribed by section 4(1) (a) of the Limitation Act, cap 39 laws of Kenya.
> 2. That the suit is an abuse of the court process.
> 3. That the suit is incompetent and ought to be struck out with costs."

6. The claimant responded to the preliminary objection and termed the same as an abuse of court process and urged the court to dismiss the same.

Submissions

7. The objection was canvased by way of written submissions. The respondents submitted that the suit is inherently defective and time barred having been instituted more than 28 years after the claimant's dismissal. It was further submitted that a suit is said to be expressly barred when it is barred by an enactment for the time being in force or by the general principles of law.

8. The respondents further urged that the claimant deliberately ignored and or refused to seek leave to file his suit out of time. It was further submitted that the court has no power to extend time with regards to claims arising from employment contracts. In support of its submissions, the respondents invited the court to consider several authorities including *Republic v Magistrates Court, Mombasa; Absin Synegy Limited (Interested Party)* (Judicial Review E033 of 2021) [2022] KEHC 10 (KLR), *Vuyile Jackson Gcaba v Minister for Safety and Security First & others* case CCT 64/08 (2009) ZACC 26, *Ganga Bai v Vijai Kumar*, AIR 1974 SC 1126, *Mary Kasiwa v Scorpio Enterprises Limited* [2013] eKLR, *Benjamin Wachira Ndiithi v Public Service Commission & another* [2014] eKLR, *The Lindsay Petroleum Co v Hurd* (1874) LR 5 PC, *YH Wholesalers Limited v Kenya Revenue Authority* [2021] eKLR and *Hilton v Sultan S Team Laundry* [1946] 1 KB 61, 81.

9. On his part, the claimant reiterated the averments contained in his claim extensively. Citing the provisions of article 159 (2) (d) of the *Constitution*, the claimant submitted that procedural technicalities should not be used to undermine fair hearing. In support of his submissions, the claimant cited the case of *Leonard Mutua Munyao and another v Attorney General and another* Pet No [2014] eKLR. It was his further submission that the inordinate delay was occasioned by the fact that he was waiting for instructions as advised in his suspension letter.

Analysis And Determination

10. The issue for determination at this juncture, is whether the suit is time barred and whether it has been brought without undue delay. The claimant has averred that he was suspended on March 25, 1998. The letter indicated that the suspension was to take effect from December 2, 1994. The instant suit was filed on June 15, 2021. This was almost 23 years after his suspension.

11. Section 4 (1) (a) of the *Limitation of Actions Act* is relevant in this case and provides as follows:

> "(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
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> a. actions founded on contract..."

12. The import of the foregoing statutory provision is that a suit founded on contract, including an employment contract as the one herein, cannot be sustained in court after the lapse of six years from the date the cause of action occurred.

13. As to what constitutes a cause of action, the Court of Appeal in the case *Attorney General & another v Andrew Maina Githinji & another* [2016] eKLR, cited with approval the case of *Letang v Cooper* [1964] 2 All ER 929 at 934 where it was held that:

> "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."

14. To this end, a cause of action would ordinarily arise at the time the claimant had a cause to complain and in this case, it would be the time he was placed on suspension on March 25, 1998. Subsequently, the claimant lost the legal right to bring the instant suit six years thereafter.

15. Even if I were wrong and a continuing injury was to be inferred in this case, the claimant is guilty of laches as the delay on his part is too inordinate and has not been reasonably explained. His only explanation was that he was awaiting instructions from his employer as advised in his letter of suspension. But why wait for 23 years to assert his right and seek a remedy?

16. The claimant further averred in his claim that in the intervening period, he has been writing to previous holders of the Office of the Commissioner and the Inspector General. Be that as it may, the only correspondence he exhibited is a letter dated May 17, 2019 addressed to the Chairman of the 1st respondent. Still, this was close to 21 years after his suspension.

17. No doubt, 23 years is quite a long period of time to be waiting for instructions from an employer. As I have stated herein, the delay was too inordinate, and no plausible explanation has been given for the same.

18. In considering what constitutes inordinate delay, the Court of Appeal had this to say in the case of *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR:

> "We agree with the learned judge that the delay of 30 years was not explained and on that point alone, we hold that the appellants claim was properly dismissed.
>
> (51) We reiterate the position that where there has been inordinate delay in bringing an action for violation of fundamental rights, appropriate facts must be placed before the court to enable the court exercise its discretion judicially, in accepting or rejecting the explanation for the delay, with the benefit of all information regarding the particular circumstances before it. To this extent this case is also distinguishable from Harun Thungu Wakaba v Attorney General (*supra*), and Gerald Juma Gichohi & 9 others (supra) in which as in Edward Akong'o Oyugi & 2 others v Attorney General (*supra*), the delay was explained.

(52) Delay is an anathema to fair trial which is one of the key fundamental rights provided to all litigants under article 50 of the *Constitution*. Furthermore, it would be an abuse of the court process and contrary to the constitutional principles espoused in article 159 that requires justice to be administered without delay, to allow a party who alleges violation of constitutional rights, to bring their action after undue inordinate delay, without any justifiable reason. For this reason we find that the appellants' action was properly dismissed."

19. Still on the same issue, the Court of Appeal held as follows in the case of *Wellington Nzioka Kioko v Attorney General* [2018] eKLR:

> "In this case we agree with the learned Judge that no plausible reason was given for the inordinate delay. The reasons given for not filing the petition with promptitude were that he was poor, he did not have parents, and that his family depended on him. Those in our view are not plausible reasons. The appellant could have gone to court and applied to file the claim as a pauper. There is no evidence that he tried to pursue that route. Could it be that the appellant had not suffered and only decided to lodge the claim because others had done so and they had been compensated? We cite with approval the following finding by Majaja J in James Kanyita Nderitu v AG and another, Petition No 180 of 2011.
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> "Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under section 84 of the *Constitution*, is entitled to consider whether there has been inordinate delay in lodging the claim. The court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of it manifestations, should be vexed by an otherwise stale claim. Just as a petitioner is entitled to enforce its fundamental rights and freedoms, a respondent must have a reasonable expectation that such claims are prosecuted within a reasonable time."

We agree with the learned judge that the delay of 30 years was not explained and on that point alone, we hold that the appellants claim was properly dismissed."

20. I wholly align myself and reiterate the determinations in the foregoing authorities by the Court of Appeal. Indeed, the claimant's explanation for the delay do not hold water at all. Certainly, waiting for an answer for 23 years is too long a time. By now, a lot of water has gone under the bridge and it is more than probable that the persons who were in office at the time and who are the main actors in this case, are no longer in service.

21. There is logic behind imposition of time within which an aggrieved party may bring a suit before court. As time runs, many events occur that interfere with evidence that may otherwise have been submitted before court for instance, witnesses leave or transfer service, memory fades and in some cases, witnesses relocate hence tracing them become quite challenging. At times and in the most unfortunate cases, witnesses pass on. Therefore, the court losses the opportunity to evaluate the evidence of such witnesses.

22. Against this background, I cannot help but find that the claimant long lost his right to move the court over the issue at hand as he slept on his rights. This scenario very well brings to mind the maxim that equity does not aid the indolent.

23. To this end, the respondents' preliminary objection dated March 30, 2022 is upheld and the suit filed on June 15, 2021 is hereby struck out with an order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the claimant in person

For the Respondents Ms Mwangi

Court Assistant Abdimalik Hussein

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 March 15, 2020 and subsequent directions of April 21, 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 had 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.

STELLA RUTTO

JUDGE