



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**PETITION NO.250 OF 2019**

**THUITA MWANGI.....PETITIONER**

**VERSUS**

**HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION.....2<sup>ND</sup> RESPONDENT**

**JOSEPH KINYUA NGUNJIRI.....3<sup>RD</sup> RESPONDENT**

**RULING**

The ruling herein relates to Preliminary Objections filed by the respondent vide Notice of Preliminary Objection dated 18<sup>th</sup> February, 2020 and on the grounds that;

- a) *The petition is time barred and offends the mandatory provisions of section 90 of the Employment Act, 2007;*
- b) *The petitioner is circumventing the Employment and Labour Relations Act and Fair Administration Act by relying on constitutional provisions having realised the matter is statute barred under the parent Acts which give effect to the constitutional rights.*
- c) *The petition is an abuse of the court process.*
- d) *The petition is incompetent and ought to be struck out with costs.*

Together with the Notice the respondents filed a list of authorities and cited **Beatrice Kahai Adagala v Postal Corporation of Kenya [2015] eKLR; Francis Atonya Ayeka v Kenya Police Service & another [2017] eKLR; Josephat Ndirangu v Henkel Chemicals (EA) Ltd [2013] eKLR; and Alphonse Mwangemi Munga & 10 others v African Safari Club Limited [2008] eKLR.**

both parties agreed and addressed the objections by way of written submissions.

The respondents submitted that the petitioner filed his petition alleging that he was dismissed from service on 28<sup>th</sup> June, 2016 and that there was violation of Article 31(2) of the Sixth schedule of the Constitution read with section 22(4) of the repealed Constitution, article 27 and 47 of the Constituent and section 3, 4, 5, 6 and 7 of the Fair Administration Act and section 5 and 43 of the Employment Act, 2007 (the Act).

The petitioner is seeking for orders and declaration that his employment was terminated unfairly, unlawfully and un-procedurally; an order of reinstatement and redeployment; an order for compensation for loss of income suffered from the date of termination to the date of reinstatement; and in the alternative payment of damages for loss of employment until the age of retirement at 60 years; loss of legitimate expectation of redeployment and the due leave days earned; loss of the right to participate in the scheme of service for state counsel and foreign service personnel; loss of right to access pension for the period served; and loss of leave days accrued but not taken on account of termination of employment.

The objections made are grounded on the principles in the case of **Mukisa Biscuits manufacturing Ltd** that preliminary objections should be raised on points of law. that the petitioner was dismissed from service on 28<sup>th</sup> June, 2016 and only filed the petition on 24<sup>th</sup> December,

2019 which is time barred under the provisions of section 90 of the Act. in the case of **Beatrice Kahai Adagala v Postal Corporation of Kenya [2015] eKLR** the Court of Appeal held that section 90 of the Act is in mandatory terms and a claim based on a contract of employment must be filed within 3 years.

The respondents also submitted that the court has no jurisdiction to extend time within which to file suit out of time as held in *Kudheha v Embakasi Girls Secondary School* and without jurisdiction the court must stop.

The petitioner has circumvented the Act and the Labour Relations Act by relying on the constitutional provisions since his claims are time barred. The notation that there are no limitations to violation of fundamental rights under the constitution and thus making parties to resort to using the constitution to litigate is irregular particularly where the claims made are time barred and are regulated under the Act as held in **Josephat Ndirangu v Henkel Chemicals (EA) Ltd [2013] eKLR** that a litigant should not avoid the provisions of the Act regarding unfair termination of employment by going behind the statute and seeking to rely directly on Article 41 of the Constitution on the right to fair labour practices. Such rights are secured under the Act. in the case of **Francis Atonya Ayeka v Kenya Police Service & another [2017] eKLR** the court held that not the names assigned to pleadings, a petition or a memorandum of claim can change the nature of remedies sought. in the case of **Alphonse Mwangemi Munga & 10 others v African Safari Club Limited [2008] eKLR** the court held that constitutional provisions should not be misused as a general substitute for the normal procedures for invoking judicial control of administrative action.

The respondents submitted that the Act applies with regard to the claims made and the suit ought to have been filed within the provisions of section 90 of the Act which was not done and is now time barred. The criminal proceedings in High Court ACECA Criminal Appeal No.1 of 2016 – ODPP v Thuita Mwangi & 2 others cannot be used to enlarge time as held in **AG v Andrew Maina Githinji & another [2016] eKLR**. the petition should be dismissed for being time barred and for want of jurisdiction with costs.

The petitioner submitted that the objections made are in abuse of court process and should be dismissed with costs.

The petitioner was employed by the 2<sup>nd</sup> respondent in the year 1988 on permanent and pensionable terms and worked in various capacities for over 24 years when he was asked to step aside on allegations of graft and was charged in **Chief magistrates Court Milimani Anti-Corruption Case No.2 of 2013** and in **High Court ACECA Criminal Appeal No.1 of 2016** he was absolved of all charges and allegations made against him.

The petitioner filed the petition on 24<sup>th</sup> December, 2016 in time contrary to the submissions by the respondents. The constitution under article 22 allow every person the right to institute court proceedings claiming that a right or a fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. The petition relates to the respondents violation of the petitioners rights to fair labour practice under article 41, fair administrative action under article 47, right to fair hearing under article 50 and right to social security under article 43 of the constitution.

The petitioner submitted that this court has jurisdiction to hear and determine the petition as held in the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1969] KLR; Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 others [2012] eKLR** and **United States University (USIU) v Attorney General & 2 others [2012] eKLR** that labour and employment rights are part of the Bill of Rights and are protected under Article 41 of the Constitution and the court has jurisdiction to deal with rights and fundamental freedoms arising out of the employment relationship.

The Employment Act does not apply to the petitioner as he was a state officer and an employee of the 2<sup>nd</sup> respondent who terminated the same contrary to his constitutional rights without notice, hearing of payment of his dues and has suffered loss and damage. Section 90 does not apply in this case as held in **Civil Appeal No.2 of 2015 County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR** that the Act was enacted to govern relationship under section 12 of the Act and a State Officer is entitled under Article 260 of the Constitution to terms and conditions of service as regulated under the constitution. as a state officer, the petitioner was not subject to the Act and section 90 thereof. Article 236 recognises and protects public officers by providing that such officer shall only be dismissed, removed from office, demoted in rank or be subjected to disciplinary action without due process of the law.

The Act does not apply to state officer terms of service as held in **Shadrack Wangombe Mubea v County Government of Nyeri & another [2015] eKLR**. the case law relied upon by the respondents do not apply to the petitioner's case. The petition is not time barred.

Time to file the petition started running at the conclusion of the fraud allegations and trial as held in **Eric Sangura Nasoko v National Police Service Commission & 4 others [2018] eKLR**. while the petitioner had been directed to step aside to allow the allegations he was facing to be addressed, the respondents ought not to have interfered with his employment. the petition is properly before the court and objections made should be dismissed with costs.

Determination

Whether the petitioner is time barred under the provisions of section 90 of the Employment Act;

Whether there are constitutional violations;

Whether the petition should be struck out.

The respondent's case is that the petitioner's employment with the 2<sup>nd</sup> respondent was terminated on 28<sup>th</sup> June, 2016 and the petition filed on 24<sup>th</sup> December, 2019 a period of over 3 years contrary to section 90 of the Act which is time barred. That the petition is filed to circumvent the applicable law and the court is without jurisdiction to hear the petition filed out of time.

The petitioner's case is that he was employed by the 2<sup>nd</sup> respondent in the year 1988 and rose through the ranks to become the Permanent Secretary in the Ministry of Foreign Affairs and senior diplomat, a state officer and under Article 260 read together with 236 his employment, terms and conditions of service are protected under the constitution and the Act and section 90 does not apply to state officers. The petition is filed pursuant to Article 22 and is properly before this court.

The petitioner filed the petition on 24<sup>th</sup> December, 2019 against the respondents on the grounds that while working as the Permanent Secretary on permanent and pensionable terms and had a legitimate expectation to retire at 60 years but by letter and notice dated 28<sup>th</sup> June, 2016 the 2<sup>nd</sup> respondent notified him that a decision had been taken to retire him from the public service on grounds of re-organisation of the government and abolition of office following the promulgation of the Constitution, 2010 and with effect from 1<sup>st</sup> July, 2013.

The petitioner is seeking for various remedies and primarily a declaration that termination of employment was unlawful, unfair and un-procedural; a reinstatement and re-deployment on similar terms held before employment terminated; compensation for loss of income suffered from the date employment terminated until the date of reinstatement. The petitioner is also seeking for various remedies in the alternative.

The petitioner last served as Permanent Secretary. His employment was terminated vide letter dated 28<sup>th</sup> June, 2016 and backdated to 1<sup>st</sup> July, 2013. The reason given for termination of employment was due to reorganisation of government and abolition of office following the promulgation of the constitution, 2010.

Article 260 of the Constitution, 2010 defines a state officer and carry a list of 17 offices. A permanent secretary is not among the list. In the case of **County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR** the employee was found to be a state officer pursuant to Article 260(h) of the Constitution, 2010.

In the case of **County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR**, the Court of Appeal in addressing the jurisdiction of the court held that;

*From the above provisions of the Constitution and the Act, it is obvious that the jurisdiction of the ELRC is precise and limited rather than unlimited. The straight forward jurisdictional question in this appeal therefore is whether recruitment of members of the National Land Commission falls within the meaning of a dispute relating to employment and labour relations. We have already set out the provisions of the Constitution regarding the Commission which indicate that it is an independent constitutional Commission whose members are appointed in accordance with a special procedure provided by the Constitution and the Act; upon appointment they are only subject to the Constitution and the law and not subject to the direction or control of any person or authority; they enjoy security of tenure and cannot be removed from office except for cause and following a specific procedure entailing recommendations of an independent tribunal as is the case with judges; and their terms and benefits cannot be varied to their prejudice, again just like judges.*

Employment and labour relations is covered by statute. The Employment Act, 2007 (the Act) and the Labour Relations Act, 2007 regulate the shop floor. Various cadres of employees including employees under independent commissions and judges are appointed under various regimes of the law and thus regulated under a framework.

The petitioner was employed by the 2<sup>nd</sup> respondent which is a constitutional commission pursuant to Article 233 of the Constitution, 2010 and the operative statute is the Public Service Commission Act. under such statute, employment under the public service is regulated. Any disputes arising out of any matter of employment and labour relations and for connected purposes, this court is conferred with jurisdiction to hear and determine.

In this regard, the petitioner's employment was terminated vide notice dated 28<sup>th</sup> June, 2016 on the grounds that;

*... the 3<sup>rd</sup> respondent wrote to him on 28<sup>th</sup> June 2016 when he purported to retroactively notify the petitioner that it had been decided that he be retired from the*

*Public Service "on grounds of reorganization of government and abolition of office" with effect from 1<sup>st</sup> July 2013 "owing to the re-organization of the Government following the promulgation of the Constitution of Kenya, 2010". ...*

The remedies sought, as set out above are mainly a declaration that the termination of employment was unlawful, unfair and un-procedural and the order of reinstatement and redeployment and compensation for loss of employment until such reinstatement. Ordinarily, these are remedies outlined under the Act pursuant to section 41, 43, 45 and 49. Even where the court were to address the rights under Article 41 of the Constitution, 2010 on fair labour practices, the remedies of unlawful, unfair the unprocedural termination of employment are regulated under

the operative statute, the Employment Act, 2007.

The reasons given for termination of employment being *retirement from the public service on grounds of reorganisation of government and abolition of office* these are ordinarily defined under section 2 of the Act as a redundancy and the remedies thereof are addressed under section 40 of the Act.

For the court to order for a reinstatement and re-deployment, compensation and payment of terminal dues, reference is section 49 of the Act read together with section 12(4) of the Employment and Labour Relations Court Act, 2011.

The claims made and the attendant remedies squarely lie under the Act and not the constitution. such must be addressed within 3 years from the date the cause of action arose and pursuant to section 90 of the Act which is stated in mandatory terms;

*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.*

The Court of Appeal in addressing claims filed under constitutional petitions in the case of **Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR held that;**

*It is evident that the petition was hybrid combining violations of various constitutional rights; employment rights under the Employment Act and breach the Public Officers Ethics Act. However, the underlying complaint was the alleged unlawful interdiction and subsequent dismissal of the 1<sup>st</sup> respondent by the Corporation and appellant. The specific remedies sought were general damages, terminal benefits and issuance of certificate of service. In determining the petition, the ELRC relied wholly on the provisions of Employment Act.*

*The **Article 41** rights are enacted in the Employment Act and 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 the 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. That principle has been reinforced by the Supreme Court in **Communications Commission** case (supra). (underline added).*

In Jane **Angila Obando versus TSC & 2 others, Petition No.4 of 2020** the court held that;

*The right to apply to the High Court under ....of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under .... the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court or being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.*

These cited cases reverberate true in this case. The petitioner cannot avoid the application of section 90 of the Act with regard to time taking into account the position held, the nature of claims made and the remedies sought.

The objections with regard to the suit being time barred cannot be cured through a constitutional petition.

With regard to proceedings under **High Court ACECA Criminal Appeal No.1 of 2016 – ODPP v Thuita Mwangi & 2 others** and **Chief magistrates Court Milimani Anti-Corruption Case No.2 of 2013** criminal proceedings, conciliation proceedings or other matters addressed by parties in an employment and labour relations dispute must take into account the provisions of section 90 of the Act. time does not stop running from the date the cause of action take effect so as to enlarge time. all claims must be lodged with the court within the provisions of section 90 of the Act.

in the case of **Rift Valley Railways (Kenya) Ltd V Hawkins Wagonza Musonye and another [2016] eKLR** the court held that;

*While there is no doubt that section 15 of the Employment and Industrial Relations Act encourages alternative dispute resolution, it must be court-based and conducted within the law. Time does not stop running merely because parties are engaged in an out of court negotiations. It was incumbent upon the respondents to bear in mind the provisions of Section 90 of the Employment Act even as they engaged in the negotiations. The claim went stale three years from the date of the termination of the respondents' contracts of service.*

And in **Francis Atonya Ayeka v Kenya Police Service & another [2017] eKLR** the court held that;

*time in employment and labour relations claims cannot be extended by virtue of criminal proceedings or any other device of the parties. In employment and labour relations claims, section 90 of the Employment Act, 2007 is clear to the extent that all such claims ought to be filed with the court within 3 years from the time the cause of action complained of arose. ...*

the cause of action herein arose following notice dated 28<sup>th</sup> June, 2016 and to file the instant petition on 24<sup>th</sup> December, 2019 is outside the limitation period pursuant to section 90 of the Act. the suit is time barred. The court is denied jurisdiction to proceed.

**Accordingly, the petition is hereby struck out. Each party shall bear own costs.**

**DELIVERED IN COURT AT NAIROBI THIS 10TH DAY OF JUNE, 2021.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

..... and .....