



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATION COURT
AT NAIROBI

PETITION NO. 82 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

HUMPHREY MACKORI NYAGOE.....PETITIONER

VERSUS

THE KENYA AIRPORTS AUTHORITY.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. The Petitioner was an employee of the 1st Respondent until his compulsory retirement in February 2004. He was initially employed by the Public Service Commission and deployed at the Aerodromes Department under the Office of the President from August 1977 to 1st July 1992.
2. In 1991, the Aerodromes Department was converted into a parastatal through an Act of Parliament and it was renamed Kenya Airports Authority, the 1st Respondent herein.
3. The Petitioner together with all the staff of the Aerodromes Department were seconded to the 1st Respondent.
4. By letter dated 27th June 1995, the Petitioner was informed that he would be absorbed into the Service of the Authority with effect from 1st July 1995. He worked with the 1st Respondent until 20th February 2004.
5. By letter dated 19th February 2004 the Petitioner was informed that he would be released from employment of the Respondent on 20th February 2004. His terminal dues were set out in the letter which is reproduced below –

“Mr. Humphrey Nyagoe Makori 19th February 2004

P/No. 370002

Dear Mr. Makori,

The Authority has been reviewing its organization structure, operations and resources necessary to discharge its mandate. I regret to advise that the Board of Directors has not been able to find a suitable placement for you in the new organization structure.

It is therefore with much regret that the Authority will have to release you from employment. You will be paid the following terminal dues upon your clearing from the Authority;

- 1. Your pay till the end of February 2004*
- 2. Three months' salary in lieu of notice*
- 3. One month's pay for each completed year worked with the*

Authority

4. Your pension in accordance with the Staff Superannuation Scheme.

5. Outstanding leave, if any.

Your last working day will be 20th February 2004. You will be required to complete a discharge upon collection of your terminal dues.

I would like to thank you most sincerely for your service to the Authority and wish you well in your future endeavours.

Yours sincerely

George K. Muhoho

MANAGING DIRECTOR”

6. It is the Petitioner’s case that he was discriminated by the Respondent thereby subjecting him to cruel, degrading and unlawful treatment. Further, that the Respondent subverted his and his family’s socio economic rights contrary to Articles 10, 27, 28, 29, 40 and 43 of the Constitution contrary to Articles 1, 2, 3, 4, 5, 14, 15, 16, 17 and 18 of the African Charter.

7. The Petitioner seeks the following reliefs –

(a) Kshs.10,446,605 being the Petitioner’s un- accounted for terminal benefits with interests to be calculated from the 31st March 2004 until payment is made in full as tabulated below –

i. Years of service rendered from the month of August 1977 to February 2004; being 26 years plus 8 months

ii. Rate of payment; being 3 months' salary pay for each year worked

iii. Total service months; being 80 months.

iv. Salary as at end of the year 2003 being Kshs.129,62

v. Applicable increment at 18% was Kshs.23,332

vi. Final/terminal salary was Kshs.152,953.

vii. The terminal dues payable to the Petitioner (80 service months x Kshs.152,953) Kshs.12,236,240

viii. Less payment made to your humble Petitioner in the year 2004 which was (service months x Kshs.141,287 Kshs.1,789,635

(b) General and exemplary damages for deliberately curtailing the fundamental human rights of the Petitioner as stated herein above.

(c) Costs of this suit and interests thereon

(d) Any other or further reliefs which the court deems fit and just to grant in the circumstances.

8. The 1st Respondent filed an undated replying affidavit of MARGARET MUNENE, the Acting Corporation Secretary in response to the petition. The Affiant states that the suit is statute barred by virtue of **Section 4(1) of the Limitation of Actions Act** which required that the same be filed within 6 years, which lapsed in 2009.

9. The 2nd Respondent filed grounds of opposition. It states that the mandate of the Attorney General is clearly defined in the Constitution and in **Office of the Attorney General Act**, and that the procedure and grounds for joinder of the 2nd Respondent to a suit are clearly stipulated in **The Government Proceedings Act** which the Petitioner did not comply with.

10. The 2nd Respondent further states that the subject matter of the suit does not raise matters of national interest. That there is no employer-employee relationship between the Petitioner and 2nd Respondent, the Petitioner’s alleged employer, the 1st Respondent being a state corporation with capacity to sue and be sued in its corporate name. That the 2nd Respondent is wrongly joined to these proceedings.

11. The 2nd Respondent pleads that the suit against it is frivolous, vexatious and otherwise amounts to an abuse of Court process. It prays that it be discharged from the proceedings.

Submissions

12. The suit was disposed of by way of written submission.

13. It is the Petitioner's submission that the averments in the petition are not controverted. That the 1st Respondent's averments that the subject matter of the petition is time barred by the **Limitation of Actions Act** was determined in the Court's ruling on the 1st Respondent's notice of preliminary objection dated 11th September 2019. That the Respondent's objections were also conclusively determined by the same ruling which was delivered on 1st November 2019. The Petitioner posits that he is therefore entitled to all the reliefs sought in the petition.

14. On general damages, the Petitioner submits that he has proved that the Appellants continue to subvert his economic rights with impunity, that he continues to be subjected to unlawful, cruel, degrading and unfair treatment contrary to Articles 10, 28 and 29 of the Constitution. Further, that the Respondents discriminated against him contrary to Article 27 of the Constitution by the deliberate miscalculation of his terminal dues. That as a consequence the Petitioner's lump sum pension and monthly pension continue to be underpaid meriting general damages which he proposes to be awarded in the sum of Kshs.300,000,000.

15. The 1st Respondent in submissions dated 11th March 2020 submit that in Misc. Application No. 6 of 2012, the Petitioner sought leave to extend the time to file suit out of time which application was dismissed. That the facts in the instant suit are the same as in the miscellaneous application.

16. The 1st Respondent submits that this Court has no jurisdiction to entertain the petition. For emphasis the 1st Respondent relies on the decision of the Court of Appeal in Civil Appeal No. 244 of 2010 between **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR** the Court of Appeal in the opening remarks of the judgment observed thus; "*It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it.*"

17. The 1st Respondent submits that the Petitioner is moving the Court under the current regime of the law including the constitutional rights which were not in place then and the Supreme Court of Kenya in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** has echoed the Judges of the South African in **Du Plessis & Others v De Klerk & Another (1997) 1 ICLR 637** where the learned Judges pronounced themselves as follows:

"... A right of action was a form of incorporeal property and there was no warrant in the Constitution for depriving a person of property which he lawfully held before the Constitution came into force by invoking against him a right which did not exist at the time when the right of property vested in him. The citation of well-known authorities on the need for a generous rather than a legalistic interpretation of the Constitution hardly supported an argument directed to depriving and individual of an existing right."

18. The 1st Respondent also relied on the case of **Francis Atonya Ayeka v Kenya Police Service & another [2017] eKLR** where Mbaru J. held thus;

"The objections by the respondent being premised on the application of section 90 of the Employment Act, 2007 and the same being mandatory, noting the time running from January, 2011 to 2017 when the petition was filed, the claims made being premised on employment and labour relations, the Petitioner cannot benefit from listing the matter herein as a Petition and not a Claim. The matters between the parties are with regard to employment and labour relations. The provisions of section 90 of the Employment Act, 2007 are mandatory. ..."

19. The 1st Respondent relied also on the case **G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR** where the Court of Appeal held in regard to continuing injury thus;

"In the circumstances of this case we find that such 'unpaid terminal dues' do not constitute a continuing injury as contemplated under the proviso to Section 90 of the Employment Act. The respondents assert claims arising from the termination of their employment and dues that accrued to each of them at the end of each month. Regarding 'a continuing injury', the proviso to Section 90 of the Employment Act requires that the claim be made within 12 months next after the cessation thereof. The learned Judge did not determine when the continuing injury ceased, for purposes of computing the twelve month period. In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred."

20. The 1st Respondent concludes that the petition is an abuse of Court process and intends to have the same Court give contradictory judgments and orders and the same ought to be dismissed.

21. For the 2nd Respondent it is submitted that the suit is statute barred under Section 4(1) of the Limitation of Actions Act relying on the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd** where Nyarangi J.A noted that

"Without jurisdiction, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

22. The 2nd Respondent also relied on the case of, **Maurice Oketch Owiti v Honourable Attorney General [2016] eKLR** the Court observed as follows after analyzing previous decisions over the question of delay:

“It is evident from the above cited authorities that courts have expressed dissatisfaction in the filling of petitions alleging violations of fundamental rights and freedoms after a considerable length of time has lapsed since the alleged violations occurred. The principle that emerges is that a court must examine each case and gauge the length of time taken before presenting such petitions, and the reason for the delay. A court is also entitled to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, to be vexed by an otherwise stale claim.”

23. The 2nd Respondent submits that this Court lacks jurisdiction to hear this Petition as it is time barred. It relied on the case of **High Court Petition No. 306 of 2012 Ochieng’ Kenneth K’Ogutu v Kenyatta University and 2 Others** the Court noted that

“There is great danger that parties are abusing the constitutional protection of rights to bring claims before the court whose sole aim is enrichment rather than vindication of rights. A delay of 10 years or more before one comes to court to allege violation of rights is clearly not justifiable.”

24. The 2nd Respondent further relies on the case of **Abraham Kaisha Kanzika alias Moses Kavala Keya t/a Kapco Machinery Services & Miliano Investments Ltd v Governor of Central Bank of Kenya & 2 Others [2006] eKLR** where Nyamu J. held that

“In my view failure by the constitutional court to recognize general principles of law including, limitation expressed in the Constitution would lead to legal anarchy or crisis. It would also trivialize the constitutional jurisdiction in that applicants would in some cases ignore the enforcement of their rights under the general principles of law in order to convert their subsequent grievance into a “constitutional issue” after the expiry of the prescribed limitation periods.”

25. The 2nd Respondent further submitted that the suit is further statute barred under Section 90 of the Employment Act relying on the decision in **Beatrice Kahai Adagala v Postal Corporation of Kenya [2015] eKLR** where the Court of Appeal stated –

“ We cannot help her as the law ties our hands. Section 90 of the Employment Act 2007, which we have quoted herein above, is in mandatory terms. A claim based on a contract of employment must be filed within 3 years...”

26. It was further the submission of the 2nd Respondent that the 1st Respondent is a state corporation with capacity to sue and be sued in its own name relying on Section 3(2) of the State Corporations Act and the case of **Okiya Omtatah Okoiti & another v Attorney General & 7 others [2013] eKLR** the learned Judge held -

“... the Attorney-General also has a mandate to represent the national interest in Court proceedings and where Commissions are minded to seek his representation, I see no bar either. To hold otherwise would be impractical and illogical given the structure of our Constitution. But where for example in specific cases the Attorney-General has to defend a claim by a Commission, for obvious reasons he cannot act and one cannot look at the office in the same way a law firm is looked at in the circumstances.”

27. The Respondent also relied on Section 29(1) of the Kenya Airports Authority Act No. 3 of 1991 which provides that;

29. Appointment of staff

(1) The Board shall, subject to this Act, have power to appoint on such terms and conditions of service as it may determine such employees as may be necessary for its efficient working, and the Board shall exercise disciplinary control over such employees.

28. The 2nd Respondent submits that it is not privity to the employer-employee relationship of the 1st Respondent and the Petitioner.

Analysis and Determination

29. In this Court’s ruling on the 1st Respondent’s notice of preliminary objection and the 2nd Respondent’s grounds of opposition which was delivered on 1st November 2019, the Court found as follows –

The Court has considered the parties’ submissions on record together with the petition, supporting affidavit and the exhibits. The evidence by the Petitioner and which has so far not been rebutted by the respondents is that upon retirement in February 2004, his terminal dues were miscalculated because his period of pensionable service was reckoned by leaving out a substantial number of served years with the consequence that his lump-sum pension and monthly pension were underpaid. The Petitioner continues to suffer underpayment of pension. The Court readily finds that in terms of section 90 of the Employment Act, 2007 the Petitioner continues to suffer a continuing injury, namely underpayment of pension including monthly pensions which continue to be underpaid and that continuing injury has never ceased. The Court returns that the cause of action is active and alive and continuing. In so far as the injury is continuing, the Petitioner is entitled to invoke alleged violation of rights and freedoms as provided for in the Constitution of Kenya, 2010 and as attaches to the alleged continuing injury. Accordingly, the Court returns that the preliminary objection was misconceived and is liable to dismissal with costs.

For avoidance of doubt, the Court returns that the 2nd respondent is a necessary and proper party to the suit in so far as the Petitioner served as a civil servant in Aerodromes Department prior to employment by the 2nd respondent.

In conclusion the preliminary objection dated 11.09.2019 and filed for the 1st respondent on 13.09.2019 is hereby dismissed with

costs and directions that parties to take prompt steps towards the expeditious determination of the petition.”

30. The issues raised in the pleadings and submissions of the Respondents being that the suit is time barred and misjoinder of the 2nd Respondents are matters that were addressed by this Court in the Ruling of this Court. The 1st Respondent even filed a notice of appeal on 13th November 2019 but which appears to have been abandoned.

31. The decision of the Court having not been contested and there having been no review application in respect of the said ruling the decision is final and this Court has no powers to make any other determination on the same issues.

32. Besides the issues of misjoinder and limitation, the Respondents have not contested the averments of the Petitioner that his terminal benefits were underpaid and that he was discriminated.

33. It is common ground that that Petitioner was employed by the Public Service Commission on August 1977. It is further common ground that the Petitioner and other staff of the Respondent were seconded and thereafter transferred to the 1st Respondent. In the letter dated 27th June 1995, the Petitioner was informed of his absorption into the service of the Respondent. The letter states –27th June 1995

H. M. Nyaoge

P/No. 37002

Thro'

General Manager - Engineering Services

Dear Sir/Madam,

RE: STAFF ABSORPTION INTO THE AUTHORITY

This is to inform you that you will be absorbed into this Authority with effect from 1st July, 1995.

Your formal letter of appointment containing details of your post, salary grade, starting salary point, allowances and benefits will be forwarded to you as soon as it is finalised.

Yours faithfully

SIGNED

P. K. LAGAT

MANAGING DIRECTOR”

34. The Petitioner has further produced a letter dated 18th December 1977 acknowledging that he had served the Respondent for 20 years. The letter is reproduced below –

“Dear Mr/Mrs/Miss H. M. Nyaoge (370002)

The management and the entire staff of Kenya Airports Authority wish to congratulate you for your 20 years’ service.

In recognition of your long service, the Authority presents to you an award of Kshs.3,000.

You will be advised by your station or Departmental Head when your cheque is ready for collection.

Yours Sincerely

SIGNED

P. K. LAGAT

MANAGING DIRECTOR”

35. From these as well as the certificates of recognition of long service at pages 7 and 8 of the Petitioner’s bundle, it is clear that his service with the Respondent was continuous from the date of first appointment on August 1977 and that the service under the Public Service Commission was transferred to the 1st Respondent.

36. The Petitioner's letter of termination implied that he was being declared redundant. The letter is reproduced below –

“KAA/370002

19th February 2004

Mr. Humphrey Nyagoe Makori

P/No. 370002

Dear Mr. Makori,

The Authority has been reviewing its organization structure, operations and resources necessary to discharge its mandate. I regret to advise that the Board of Directors has not been able to find a suitable placement for you in the new organization structure.

It is therefore with much regret that the Authority will have to release you from employment. You will be paid the following terminal dues upon your clearing from the Authority;

- 1. Your pay till the end of February 2004.*
- 2. Three months' salary in lieu of notice.*
- 3. One month's pay for each completed year worked with the Authority.*
- 4. Your pension in accordance with the Staff Superannuation Scheme.*
- 5. Outstanding leave, if any.*

Your last working day will be 20th February 2004. You will be required to complete a discharge upon collection of your terminal dues.

I would like to thank you most sincerely for your service to the Authority and wish you well in your future endeavours.

Yours Sincerely

SIGNED

George K. Muhoho

MANAGING DIRECTOR”

37. The Petitioner was however paid severance pay for the years he worked with the 1st Respondent but no consideration was made for the years he had served under the Public Service Commission which were transferred to the 1st Respondent.

38. In his letter dated 24th February 2006 at page 50 of his bundle, the Petitioner pointed out to the Respondent that he had been discriminated as those who left employment in similar circumstances before him were paid for all years worked including the period worked in the Public Service Commission. The Respondents did not deny these averments.

39. From the foregoing I find that the Claimant's years of service were continuous from August 1997 to February 2004, a period of 26 years and 7 months. I thus find that the payment of severance pay should have been for the 26 years and 7 months and not 12 years and 8 months as tabulated by the 1st Respondent.

40. The total severance payable to the Petitioner was therefore at the rate of 152,953 x 26 years and 7 months being Kshs.4,066,000.60. Having been paid severance of Kshs.1,789,635, he is entitled to the difference of **Kshs.2,276,365.60** which I award him.

41. The Petitioner further prayed for adjustment of his lump sum and monthly pension based on the total number of years served being 26 years and 6 months. This is a factual position borne out of the pleadings and is not contested. I direct that the Petitioner's pension be readjusted accordingly.

42. The Petitioner prayed for damages for discrimination. The basis for so praying as urged by the Petitioner is set out in his summary at page 47 of the Petitioner's bundle in tabular form as follows –

Year	Service Years (continuous)	Rate of Pay (Months per year)	Months in lieu of Notice	Taxation of Terminal Dues

1990	GOK + KAA	3	2	Exempted
2004	KAA	1	3	Not Exempted
2006	GOK + KAA	3	3	Exempted

43. The table shows that the Petitioner who left in 2004 was given less favourable package than those who left in 1998 and in 2006 in terms of rate of pay per year, pay in lieu of notice tax exemption and payment for the entire period served both under GOK and under KAA.

44. These facts are not contested by the Respondents. I thus find that the Petitioner was discriminated by the 1st Respondent and award Kshs.1 million in respect of general damages for discrimination.

Conclusion

45. In conclusion, I award the Petitioner the following

(i) Underpayment of severance pay Kshs.2,276,365.60

(ii) That the Petitioner's monthly and lump sum pension calculation by the 1st Respondent be readjusted to cover the entire 26 years and 7 months worked.

(iii) Damages Kshs.1,000,000.00

(iv) Costs

(v) Interest from date of filing on underpayment of severance pay [item (i) above] and from date of judgment on the other heads.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH DAY OF NOVEMBER 2021

MAUREEN ONYANGO

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 15th March 2020 and subsequent directions of 21st 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.

MAUREEN ONYANGO

JUDGE