



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**PETITION NO.118 OF 2018**

**PETER AMBOGO ABUSO.....PETITIONER**

**VERSUS**

**NAIROBI CITY COUNTY [FORMERLY CITY COUNCIL OF NAIROBI].....RESPONDENT**

**RULING**

The ruling herein relates to the respondent's Notice of Preliminary Objections dated 27<sup>th</sup> November, 2019 and on the grounds that;

1. *The petitioner's claim is statutory barred as it contravenes section 90 of the Employment Act.*
2. *The court is not clothed with the power to extend limitation period to allow the petitioner file his claim out of time.*
3. *The court therefore lacks the jurisdiction to hear and determine this matter.*
4. *The petition filed herein is a normal employee an employer cause which need not be determined as a Constitutional petition but in accordance with the Employment and Labour Relations (Procedure) Rules [Employment and Labour Relations Court (Procedure) Rules, 2016].*
5. *The petitioner has failed to comply with the provisions of the Employment and Labour Relations (Procedure) Rules which lays down the rules on how an aggrieved party should invoke the jurisdiction of this court.*
6. *The court lacks jurisdiction to hear and determine this matter as ELRC Court's jurisdiction is limited to private disputes between employee and employers.*
7. *The Employment Act does not apply to state officers which includes county Government employees as Government has its own procedures for redress.*
8. *The petition is an abuse of the legal process.*

In reply, the petitioner filed his own Replying Affidavit and avers that the objections made are frivolous and should be dismissed as section 90 of the Employment Act does not apply in this case which is a constitutional petition and the court has jurisdiction under Article 162 to hear the matter.

The petitioner also avers that with regard to limitation of time, such does not apply to a constitutional petition and the allegations that the petitioner should have filed a normal cause is not correct as the petition raises weighty constitutional violations in the nature of unfair labour practices under Article 41 of the Constitution while the petitioner remains in the employment of the respondent but has not been paid for several months. The petition is therefore filed under the constitution and the court Rules do not apply.

This court has jurisdiction to hear this petition without limitations and the Employment Act applies to all employees and employers including county government and objections made should be dismissed.

Parties agreed and filed written submissions.

The respondent submitted that section 90 of the Employment Act (the Act) limits the time within which employer/employee claims should be filed, at three (3) years. the petitioner was summarily dismissed on 14<sup>th</sup> December, 2004 vide letter attached to his petition at page 22 and by

virtue of section 90 of the Act his claim(s) against the respondent lapsed due to time limitation. No action was taken until he filed his petition on 26<sup>th</sup> October, 2018 a period of over 3 years. The court is denied jurisdiction as held in **Ephraim Gachagua Mwangi v TSC Cause No.215 of 2015**.

Without jurisdiction, the court must stop as held in the case of **Samuel Kamau Macharia & another v Kenya Commercial bank [2013] eKLR**.

The law governing employment contracts is the Act and section 90 does not allow or give the court power to enlarge time to allow a claimant files suit after the 3 years limitation period as held in **Miscellaneous Appl. 21 of 2016 – Kenneth Ouma Wasike v Mumias Out growers Sacco Society Ltd & another**.

The petitioner is circumventing the Employment Act by filing a constitutional petition whereas this matter is an ordinary suit which ought to be addressed under the Court

Rules as held in **The Speaker of National Assembly v James Njenga Karume Civil Appeal No.92 of 1992**.

Upon a summary dismissal, section 47 of the Act allows an employee to prove the unfairness whereas the employer is required to justify the same. Under section 87 of the Act, the disputes resolution procedures are addressed. A complaint must be filed through the internal dispute resolution mechanisms which the petitioner has failed to address and the objections made should be allowed and the petition dismissed with costs.

The petitioner submitted that in his petition he has prayed for a declaration that the stoppage, withholding and refusal to pay his salary for 12 years and failure to deeply him is unconstitutional and in violation of his constitutional rights and is seeking for a mandatory injunction to compel the respondent to deploy and pay him his dues accumulated from May, 2004 to date amounting to Ksh.11, 025,630.

This being a constitutional petition, the invocation of the Act I improper as the petition relates to violation of the constitution as held in **Henry Nyakoe Obuba v National Police Service Commission Petition No.14 of 2015**. The petitioner is properly before this court which should be heard on the merits.

Determination

The petitioner filed the instant petition on 26<sup>th</sup> October, 2018 and on the grounds that on 15<sup>th</sup> September, 1994 he was employed by the respondent but on 14<sup>th</sup> December, 2004 he was issued with notice of summary dismissal. On 23<sup>rd</sup> July, 2013 he wrote a letter of demand for the payment of his dues and the respondent has refused to pay. The petitioner then filed **ELRC Cause No.1507 of 2014 – Peter Ambogo v Nairobi Water and Sewerage Company Limited** which he later withdrew and filed this petition.

Under section 90 of the Act, a claimant should address any dispute relating to employment and labour relations within 3 years from the date the cause of action arose.

*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 provisions of section 90 are couched in mandatory terms.

The petitioner's case is that his petition relates to constitutional violation and not an ordinary suit subject to the Court Rules. However, the Court of Appeal in the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR** held 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. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.*

In employment and labour relations disputes, the question as to whether to file a Memorandum of Claim or a constitutional petition was addressed by the Court of Appeal 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).

The petitioner's case related to a challenge of his summary dismissal on 14th December, 2004 within the application of the repealed Employment Act and which allowed him to file suit within the provisions thereof and any constitutional violations only arise out of the repealed Constitution and not the Constitution of Kenya, 2010.

Where any matter arise as of 26<sup>th</sup> October, 2018 when the instant petition was filed, such cannot be based on any other statute of constitutional framework applicable after the date the cause of action arose, the 14<sup>th</sup> December, 2004. Even where the petitioner had any cause of action, such relating to his summary dismissal and payment of his salaries, the application of the constitution cannot sanise the misapplication of procedure. A Memorandum of Claim would have well addressed such matter as cited above in the case of **Sumayya Athmani Hussan**.

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. See **Thuita Mwangi & another v Hon. Attorney general & another Petition No.250 of 2019**.

On this basis the claim is filed out of time and contrary to the provisions of section 90 of the Act. Even where employment terminated by summary dismissal on 14<sup>th</sup> December, 2004 the petitioner's case premised on an employer and employee relationship, he has not complied with the statutory requirements applicable as of the year 2004, the repealed Employment Act.

This court is effectively denied jurisdiction to address the matter outside the time limitations.

The respondent's case is also that the Employment Act does not apply to state officers which include county government employees as the government has its own procedures. Whereas the application of the Employment Act is regulated to apply to all employee and employers, the court appreciates the provisions and application of various statutes to regulate employee in the public service and particularly county governments. In this regard the County Government Act, 2012 was enacted by Parliament to regulate county governments and therein established the County Public Service Boards and under section 77 thereof gives mandate for discipline and other matters of deployment and resignation to such board. Any employee aggrieved by any decision of the County Public Service Board is directed to file an appeal to the Public Service Commission pursuant to Article 234 of the Constitution.

however, in this case, the petitioner was dismissed from his employment vide notice dated 14<sup>th</sup> December, 2004 and the requirements to attend before the County Public Service Board or the Public Service Commission to lodge an appeal did not apply to him. He ought to have filed suit pursuant to the repealed Employment Act.

**On this basis, the court is without jurisdiction and must down its tools. The objections by the respondent are found with merit and hereby allowed. The petitioner is hereby struck out. Costs to the respondent.**

**DELIVERED IN COURT AT NAIROBI THIS 9TH DAY OF DECEMBER, 2021.**

**M. MBAR?**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

..... and .....