



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
PETITION NO. 120 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF ARTICLES 22, 23 AND ARTICLE 258 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM ENSHRINE DIN CHAPTER FOUR OF THE CONSTITUTION (BILL OF RIGHTS) ARTICLES 19, 20, 21, 23, 24, 27, 28, 47, 48 AND 50 AND ALL OTHER ENABLING PROVISIONS OF THE LAW

BETWEEN

JACKSON KABINGU GICHOHI..... PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

RULING

By notice of preliminary objection dated 15th August 2016 and filed on 19th September 2016, the respondent raises the following objections to the petition herein –

1. That the suit is time barred and offends mandatory provisions of Section 90 of the Employment Act, 2007.
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.

The respondent filed submissions in respect thereto dated 10th September 2016 and filed on 11th September 2019.

The gist of the respondent's preliminary objection is that the suit herein is statute barred under Section 90 of the Employment Act and that the petitioner herein is intent to circumvent the Employment Act.

For validity of the preliminary objection the respondent relies on the case of *Mukisa Biscuits Manufacturing Company Limited –V- West End Distributors Limited (1969) EA 696* where the court stated –

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

The respondent further submits that the petitioner was acquitted of criminal charges on 11th April 2013 but has not stated in his pleadings the exact date he left employment. That in the letter from the Ministry of Lands dated 23rd April 2010 and amended on 7th March 2011 attached to the petition it is apparent the petitioner was dismissed from service before 23rd April 2010. That the claim is thus statute barred having been filed on 29th August 2016. The respondent relied on the decision of the court in the **Cause 1201 of 2012: Banking Insurance and Finance Union (K) –V- Bank of India** where while dealing with the issue of limitation the court observed –

“The fact of the matter is that employment contracts like other commercial contracts were subject to the provisions of the limitations of Acts Act, Cap 22 of the Laws of Kenya at the time with regard to limitations but presently the limitation period is governed by Section 90 of the Employment Act 2007 which has reduced the limitation period in employment matters to three (3) years.”

The respondent submits that even if the petitioner argues that his criminal case was pending in court, it would not avail him respite as the courts have held that pendency of criminal suits do not expand limitation period. The respondent relies on the decision in **ELRC Misc. Appl. No. 99 of 2015: Fredrick Otieno Onono and The Attorney General** where the court held that –

“... criminal proceedings is not a bar to the commencement of civil proceedings particularly with regard to employment and labour relation claims based on the application of Employment Act, 2007. Such claims should be lodged 3 years from the time the cause of action arose. In this case the cause of action under the Employment Act was the summary dismissal of the claimant on 27th April 2011 and not his criminal discharge in February 2015.”

It is further the respondent’s submissions that the petitioner has not demonstrated a continuing injury, relying on the decision in **Ndirangu – V- Henkel Chemicals (EA) Limited (2013) eKLR** where the court held that –

“... Section 90 of the Act now regulates limitation time in employment contracts to three years ... Section 4(1) of the Limitation of Actions Act is not applicable and therefore the claimant cannot be heard to argue that the limitation was 6 years.”

On the averment that the claimant has circumvented the Employment Act, the respondent submits that there has been a notion that there is no limitation to violations of fundamental rights under the Constitution. It is submitted that the petitioner has filed a petition to escape the law on limitation. The respondent submits that the court dealt with a similar situation in **Mombasa ELRC Petition 1 of 2013, Josephat Ndirangu Vs Henkel Chemicals (EA) Limited (2013) eKLR**, where the court held that:

“... In my view a litigant should not avoid the provisions of the Employment Act regarding unfair termination or wrongful dismissal by going behind the statute and seeking to rely directly on Art 41 of the constitution on the Right to fair Labour Practices. The purpose of this constitution is that the right to fair labour practices is given effect in various statutes of which the Employment Act and Labour Relations Act are primary.

The primary legislation should not be circumvented by seeking to rely directly on a constitutional provision. Both the Employment Act and the Labour Relations Act give effect to constitutional rights.

It is clear to mind that the Claimant filed the Petition after realizing that the cause he had filed was under legal attack and there was not any legal defence to the attack on the ground of time bar.”

The respondent further relies on the decision in **High Court Petition No. 565 of 2004, Alphose Mwangemi Munga and 10 Others -V- Africa Safari Club Limited** where the Nyamu J. (as he then was) held that–

*“In all the above cases the courts dismissed the applications for not raising any constitutional issues. The Constitution is the Supreme Law of the land but it has to be read together with other laws made by Parliament and should not be construed as to be disruptive of other laws in the administration of justice and in this case we adopt and endorse the decision in the case of **Harrikisson – Vs- Attorney General of Trinidad and Tobago [1980] AC 265**, where a teacher was transferred to another school without being given 3 months’ notice as required by the provisions of the Teachers Service Commission. He applied under Section 6(1) of their Constitution for redress (similar to our Section 84) and the Privy Council in rejecting his appeal said thus at page 268 paragraph B – C.*

“The notion that whenever there is a failure by an organ of Government or a Public authority or public office to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed to individuals by Chapter 1 of the Constitution (our Chapter V) is fallacious. The right to apply to the High Court under Section 6 (our Section 84) of the Constitution for redress when any human right or fundamental freedoms 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. The mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the section if it is apparent that the allegation is frivolous, vexatious or abuse of the process of court, as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

Nyamu J. further held that –

“In the instant case, we wish to emphasize the point that 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. 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 process and it is hereby dismissed.”

It is submitted that the petitioner is making constitutional issues where there is none, having realised the claim is statute barred, in a bid to circumvent the Employment Act. The respondent prays that the same is an abuse of court process, is incompetent and ought to be struck out.

The petitioner replied to the notice of preliminary objection by his affidavit sworn on 6th November 2019 and filed on 12th November 2019. In the affidavit the petitioner deposes that he sent a copy of the judgment in the criminal case against him to the concerned Ministry on 15th June 2013 and got a reply on 15th May 2014 confirming his summary dismissal. That he tried to exhaust the channels at the Ministry and only filed suit when his efforts bore no fruits. He submits that he was prior to that awaiting the conclusion of the criminal trial against him at Kibera Law Courts where judgment was delivered on 11th April 2013 by which time he had long been dismissed. That having been dismissed without being heard, he had a right under Article 50(1) of the Constitution to a fair hearing by an independent and impartial tribunal or body.

Determination

I have considered the preliminary objection and grounds and submissions in support thereof as well as the replying affidavit of the petitioner.

It is not in dispute that the petitioner was arraigned in Kibera Criminal Case No. 3495 of 2008 and that he was acquitted on 11th April 2013.

The petitioner has not stated when he was dismissed from employment but he must have been aware of the same as in the judgment in Criminal Case No. 3495 of 2008 it is stated that he testified that he had been sacked because of the case. He was therefore not truthful in stating that he learned of his dismissal after he presented the judgment and sought reinstatement. He has also withheld information and appears to have carefully chosen the documents presented to court to ensure none of them make reference to the date of dismissal.

Be that as it may, the judgment in the criminal case was delivered on 11th April 2013. Even if we assume that this was the date when the cause of action arose (which is obviously not the factual or legal position), the suit would still be statute barred, having been filed on 29th August 2016, more than 3 years from the date of acquittal.

The petitioner's explanation that he was trying to resolve the matter through the internal machinery with the Ministry cannot aid him as this does not expand the limitation period as was held in the case of **Fredreck Otieno Onono** (supra) where the court stated that –

“It was therefore the duty of the claimant to seek and protect his rights when the criminal charges commenced or immediately when he was terminated from his position with the respondents. Nothing prevented him from commencing his civil claim at any stage within the permissible time.”

I have further noted from the petition that this is a simple employment dispute that would have been resolved by a claim under the Employment Act. I thus agree with the respondent that the petitioner chose to file a petition in a bid to circumvent the limitation provisions of Section 90 of the Employment Act, which as stated by Nyamu J. (as he then was) in Petition No. 565 of 2004 in the case of **Alphonse Mwangemi Munga and 10 Others**, is an abuse of court process.

Section 90 of the Employment Act provides that –

90. Limitations

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.

For the foregoing reason the preliminary objection succeeds. I therefore strike out the petition herein for being statute barred and an abuse of court process.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JANUARY 2020

MAUREEN ONYANGO

JUDGE