



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

PETITION NO. 40 OF 2018

(Formerly High Court Petition No. 110 of 2018)

Before Hon. Lady Justice Maureen Onyango

REUBEN KIPNGENO KOECH.....PETITIONER

VERSUS

PERMANENT SECRETARY,

PROVINCIAL ADMINISTRATION AND INTERNAL SECURITY.....1ST RESPONDENT

COMMISSIONER OF POLICE.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

The Petitioner instituted this petition on 27th March 2018, at the High at Nairobi, alleging that his rights under articles 41, 47 and 50 of the Constitution and Sections 44 and 45 of the Employment Act had been violated.

On 7th May 2018, the Respondents filed a Notice of Preliminary Objection on behalf of all the Respondents. The PO sought to challenge the validity of the petition and the jurisdiction of the High Court to hear and determine the same.

However, on 7th March 2018 the Mwita J. gave directions to have the matter transferred to this Court because it fell within its jurisdiction. Thereafter, the Respondents filed an amended preliminary objection against the petitioner on the following grounds-

- a. That the suit is time barred and offends the provisions of section 4 (1) of the Limitation of Actions Act and section 90 of the Employment Act, 2007.
- b. That the Petitioner has not sought and obtained leave to file this suit out of time contrary to section 27 and 28 of the Limitation of Actions Act.
- c. That the Petitioner is circumventing the Employment and Labour Relations Court by relying on the Constitutional provisions having realized that the matter is statute barred under the parent Acts which give effect to constitutional rights.
- d. That the Petitioner has not demonstrated with precision how his fundamental rights and freedoms under the Constitution have been violated or are threatened contrary to article 22 (1) of the Constitution and in the *locus classicus* decisions in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** and **Anarita Karimi Njeru vs. Republic [1979] eKLR**.
- e. That the suit is an abuse of Court process; and
- f. That the suit is incompetent and ought to be struck out with costs.

The Petitioner did not file a response to the preliminary objection and neither did he file his written submissions.

The Respondents' Submissions

In their submissions filed on 2nd December 2019, the Respondents submit that the Petitioner has not given an explanation or justification why he did not move this court between 19th August 2009 and 18th August 2015 which was within the six years' period that he was required to move Court under Section 4 (1) of the Limitation of Actions.

It is submitted that the Petitioner has not shown any continuing injury or damage to warrant the court to review the limitation period by a consideration of the continuing injury or damage. As such, the petition is statute barred hence this court lacks the jurisdiction to entertain the petition.

They rely on the case of **Kenya Union of Domestic, Hotels, Educational Institutions & Hospital Workers vs. Embakasi Girls Secondary School [2019] eKLR** where the Court observed that no court has the right or power to entertain what cannot be done, namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action.

The Respondents submit that the Petitioner is using the constitution as procedural and substantive law and creating constitutional issues where there are none in order to circumvent the implications of the provisions of the Employment Act and the Labour Relations Act. They rely on the case of **Josephat Ndirangu vs. Henkel Chemicals (EA) Limited [2013] eKLR** where the Court observed that the primary legislation should not be circumvented by seeking to rely directly on a constitutional provision and that both the Employment Act and the Labour Relations Act give effect to constitutional rights.

It is the Respondents' submissions that the Petitioner has not demonstrated how the Respondents have violated or are threatening to violate his constitutional rights under the Constitution as was held in the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [Supra]**. They further submit that the Petitioner has failed to specify the rights that have been violated and rely on the case of **Anarita Karimi Njeru vs. Republic [Supra]** to fortify this position.

In light of the foregoing, the Respondents submit that the petition is incompetent and ought to be dismissed with costs.

Analysis and Determination

I have considered the grounds of preliminary objection raised and the Respondents' submissions. The issue for consideration before this court is whether the preliminary objection is merited.

Section 3 (2) of the Employment Act states as follows with regards to the application of the Act-

(2) This Act shall not apply to—

- a. the armed forces or the reserve as respectively defined in the Armed Forces Act (Cap. 199);**
- b. the Kenya Police, the Kenya Prisons Service or the Administration Police Force;**
- c. the National Youth Service; and**
- d. an employer and the employer's dependants where the dependants are the only employees in a family undertaking.**

Section 90 of the Employment Act does not apply to the Petitioner herein who was a Police Officer. The relevant legislation would therefore be the Limitations of Action Act. Section 4 (1) of the Act 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—

- a. actions founded on contract;**
- b. actions to enforce a recognizance;**
- c. actions to enforce an award;**
- d. actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;**
- e. actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.**

It is not disputed that the Petitioner was dismissed from employment on 19th August 2009. The Petition was filed on 27th March 2018. The Petitioner has not explained the reason for the delay in instituting the suit.

In the petition, the Petitioner claims that his rights under Articles 41, 47 and 50 of the Constitution and Sections 44 and 45 of the

Employment Act have been violated. As already stated above, the Employment Act is not applicable to the petitioner. Further, the Constitution of Kenya 2010 does not apply as the Petitioner was dismissed from service in 2009 before the Constitution of Kenya 2010 was promulgated.

I have also looked at the prayers sought by the petitioner. He prays for the following –

- a. A declaration that the Respondents' action of terminating the Petitioners service was in violation of Article 41, 47 and 50 of the Constitution and sections 44 and 45 of the Employment Act 2007.
- b. A declaration that the dismissal of the Petitioner from the Kenya Police Force was unlawful, unreasonable and unfair.
- c. A declaration that the conduct of the Orderly Room proceedings was flawed in the procedure as the complainant was condemned unheard.
- d. An order that the Respondent do compensate the Petitioner for:
 - i. Damages for wrongful dismissal.
 - ii. Service pay
 - iii. Unpaid leave
 - iv. Pension from a pension scheme as and when they fall due
 - v. Interest thereon at court's rates.
 - vi. Cost of the petition
 - vii. Any other or further relief the court may deem just to grant.

All the prayers are anchored on the Employment Act 2007 which as already observed, does not apply to the petitioner. Whichever way one looks at the petition, whether from the standpoint of the Constitution of Kenya 2010 or from the Employment Act 2007, or from the point of the Limitation of Actions Act, it is doomed to fail.

I accordingly dismiss the petition on grounds that it is bad in law for all the reasons stated. There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF MAY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of 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