



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 95 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF: ARTICLES 2, 10, 22, 23, 21, 29,41, 43, 47 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: SECTION 66, 68, 69, 72 OF THE PUBLIC SERVICE COMMISSION ACT

AND

IN THE MATTER OF: FAIR ADMINISTRATION OF ACTIONS ACT

AND

IN THE MATTER OF: OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION HUMAN RESOURCE MANAGEMENT MANUAL

BETWEEN

DAVID MUTHUI NDEGWA.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

The 1st Respondent, Office of the Director of Public Prosecutions filed a Notice of Preliminary Objection dated 10th March 2020 raising a preliminary objection against the current proceedings on the grounds that:

1. The Petition is statutorily time barred and grossly offends the mandatory provisions of Section 4(1) of the Limitation of Actions Act [CAP 22] (Laws of Kenya) as read together with Section 90 of the Employment Act No. 11 of 2007 thus the Petition, the application to amend the Petition and amended Petition ought to be struck out.
2. The Application to amend the Petition is frivolous, mischievous and otherwise a blatant abuse of the court process and should be therefore be dismissed sua sponte.

The brief facts are that the Petitioner, David Muthui Ndegwa was employed by the 1st Respondent as a Clerical Officer and after filing or reporting loss of items from the 1st Respondent’s store on two occasions, he was surcharged for the said loss. The 1st Respondent also decided to interdict him on 10th June 2016 after the second loss of items and which led to the filing of this suit.

The Petitioner filed a Reply dated 30th June 2020 stating that the Respondent's Preliminary Objection is based purely on misapprehension as to when the cause of action arose and should be dismissed with cost as it is frivolous, mischievous and an abuse of the court process.

1st Respondent/Applicant's Submissions

The 1st Respondent submits that a preliminary objection constitutes “*a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.*” The 1st Respondent cites the language employed by Sir Charles Newbold P in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** where the Court of Appeal for East Africa per Law J.A described a preliminary objection to include an objection to the jurisdiction of the court or a plea of limitation. It submits that if this court were to presume all facts as accurate, the objection speaks to this court's jurisdiction and therefore fits within the prism of a preliminary objection as canvassed in the *Mukisa case*. Further, that in light of the statutory limitation period as invoked by the 1st Respondent, the Application dated 15th November 2019 together with the Petition dated 12th June 2019 in the present suit be struck out with costs.

It is submitted by the 1st Respondent that **section 90 of the Employment Act** explicitly provides that:

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap 22), no civil action or proceedings based on 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.

That the cause of action arose against the Respondents on 10th June 2016 when the Petitioner was interdicted and that this position is supported in the Petition wherein the Petitioner seeks remedies for payment of sums allegedly owed and accruing from the said 10th June 2016. That the Petition was filed on 12th June 2019, which is notably two days beyond three years of the statutorily prescribed timeline to institute proceedings related to the Employment Act and that this constitutes a fundamental flaw. It relies on **Petition 3 of 2017; Matthew Kamanu Mwaura v Permanent Secretary Office of the President Provincial Administration & 2 others [2018] eKLR** where the court held that:

“Though the matter is filed as Constitutional Petition, there is no denial that the cause of action is related to a contract of employment. The petitioner's employment was terminated in 2012. Any action related to that termination was supposed to be filed within a period of three years. That is to say by 1/4/2015. No claim was filed within that period. The claim was therefore statute barred. The petitioner has not given any explanation as to why he did not file the claim within time. Failure to file the claim within the time limited for filing is not a mere technicality as it touches on substantive matter on the claim and a fundamental flaw if not dealt with before filing the claim...

Where a party has not come to court within time, the issue of court's jurisdiction arises as the court is supposed to deal with claims which are filed in compliance with the law.”

Further, that while it may be arguable that Section 90 envisages a continuing injury which may cure the prevalent defect in the present Petition, **Cause 215 of 2017; Ephraim Gachigua Mwangi v Teachers Service Commission & Board of Management Thogoto Teachers College [2018] eKLR** is instructive, where Nzioki wa Makau J. elaborated that even if the effects of an adverse employment decision reverberate to date, they do not alter the date in which the cause of action arose. The court further stated thus:

“...By parity of reasoning, after dismissal a person may suffer economic hardship and his social standing irreparably altered or damaged. That does not however entitle the dismissed employee to claim 4 or 5 years later on account of the dismissal being a continuing wrong since the effect of the dismissal may be continuing. This is an incorrect reading of the law. The court finds that the wrong complained of was finite in time and was on the basis of the demotion dated 7th January 2013 and therefore limitation begun to run on 7th January 2013 when his cause of action against the demotion arose. He opted to exercise his right on 13th June 2017 whereas he had until 7th January 2016 to file suit for the demotion. The suit is therefore out of time and in keeping with the determination in **David Ngugi Waweru v Attorney General & Another [2017] eKLR** where the Court of Appeal held that there is no room to extend time in case of limitation under Section 90 of the Employment Act, I hold that the suit is hopelessly out of time and is struck out with costs to the Respondent.”

The 1st Respondent submits that having demonstrated that the Petition is time barred, the issue on whether this court possesses the requisite jurisdiction to determine this suit arises because jurisdiction is donated by statute which in this case limits the period in which an employment dispute may be presented. It urges the Court to be guided by **Civil Appeal 158 of 2015; G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR** where Court of Appeal allowed the appeal and expressed itself that the Employment and Labour Relations Court erred in holding it had jurisdiction when in fact the claim had been filed outside the limitation period of 3 years. The 1st Respondent further cites the case of **Seven Seas Technologies Limited v Eric Chege [2014] eKLR** relying on the *locus classicus* case on jurisdiction of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Nyarangi J. of the Court of Appeal held that where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence and that the court downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

The 1st Respondent submits that the Court's unfettered discretion to allow amendment of pleadings may only be exercised judicially in tandem with the celebrated principles in the court of appeal case of **Central Kenya Ltd. v Trust Bank & 4 Others, Ca No. 222 of 1998** that provided there had been no undue delay; no new or inconsistent cause of action was introduced; no vested interest or accrued legal right was affected; and the amendment could be allowed without injustice to the other side. That the Petitioner herein has inordinately delayed in seeking an amendment from the date of filing the Petition and that evidently such amendment is in bad faith and only as a result of the responses filed by the Respondents herein. That the Application is therefore an afterthought and designed to prejudicially expose the Respondents to vexatious litigation and further impede this Court's obligation to expeditiously dispose of cases. The 1st Respondent beseeches this court to disallow the application as it strikes out the suit as presented.

It further submits that a critical assessment of the impugned amendment elicits that the Petitioner has generally set out the legal provisions of the Constitution and facts but does not indicate with a reasonable degree of precision the provisions of the Constitution that have been violated, the manner in which they have been contravened or threatened and resultant injury from the alleged violation. That the Petitioner has thus not cured any defects in the Petition filed on 12th June 2019 and has similarly failed to satisfy the threshold of specificity as espoused in the celebrated cases of **Anarita Karimi Njeru v Republic (No. 1) (1979) I KLR 154** and **Mumo Matemu v Trusted Society of Human Rights Alliance Civil Appeal No. 290 of 2012 (2013) eKLR**. That this renders the Petition dated 12th June 2019 and the subsequent application to amend fatally defective.

Petitioner's Submissions

In the Petitioner's Submissions dated 30th June 2020, the Petitioner cites the case of **D. T Dobie and Company (Kenya) Limited v Muchina (1982) KLR 1 at page 6** wherein Madan JA stated that a cause of action is an act on the part of the Defendant which gives the Plaintiff the cause of complaint. He submits that the cause of action arose on the date the interdiction period ought to have come to an end, that is when the time limit lapsed pursuant to **Section 11, sub-section 11.17.5.5 O.P.P.S Human Resource Manual** which provides that interdiction shall not exceed (3) three months within which investigations should be completed and disciplinary action determined. That therefore time starts running upon expiry of the three months' duration within which the 1st Respondent ought to have taken action.

The Petitioner further submits that after expiry of the three months' interdiction period, any continued placement on interdiction is unreasonable and a violation of the Petitioner's rights to a fair administrative action and fair labour practices. That therefore the limitation period as per Section 90 of the Employment Act starts running when the breach and violation of his rights started, which is **10th September 2016** on the expiry of the interdiction period of three months, when the cause of action arose. That the Petitioner's claim was thus filed within the limitation period based on the said date of 10th September 2016, after the intermediate period prescribed in the 1st Respondent's Human Resource Manual.

Analysis and Determination

The first issue for determination is when the cause of action in the instant case arose. The second issue for determination is whether the 1st Respondent's Preliminary Objection is merited.

In the case of **Drummond Jackson v Britain Medical Association (1970) 2 WLR 688**, cited with approval in **Jane Njeri Mbugua v Teachers Service Commission [2017] eKLR**, the Court defined a cause of action as *an act on the part of the defendant, which gives the plaintiff his cause of complaint*. This definition has been upheld by the Court of Appeal in **Attorney General & Another v Andrew Maina Githinji & Another [2016] eKLR**.

In the instant case, the 1st Respondent has argued that 10th June 2016 is the date when the cause of action arose being the date the Petitioner was interdicted further demonstrated by the prayers in the Petition. The Petitioner on the other hand argues that the cause of action arose on the date his interdiction lapsed as provided under the 1st Respondent's Human Resource Manual. In the Interdiction Letter to the Petitioner which is referenced "**Interdiction for Gross Misconduct**", the Petitioner was required to show cause why disciplinary action should not be taken against him for gross misconduct and was interdicted with effect from 6th June 2016 "*until the case is determined*" with entitlements as under section 11.17.5 of the Human Resource Manual.

Section 11.17.5.5 of the ODPP Human Resource Manual provides thus: -

"Interdictions shall not exceed three (3) months, within which time investigations should be completed and disciplinary action determined."

A perusal of the Petition dated 12th June 2019 generally shows that the Petitioner is aggrieved by the fact that the 1st Respondent contravened the rules of interdiction of an employee as set under the 1st Respondent's Human Resource Manual. The cause of the Petitioner's complaint is being placed on interdiction by the 1st Respondent for a period exceeding the set time limit and without being paid all the benefits accruing to an interdicted employee.

I agree with the petitioner that the cause of action arose on the date the interdiction period was to lapse and not the date the interdiction took effect.

I thus find that the petition was filed within the limitation period set out in Section 90 of the Employment Act. The result is that the preliminary objection fails and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF NOVEMBER 2020

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