



**REPUBLIC OF KENYA**

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

**KENYA AT NAIROBI**

**CAUSE NO PET 34 OF 2017**

**CHRISTOPHER AMASAVA.....CLAIMANT**

**VERSUS**

**THE KENYA REVENUE AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a notice of preliminary objection dated 16<sup>th</sup> October, 2017 the 1<sup>st</sup> respondent contended that the court lacked jurisdiction to determine issues raised in the petition since the same was based on a cause of action which was statute barred pursuant to section 90 of the Employment Act. Further that the matter was time barred by virtue of section 3 (2) of the Public Authorities Limitation Act.
2. In support of the petition Mr Chabala for the 1<sup>st</sup> respondent submitted that the petition was filed on 4<sup>th</sup> July, 2016. The petitioner joined the employment of the 1<sup>st</sup> respondent on 23<sup>rd</sup> September, 1996. On 18<sup>th</sup> May, 2005, the petitioner together with another employee of the 1<sup>st</sup> respondent were arrested by officers of the then Kenya anticorruption Commission. They were subsequently charged on 19<sup>th</sup> May, 2015 with the offence of soliciting a bribe contrary to the provisions of section 39(3) (9) and 48(1) of ACECA. By a letter dated 26<sup>th</sup> May, 2006 the petitioner was suspended from the 1<sup>st</sup> respondent's employment. He was subsequently afforded a hearing before the 1<sup>st</sup> respondent's disciplinary committee on 7<sup>th</sup> September, 2006 and subsequently dismissed through a letter dated 13<sup>th</sup> September, 2006 effective 22<sup>nd</sup> May, 2006.
3. According to counsel in 2006 when the dispute/cause of action arose, the Industrial court existed and derived mandate from the Trade Dispute Act. The petitioner herein claimant to have been unjustifiably dismissed from employment could only access the court through the procedure in the Trade disputes Act. The effect of this was that the report to the Minister of a dispute that arose in 2006 should have been reported and processed under the Trade Disputes Act. It followed therefore that the Industrial Court would be wrong to assume jurisdiction in a claim governed by the Trade Disputes Act in any other manner other than what the law provides.
4. Counsel further submitted that the petition was filed on 4<sup>th</sup> July, 2016 in accordance with the provisions of the employment Act 2007. The prayers sought were contained in the Employment Act 2007 as read together with the Kenya Constitution 2010 which remedies did not exist in the repealed Employment Act cap 226 or the Trade disputes Act. Further even if the petitioner was entitled to base his claim on the Employment Act 2007 his claim which was filed over 10 years after the date of termination

was time barred by virtue of section 90 of the Employment Act.

5. Mr Gethua for the petitioner on the other hand submitted that on 13<sup>th</sup> September, 2006 the petitioner received a letter of dismissal from 1<sup>st</sup> respondent which he promptly challenged by instituting Judicial Review proceedings wherein the court granted the applicant, the petitioner herein, leave to commence JR proceedings and leave so granted was to operate as a stay in respect of his dismissal pending the determination of the anti-corruption case against the petitioner.

6. The criminal proceedings ended in 2012 when the officer in charge of prosecutions withdrew the matter under section 87(a) of the Criminal Procedure Code. Subsequently the petitioner reverted to the 1<sup>st</sup> respondent and sought to appeal against the decision to dismiss him which request the 1<sup>st</sup> respondent ignored without giving reasonable cause leading to the filing of the petition herein. According to counsel, the petitioner was brought under the context of the Constitution of Kenya 2010 and sought to urge the court to recognize and enforce constitutional rights as enshrined under articles 27 and 41 of the Constitution.

7. Further the petitioner sought to persuade the court to conclude that the respondent's decision to dismiss the petitioner on a regulation, the Kenya Revenue Authority code of conduct, that was not lawful and does not embody the letter and spirit of the Constitution. According to counsel the nature of the prayers sought in the petition demonstrate to the court that the dispute was not strictly under the purview of employer –employee relationship and that the petitioner expects to obtain constitutional reliefs which would not be otherwise available if the litigants were to restrict to the issue to one of an employer-employee dispute. The main issue to decide in this preliminary objection is whether the petitioner's claim before court is statute barred either by virtue of Limitation of Action or the Employment Act 2007.

8. It is not in dispute that the petitioner was dismissed from service on 13<sup>th</sup> September, 2006 with effect from 22<sup>nd</sup> May, 2006. He challenged his dismissal by filing an application for leave to institute Judicial review application and sought that such leave do operate as a stay of his dismissal. The court (Emukule J) declined to grant Judicial Review orders as prayed however the learned Judge granted the petitioner leave to challenge the validity of the 1<sup>st</sup> respondent's code of regulations and such leave was to operate as a stay only in respect of the petitioner's right of appeal against the dismissal letter of 13<sup>th</sup> September, 2006 pending the determination of the anti-corruption criminal case against the petitioner.

9. It was not in dispute that the criminal case ended in 2012 when the same was withdrawn under section 87(a) of the Criminal Procedure Code. He filed for review of the decision to withdraw the matter and a ruling was issued on 5<sup>th</sup> November, 2015 dismissing the application. The order of the court was that the leave to file Judicial review was to operate as a stay in respect of the petitioner's right of appeal against the dismissal pending the determination of the criminal case against the petitioner. This implies the court froze the running of limitation period until the conclusion of the criminal case against the petitioner. This period could not therefore be reckoned in determining limitation period. The petition is therefore properly before the court.

10. However the petitioner was to appeal using the internal appeal process of the 1<sup>st</sup> respondent which he says he did but the respondent failed and or ignored prompting the filing of the petition. This therefore means the petition has been filed before exhausting the internal disciplinary process. Where the law or regulation or code of conduct provides for internal dispute resolution mechanism such process must be followed to completion before the jurisdiction of the Court can be invoked.

11. In the circumstances the court will dismiss the preliminary objection on limitation but direct that the petition herein be stayed for 60 days from the date of this ruling within which the 1<sup>st</sup> respondent should hear and determine the petitioners appeal against the dismissal.

12. The other arguments by counsel for both parties delve into the merit of the petition which is a matter for full trial of the petition. Either party shall have liberty to apply to court for directions once the time set herein has lapsed.

13. It is so ordered.

Dated at Nairobi this 18<sup>th</sup> day of January 2019

**Abuodha J. N.**

**Judge**

Delivered this 18<sup>th</sup> day of January, 2019

**Abuodha J. N.**

**Judge**

**In the presence of:-**

.....for the claimant

.....for the Respondent

**Abuodha J. N.**

**Judge**