



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2378 OF 2016

(Formerly HCCC No. 541 of 2004)

RONALD MUGE CHEROGONY.....CLAIMANT

- VERSUS -

CABINET SECRETARY FOR DEFENCE.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

THE CHIEF OF GENERAL STAFF OF THE ARMED FORCES.....3RD RESPONDENT

THE CHIEF OF DEFENCE FORCES OF KENYA.....4TH RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th March, 2019)

JUDGMENT

The claimant initially filed the plaint on 26.05.2004 through Gimose & Company Advocates. The claimant changed his advocates to Okoth & Kiplangat Advocates as per the notice filed on 13.07.2005. The amended plaint was filed on 23.06.2014 and the claimant prayed for judgment against the respondents for:

- a) A declaration that the plaintiff's removal from his service by the defendants is unlawful and therefore null and void *ab initio*.
- b) General damages for illegal removal from office, loss of promotion and for unlawful termination of service.
- c) Loss of salary and other emoluments due from 14.03.2001.
- d) Costs of the suit.
- e) Interest at court rates.
- f) Any further or other consequential relief the Honourable Court will deem fit to grant.

The defendants' joint statement of defence was filed on 28.09.2004 through T.W. Gathangu, Senior Litigation Counsel, for Attorney General. The defendants' amended joint statement of defence was filed on 08.12.2015. The respondents prayed that the entire suit to be dismissed with costs.

The following facts are admitted by the respondent:

- a) In May 1977 the claimant was conscripted into Kenya Army as a Cadet Officer and in March 1978 commissioned to the rank of Second Lieutenant and eventually promoted to the rank of Colonel Personnel in recognition of his service.
- b) Sometimes in 1998 the claimant while serving in the personnel section of the Army Headquarters was put under close arrest and charged with the offences of theft of public funds and was court martial subsequent to which the claimant moved the High Court to challenge the constitution and the proceedings of the Court Martial.
- c) The High Court in Miscellaneous Cause No. 672 of 1999 (**R –Versus- Chief of General Staff and 2 Others Exparte Col.**

Ronald Muge Cherogony) issued an order inter alia quashing the convening order and the constitution of the said Court Martial; prohibiting the convening and holding a Court Martial to try the claimant; and the release and reinstatement of the claimant in the military service.

d) In compliance with the said order the claimant was reinstated and duly transferred to Lanet Barracks to serve as the Commanding Officer of the cadet school.

e) On or about 22.02.2001 the claimant while serving as the commanding officer of the cadet school at the said Lanet Barracks was summoned and he duly appeared before the Appropriate Superior Authority, Major General Peter M. Waweru on the same charges upon which he had been previously charged with, but he opted to be Court Martial led in accordance with the Armed Forces Act, procedures and regulations.

The claimant's case is that the purported summary trial was held and presided over by the said Major General Peter M. Waweru who did not have the jurisdiction to do so and the claimant's contention is that the Court Martial has never been convened for such purpose at all. The claimant's further case is that on 14.03.2001 the plaintiff while in military service was summarily dismissed from his service in a tacit circumvention, contravention and contempt of the said decision of the High Court of Kenya, the rules of natural justice, and the provisions of the Armed Forces Act. His further case is that on 14.03.2001 while in military service as Colonel in Charge of personnel at Army Headquarters, the claimant was summarily dismissed from his employment by the 4th respondent without the 4th respondent assigning a reason whatsoever. Further it was the decision of the High Court that the claimant remains and continues in his employment but the 4th respondent in flagrant abuse of wisdom of the High Court nonetheless unlawfully and without any benefits dismissed the claimant. The claimant's case is that his removal from the military was unlawful, unjustified and in breach of the order by the High Court that his removal from the Armed Forces was and remains null and void *ab initio*. The claimant further states that effective 14.03.2001 he was not paid his due salary and his retirement and accrued benefits.

The respondent's case is that the claimant's commission was terminated on 14.03.2001 pursuant to a directive of the requisite authority and duly conveyed by the Defence Council. The termination was in accordance with the law and with the object of safeguarding the best interest of the Kenya Armed Forces. Further, the termination was as a result of summary disciplinary trial held on 22.02.2001 on four charges on conduct to the prejudice of the good order and service discipline contrary to section 68 of the Armed Forces Act Cap 199 (now repealed). The termination was therefore lawful and rules of natural justice had been complied with. The decision of the High Court was only relevant to the case that was before the High Court and the Court Martial convened at the time but not subsequent trials and disciplinary proceedings in the course of service duty. The amended defence concluded, "**14. The defendants file their defence without prejudice to their right to raise a Preliminary Objection at the hearing hereof that the suit is incompetent and should be struck for failing to comply with the Government Proceedings Act and being time barred according to the Public Authorities Limitation Act.**"

The claimant testified to support his case and the respondent's witness (RW) was Major Emmanuel Makokha Wandera, working as SO1 Records at the Defence Headquarters. Parties filed their respective submissions.

The Court has considered the pleadings, the evidence and submission on record.

The **1st preliminary issue** for determination is whether the claimant's suit was time barred. It is submitted for the respondents that the claimant filed the suit on 26.05.2004 and the cause of action arose on 14.03.2001 when the claimant's commission was terminated. Thus the suit was filed after the statutory period of 3 years which lapsed on 14.03.2004 and the claimant had not applied and obtained extension of time in that regard. It is therefore submitted that the suit is time barred under section 3(2) of the Public Authorities Limitation Act, Cap 39 which states, "**No proceedings founded on contract shall be brought against the government or a local authority after the end of three years from the date on which the cause of action accrued.**" It is submitted that the present case is based on a contract of service and the said section 3(2) applies.

For the claimant there were no submissions made to oppose the respondents' submissions on the lapsed limitation period as at when the suit was filed. The Court returns that the respondents have established that indeed the suit was time barred. In such circumstances, the Court lacks jurisdiction to entertain the suit on its merits. The Court has further considered the time that has lapsed without the respondents prosecuting the preliminary objection and returns that each party shall bear own costs of the suit.

In conclusion, the preliminary objection is upheld and judgment is hereby entered for the respondents for dismissal of the suit with orders that each party shall bear own costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 29th March, 2019.**

BYRAM ONGAYA

JUDGE