



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO. 41 OF 2017**

**IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**IN THE MATTER OF : ARTICLES ON THE ALLEGED VIOLATION OF FUNDAMENTAL HUMAN RIGHTS OF THE CONSTITUTION OF THE REPUBLIC OF KENYA 1, 2, 3, 10, 19, 20(3)(4), 21, 22(2), 23(1), 24, 25, 41, 47, 48, 49 AND 50(1)**

**AND**

**IN THE MATTER OF: ARTICLE 50 ON FAIR HEARING CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF: THE PRINCIPLE OF LEGITIMATE EXPECTATIONS**

**AND**

**IN THE MATTER OF: SECTION 27 OF THE LIMITATION OF ACTIONS ACT LAWS OF KENYA**

**AND**

**IN THE MATTER OF: EMPLOYMENT ACT CAP 226 ON SECTION 45(1) AND (2)**

**BETWEEN**

**FREDRICK AINEA LUCHERA.....PETITIONER**

**AND**

**GLAXOSMITHKLINE KENYA LTD.....1<sup>st</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL.....2<sup>nd</sup> RESPONDENT**

**OFFICER IN-CHARGE OF INDUSTRIAL AREA**

**POLICE STATION NAIROBI.....3<sup>rd</sup> RESPONDENT**

**RULING**

1. The Petitioner was employed by the 1<sup>st</sup> Respondent on 1 July 1970. He served until 24 November 1986 when the contract was terminated.
2. On 9 May 2017, the Petitioner instituted the instant Petition alleging that the termination of his employment was wrongful and violated his rights to fair labour practices, fair administrative action, fair hearing and property as guaranteed by the Constitution of Kenya, 2010.
3. The Petitioner sought the following remedies: *an order compelling the 1<sup>st</sup> Respondent to pay retirement benefits; declaratory order against the 2<sup>nd</sup> Respondent to file investigation reports and damages.*
4. Upon service, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a *Notice of Preliminary Objection* contending

1. **THAT** the suit is time barred and offends section 4(1)(a) of the Limitation of Actions Act and alternatively section 90 of the Employment Act.

2. **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.

3. **THAT** the Petitioner is circumventing the Employment Act and the Labour Relations Act by relying on the constitutional provisions having realized the matter is statute barred under the parent Acts which give effect to constitutional rights.

4 **THAT** the Petition offends Article 22(1) of the Constitution and the *locus classicus* decision in Mumo Matemu and Annarita Karimi Njeru.

5. **THAT** the suit is an abuse of the court process.

6. **THAT** the suit is incompetent and ought to be struck out with costs.

5. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed submissions and authorities in support of the objection on 21 May 2018 while the Petitioner filed his submissions on 31 January 2019.

6. The Court heard the parties on 12 February 2019.

7. The Court has considered all the material placed before it and come to the following conclusions.

8. Sections 27 and 28 of the Limitation of Actions do not apply as the cause of action advanced here is anchored on contract, rather than negligence or tort.

9. The Petitioner having been dismissed in 1986 should have instituted legal proceedings within 6 years as contemplated by section 4(1)(a) of the Limitation of Actions Act, being the applicable law on limitation at the material time.

10. The substantive reliefs sought in the Petition are mainly in the area of contract and employment law and could be determined by the interpretation and application of contract and employment law without reaching any possible constitutional provisions, and therefore the Petitioner in moving the Court through a Petition rather than through the statutory route was circumventing the question of limitation.

11. The Petitioner was camouflaging a stale cause of action.

12. Further, the rights to fair labour practices and fair administrative action were not part of the rights guaranteed by the Constitution in place when the Petitioner's cause(s) of action accrued.

13. The Court finds no *retrospectivity* of application in the circumstances of the present case and would draw attention to the pronouncement by the Supreme Court in *Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & 2 Others (2012) eKLR* that

*However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provision, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately accrued before the commencement of the Constitution.*

14. The Court would also endorse as applicable herein the legal principle in *Harrikson v Attorney General of Trinidad & Tobago (1980) AC 265* that

**...the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the provision if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom.**

15. The Court finds that the Petitioner invoked the Constitution and followed the Constitutional Petition route to avoid the limitation question.

16. From the foregoing, the Court finds the *preliminary objection* merited, and orders that the Petition herein be struck out with no order as to costs.

Delivered, dated and signed in Nairobi on this 22<sup>nd</sup> day of March 2019.

Radido Stephen

Judge

**Appearances**

For Petitioner Ms. Shumila instructed by Khaminwa & Khaminwa Advocates

1<sup>st</sup> Respondent did not appear

For 2<sup>nd</sup> & 3<sup>rd</sup> Respondents Mr. Odukenya, State Counsel, Office of the Hon Attorney General

Court Assistant Lindsey