REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

PETITION NO.11 OF 2018

PETER NDEGWA NDERITU.....PETITIONER

VERSUS

TEACHERS SERVICE COMMISSION .....RESPONDENT

RULING

The ruling herein relates to notice of preliminary objections filed by the respondent on 4th March, 2019 on the grounds that;

> *the Statement of claim dated 21st September, 2018 is statute barred pursuant to the mandatory and express provisions of section 90 of the Employment Act, 2007.*

The parties addressed the objections made by way of written submissions.

The respondent submitted that under section 90 of the Employment Act, 2007 all suits based on employment and labour relations should be filed with the court within 3 years from the date the cause of action arose.

The claimant's employment was terminated on 18th October, 2012 and by filing the petition on 21st September, 2018 the claims made are time barred by operation of the law.

In the case of **Attorney General & another versus Andrew Maina Githinji & another, Nyeri Civil Appeal No.21 of 2015** where the Court of Appeal held that the cause of action arose when the employee was issued with letter of dismissal and the time limitation period started running from such date. Being an employment claim, such time was 3 years.

In this case from 18th October, 2012 nothing stopped the claimant from filing suit where he felt aggrieved by the summary dismissal. The accrual of the cause of action in an employment contract takes effect from the date employment terminated and communicated to the employee as held in **Benjamin Wachira Ndiithi versus PSC.** In this regard therefor the court has no jurisdiction to hear the matter as it is time barred and there is no power to extend time under section 90 of the Employment Act, 2007 as held in the case of **Kenya Electrical Trades & Allied Workers Union versus Kenya Power & Lighting Company Ltd [2015 eKLR, David Ngugi Waweru versus Attorney General & Another [2017] eKLR.**

The petitioner submitted that the objections made are misconceived as the petitioner's case is instituted as a constitutional petition and not as a statement of claim under the Employment Act, 2007. The respondent has since filed a Reply and list of witnesses in answer to the petition.

In the petition the petitioner has addressed the violation of his constitutional rights under article 25, 27, 28, 41, 47 and 50 of the constitution, 2010. This court has jurisdiction under the provisions of Article 162(2) of the constitution to hear and determine the petition herein. The limitations set out by the respondent do not apply to a constitutional petition and rely on the case of **John Wairimu Mathenge (petitioner on behalf of the Estate of Adam Mathenge Wangombe) versus the Attorney General, Nairobi Petition No.147 of 2015.**

Determination

In this case the issues which emerge are whether the provisions of section 90 of the Employment Act apply in this case and whether time bar apply to constitutional petitions with regard to employment;

It is common cause that the petitioner was issued with letter dismissing him from the employment of the respondent on 18th October, 2012. He filed the petition on 21st September, 2018.

The petitioner is seeking for orders that the respondent be found to have failed to comply with the law and regulations of his disciplinary case

and thus violated his constitutional rights to a fair hearing, judicial reviews orders be issued quashing all proceedings in respect of the disciplinary proceedings, decision and measure made therefrom and that he be reinstated to the register of teachers and to his former position as teacher and payment of his salary and allowanced from 1th June, 2012.

The petition is grounded on the facts that the petitioner was employed by the respondent as a teacher but on 12th October, 2012 he was dismissed from his employment following allegations of having carnal knowledge of a student at Matura Secondary School where he had been posted as a teacher. He has challenged such decision as being unfair and without evidence and thus filed the petition herein seeking to have the decision reviewed and orders issued to reinstate him back to his employment and position as teacher with the respondent.

It is trite, all employment and labour relations claims should be filed with the court within the provisions of section 90 of the Employment Act, 2007 as held by the Court of Appeal in the case of **G4S Security Services (K) Ltd versus Joseph Kamau & 468 others [2018] eKLR** and the court has no jurisdiction to extent time for such claims in whatever nature as held in the case of In **Maria Machocho versus Total (K) Industrial Cause No. 2 of 2012 ;**

> **…** *The corollary to this is that no court may or shall have 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……A perusal of Part III shows that its provisions do not apply to actions based on contract. In the light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that 'the wording of section 4(1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked.*

Can such time then be ignored in constitutional petitions?

The ultimate remedy sought by the petitioner in his petition is that his disciplinary matter was not given a fair hearing and as a result the decision should be quashed so that he can be reinstated back to the register of teachers and to his position as teacher with payment of his salary and benefits from 11th June, 2012. Such are remedies only available under section 49 of the Employment Act, 2007 read together with section 12(3) of the Employment and Labour Relations Court Act, 2011. However best the petition is framed, employment and labour relations rights articulated under the petition, though framed in a different name from that of a Memorandum of Claim, the orders sought relate to what an employee claiming under the Employment Act, 2007 should apply.

It is not the filing of a petition which can extend time for the remedy of reinstatement. Such remedy is set out under statute and cannot be circumvented through filing a petition instead a Memorandum of Claim.

Despite the petitioner citing the violation of his rights under the various articles of the constitution, and supporting the facts of the petition with a chronology of the violations against him, the remedies sought can only issue within the framework of the provisions of section 90 of the Employment Act, 2007.

The Court of Appeal in addressing an appeal with regard to filing of a judicial review proceedings instead of filing a Memorandum of Claim in the case of **Maurice Adongo Anyango versus Kenyatta International Convention Centre [2018] eKLR** held as follows;

> *Furthermore, this Court has in several decisions held that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. See for instance* ***Speaker of the National Assembly v Karume*** *(supra). The appellant's claim was based on a contract of employment. A specialized court exists to deal with employment matters and it would cause jurisdictional rivalry and/or confusion if courts would allow litigants to shuffle between any courts, even if they are of equal status. …*

In the findings above, the court made reference to the decision of **R versus East Berkshire Health Authority, ex p. Walsh [1984]0 APP.L.R. 05/14,** that;

> *The ordinary employer is free to act in breach of his contracts of employment and if he does so his employee will acquire certain private law rights and remedies in damages for wrongful dismissal, compensation for unfair dismissal, an order for re-instatement or re-engagement and so on. …*

It therefore behoves a party aggrieved by a decision of the employer to move the court as appropriate and in view of Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016 where the matter elates to a constitutional violation and the remedies therefrom or seek for judicial review orders are where necessary or by Memorandum of Claim, apply the same accordingly.

Constitutional petitions are allowed and the court has jurisdiction to address the same. However such should not be applied to avoid the obvious time limitations in a matter where the cause of action and the remedy sought is tailored around a statute with time limitations. See **Nicholas Mayieka & 22 others versus Judicial Service Commission Petition No.260 of 2016 (Nakuru);**

> *in matters of employment and labour relations, unless otherwise prescribed, through a Statement of Claim a party is allowed to urge its case. Such memoranda gives the other party a fair chance to call its witnesses and cross-examine them and have the court address the case on its merit(s). The application of technical procedures under a petition with mere citations of various articles of the constitution where ordinarily a suit ought to be commenced by way of Statement of Claim only serves to deny the other party and the court crucial evidence to the disadvantage of the petitioner.*

In this case, it is apparent to the court the claims made relate to an ordinary employer and employee relationship and the remedies sought can only issue pursuant to statute under the Employment Act, 2007 and the Employment and Labour Relations Court Act, 2011 and to file a petition instead of a Memorandum of 'Claim the time bar cannot be cured.

Accordingly, the objections made by the respondent herein are founded with merit and are hereby allowed. The petition and the remedies sought cannot issue and is hereby dismissed. Costs to the respondent.

Delivered in open court at Nakuru this 29th day of April, 2019.

M. MBARU

JUDGE

In The Presence Of:.....