REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 98 OF 2018

IN THE MATTER OF: THE CONSTITUTION OF KENYA

IN THE MATTER OF: ALLEGED CONTRAVENTION AND VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUALS AS ENSHRINED UNDER ARTICLES 2(1), 23(1), 27, 28, 40, 41 AND 47 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATION, REASONABLENESS AND DOCTRINE OF PROPORORTIONALITY

IN THE MATTER OF: SECTION 44(1) OF THE EMPLOYMENT ACT, 2007

BETWEEN

VICTOR MAKORI.....PETITIONER

v

PUBLIC SERVICE COMMISSION.....1st RESPONDENT

HON ATTORNEY GENERAL.....2nd RESPONDENT

RULING

1. The Petitioner moved the Court on 24 September 2018 alleging unfair dismissal from employment and contended that the failure to pay him terminal dues and/or pension constituted unfair labour practices and violated his rights as enshrined in Articles 23(1), 27, 28, 41(1), 47 and 57 of the Constitution.

2. When served with the Petition, the Respondents filed a Notice of Preliminary Objection dated 15 April 2019 to the effect

> 1. That this suit is time barred and offends mandatory provisions of section 90 of the Employment Act, 2007 and Limitation of Actions Act cap 22 Laws of Kenya.
>
> 2. The Court lacks jurisdiction to extend time for filing suits.
>
> 3. That the suit is an abuse of the court process.
>
> 4. That the suit is time barred and ought to be struck out with costs.

3. The Respondents filed submissions in support of the preliminary objection on 30 April 2019, and the Petitioner filed his submissions in opposition thereto on 12 June 2019.

4. The Court took submissions on 17 June 2019.

5. The Employment Act, 2007 does not apply in this Cause because the cause action accrued sometime in 2000/2001 when the Petitioner was dismissed from employment.

6. In pursuing the objection, the Respondents submitted that 43 years had lapsed since the cause of action advanced accrued and that part of the cause was *res judicata* because the Petitioner had moved the High Court in Milimani Civil Case No. 7390 of 2003 seeking general damages for malicious prosecution, a suit which was dismissed for want of prosecution.

7. The Petitioner on the other hand urged that because he was asserting violation of constitutional rights, limitation was not in issue, and therefore the preliminary objection was misplaced.

8. According to the Petitioner, it was normal practice to reinstate into the payroll public officers who were acquitted by the Courts without loss of any benefits and therefore it was discriminatory of the Respondents to deny him his pension after he was acquitted of a criminal offence of making a document without authority.

9. The Petitioner also submitted that there were disputed facts which required to be subjected to a hearing to establish the truth.

10. The Petitioner is attempting to assert a right to pension.

11. Under the retired Constitution of Kenya, pension was recognised as an accrued right/benefit.

12. Entitlement to pension, as a species of property, it can be argued has been preserved in the Constitution of Kenya, 2010 (the right to property to Article 40).

13. This Court is aware that the issue of vesting of pension was the subject of decision in *Henry Kamau Ngare v Teachers Service Commission & Ar* (2016) eKLR, and that the decision is pending challenge before the Court of Appeal.

14. The Court is also alive to the holdings by the Court of Appeal in the case of *Director of Pensions v Abdul Majid Cockar,* Civil Appeal No. 50 of 1999. The *ratio* therein may be also relevant herein.

15. In the view of the Court, the Petition raises a fundamental question as to the vesting of pension and/or terminal benefits, and is not purely a contractual dispute susceptible to defeat on account of the law of limitation.

16. The Court finds no merit in the preliminary objection and orders it dismissed with no order as to costs.

Delivered, dated and signed in Nairobi on this 20th day of September 2019.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Masaviru instructed by Masaviru & Ketoo Advocates

For Respondents Mr. Motende, State Counsel, Office of the Attorney General

Court Assistant Lindsey