



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**  
**KENYA AT NAIROBI**  
**CONSTITUTIONAL PETITION NO. 80 OF 2018**  
**IN THE MATTER OF ARTICLES 27,28,41,47,50(1),50(2)(B),**  
**50(2)(F),50(2)(J) AND 50(2)(K) OF THE CONSTITUTION OF**  
**KENYA, 2010**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015**

**IN THE MATTER OF ILLEGAL, UNCONSTITUTIONAL AND UNFAIR TERMINATION OF EMPLOYMENT OF REUBEN NGILA KITONYI BY THE CENTRAL BANK OF KENYA**

**IN THE MATTER OF ENFORCEMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27,28, 41,50(1),50(2)(b),50(2)(f),50(2)(j) AND 50(2)(k) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF VIOLATION OR THREATENED VIOLATION OF THE CONSTITUTION OF KENYA AND THE ENFORCEMENT AND PROTECTION OF THE CONSTITUTION OF KENYA, 2013**

**BETWEEN**

**REUBEN NGILA KITONYI ..... PETITIONER**

**VERSUS**

**CENTRAL BANK OF KENYA..... RESPONDENT**

**RULING**

**Introduction**

1. The petitioner/applicant was employed by the respondent from 1977 as a clerk to 26/9/1996 when he was dismissed for gross misconduct while serving as a Senior Clerk. Thereafter he engaged several lawyers who kept on serving letters on the respondent alleging that his services were unlawfully terminated and demanding for reinstatement.
2. When the respondent refused to give in to the demands the petitioner filed Judicial Review Application No. 390 of 2015 in the High Court seeking order of Mandamus to compel the respondent to reinstate him to his employment but the same was dismissed. Thereafter he filed Judicial Review Application No. 501 of 2016 seeking a similar order of madamus but the High Court struck it out for lack of jurisdiction since the dispute related to employment.
3. As a result, the petitioner brought the instant petition on 22/8/2018 seeking a declaration that his constitutional rights under the retired constitution were infringed by terminating his services without being heard and he was discriminated by being treated differently from others. He prayed for reinstatement to his employment without loss of benefits, payment of his retirement benefits and pension, General damages for constitutional violations, compensation for unfair termination, costs and interest.
4. The respondent filed a Replying Affidavit to oppose the petition and in addition filed a Notice of Preliminary objection for determination by the Court *in limine* on grounds that the suit is time barred by dint of section 90 of the Employment Act; that the alleged constitutional

violations are meant to circumvent the statutory provision on Limitation of Actions; that the suit is incompetent, scandalous, vexatious, frivolous and an abuse of the court's process; and that the suit should be dismissed in furtherance of the overriding objective of timely disposal of proceedings in accordance to Article 159(2) and the Section 3 of Employment Act.

5. On 6/3/2019 counsel for the parties agreed to dispose of the preliminary objection by written submissions. The respondent filed and served her submissions on 19/3/2019 and the petitioner filed his on 8.5.2019.

6. The main issue for determination is whether the petitioner's suit herein is time barred.

### **Respondent's submission**

7. The respondent submitted that the petitioner's contract of employment was terminated on 26.9.1996 and filed the instant suit on 23.8.2018, more than 22 years after the said separation. She contended that the suit is time barred by dint of section 4 of the Limitation of Actions Act and also section 90 of the current Employment Act. That the former provision was the applicable law when the petitioner was discharged and it barred filing of suits founded on contract after the end of six years from the date when the cause of action arose. That the latter provision is the current law and it bars filing of filing of any suit founded on employment contract after the end of three years from the date when the cause of action arose.

8. She further submitted that the petition herein being time barred, the cause is now non-existent and the court lacks jurisdiction to hear it or enlarge the limitation period. To fortify the foregoing submission, she relied on **Divecon limited v Samani [1995-1998] 1 EA 48** where the court of appeal held that after the lapse of the six years limitation period, no court has jurisdiction to entertain a suit founded on contract or any application to extend the limitation period.

9. She also submitted that what is contrived as a constitutional petition herein is indeed a private law dispute founded on a private contract of employment between the parties herein and the Employment Act Cap.226 (now repealed). That the reliefs sought are reinstatement and compensatory damages under the Employment Act and there is no iota of constitutional provision applicable. Consequently, she contended that levitation of the private employment contract governed by private law to a constitutional petition subject to public law by the petitioner cannot oust the respondent's defence of limitation of actions and cannot invoke the jurisdiction of this court to sit as a constitutional court.

10. To fortify the foregoing submission, she relied on **Josephat Ndirangu v Henkel Chemicals (EA) Ltd [2013]eKLR, Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi [2011]eKLR and Moses A Segite & 29 others v Kenya Flouspar company Ltd [2015] e KLR** where the court held that persons who are caught up by the limitation period cannot be allowed to circumvent the statutory provisions on limitation by hiding their employment contract claims under the veil of constitutional petitions.

11. The respondent further submitted that whereas the constitution has not set any time limitation for filing constitutional petitions, even in a genuine constitutional case a delay in filing the petition must be satisfactorily explained. For emphasis, she relied on **Njuguna Githiru v Attorney General [2016]eKLR** where the High Court held that even in constitutional petitions a delay of ten years or more must be explained satisfactorily.

12. In conclusion, she contended that the petitioner herein filed without success, two Judicial Review Applications in the High Court, Misc. Application No.390 of 2015 and No.501 of 2016 seeking similar orders as in in the instant petition. She therefore urged the court to find that the petition herein to be vexatious and dismiss it with costs.

### **Petitioner's submissions**

13. The Petitioner opposed the PO and prayed for it to be dismissed with costs. He submitted that his petition is not founded on a cause of action of breach of an employment contract which has a statutory time limitation of 3 years, but on breach of fundamental human rights and freedoms under the constitution. In his view, although the infringement of the petitioner's fundamental rights arose out of his employment relationship with the respondent at the time when the employment was terminated, the instant petition is not synonymous with the cause of action for breach of an employment contract, and the same cannot by any stretch of imagination be construed or deemed to be synonymous with a cause of action for breach of an employment contract.

14. He further submitted that an employee whose employment is terminated by an employer in a manner that infringes upon his constitutional rights and freedoms, and also constitutes a breach of the employment contract, can elect to file a constitutional petition rather than Memorandum of Claim even before the 3 year limitation period after the separation lapses. According to him it is not automatic that filing of claim is the only option to be taken whenever employees contract of service is terminated. Consequently, he contended that the facts and circumstances could constitute infringement of constitutional rights warranting filing of constitutional petition rather than a Memorandum of Claim.

15. To fortify the foregoing submission, he relied on **Peris Nyambura Kimani v Dalbit Petroleum Limited [2015] e KLR** and **Misia Manuguti Kadeyi v Masai Mara University & 3 others [2018] eKLR** employees filed constitutional petitions challenging infringement of their constitutional rights and freedoms during termination of their employment and the court granted the reliefs sought.

16. He further submitted that since his claim under breach of contract was time barred, he elected to pursue his other cause of action, which does not have a statutory time limitation, that is, infringement of fundamental rights and freedoms. He contended that there is litany of judicial precedents that are unanimous that claims agitating for infringement of fundamental rights and freedoms under the constitution do not have statutory time limitations. For emphasis, he relied on **Njuguna Githiru v Attorney General [2016] e KLR** where the court entertained a constitutional petition after many years.

### **Analysis and determination**

17. There is no dispute that the petitioner's employment contract was terminated by the respondent on 26.9.1996 for gross misconduct. There is further no dispute that the petitioner brought the petition herein on 22.8.2018 alleging that during the termination, the respondent infringed on his constitutional right to a hearing before the dismissal, as guaranteed under section 77(1),(2)(d) of the repealed constitution and Article 50(1),(2)(f)(k) of the current constitution of Kenya; his constitutional right to fair administrative action under Article 47 of the current constitution; and his fundamental freedom from discrimination under section 82 of the repealed constitution and Article 27 of the current constitution.

18. As indicated herein above, the issue for determination is whether the suit herein is time barred. To answer the said question effectively the court should first determine whether the cause of action herein concerns breach of a private law contract between the parties herein or violation of petitioner's fundamental rights and freedoms as enshrined in the constitution of Kenya. The petitioner contended that the petition is not founded on breach of the employment contract but infringement of his fundamental rights and freedoms under the constitution. However, the respondent maintained that the cause of action being agitated by the petitioner is purely a private law claim disguised as a constitutional reference to circumvent statutory provisions on limitation of actions.

19. In paragraph 6 of the petition, the petitioner has pleaded that on 24.9.1996, he was arraigned in court and charged with forgery contrary to section 349 of the Penal Code and on 26.9.1996, his employment was terminated by the respondent, without being accorded a hearing, on ground that he uttered a forged Memo purporting that it originated from the respondent's Principal HR Division, contrary to rules 3.17 and 3.46 of the respondent's Staff rules and Regulations. He further contended that his dismissal was discriminatory because two other employees, Lucy Nyokabi Wairoto and Agnes Nanjala Wanga who were also charged with criminal cases were not dismissed like him.

20. In the petition the petitioner seeks declaration that the respondent's decision to terminate his employment without granting him a hearing was unconstitutional, illegal, null and void because it infringed upon his constitutional rights to fair labour practices, right to fair administrative action, right to fair hearing and his freedom from discrimination under Article 41,47,50 and 27 of the current constitution of Kenya respectively, and section 77 and 82 of the retired constitution. He further seeks declaration that the respondent's said breach of his constitutional rights set out above, the termination of his employment was unfair.

21. In addition to the foregoing declarations, the petitioner prays for reinstatement to his employment without loss of benefits, 12 months' salary compensation for unfair termination of his employment, full retirement benefits, pension and allowances. Finally, he prays for general damages for infringement of his said constitutional rights.

22. After careful consideration of the pleadings and the rival submissions by both sides, it is vivid that the cause of action in the petition relates to the termination the petitioner's contract of employment on 26.9.1996. The termination was due to gross misconduct by the petitioner contrary to the respondent's Staff rules and regulations which formed part of his contract of employment. The said contract of service was subject to section 16 of the Employment Act (now repealed) which entitled the respondent to dismiss the petitioner summarily for gross misconduct.

23. The said Act, unlike the current employment Act, never provided for any hearing before terminating the contract for gross misconduct by the employee. The repealed Act also never provided for the doctrine of unfair termination or compensation for unfair termination other than salary in lieu of notice if the contract was terminated through breach. The petitioner has not demonstrated that the cause of action in the instant petition fell within the ambits of the public law to qualify to be agitated by way of constitutional reference. Consequently, the court returns that the petition herein is founded on cause of action which is a purely private law dispute founded on an alleged breach of contract of employment. The said petition is time barred because it was filed more than 22 years from the date when the cause of action arose. Section 4 of the Limitation of Actions Act prohibited filing of civil claims founded on contracts of employments after the end of six years from the date when the cause of action arose.

24. The petitioner admitted in paragraph 3.11 of his written submissions that his claim for breach of the employment contract was time barred, thus:

***"3.11. We submit that since the petitioner's claim under breach of contract was time barred, he elected to pursue his other cause of action which does not have a statutory time limitation the moment[sic]. That is, a cause of action for infringement of his constitutional rights and freedoms, hence the instant petition."***

25. The question that begs for answer is whether the court should accept the petitioner's mischief of conveniently invoking constitutional provisions in order to deliberately circumvent statutory provisions that limit time within which to commence civil suits. In my view the answer should be in the negative. If that was to be allowed, the constitutional right to fair hearing would not accrue equally between the suing parties and the respondents in civil litigation. The respondents would seriously be prejudiced because the defence of limitation of actions would in effect be extinguished.

26. The instant case is distinguishable from the precedents cited by the petitioner. In **Njuguna Githiru v Attorney General [2016]eKLR** the cause action did not relate to private law transaction but violation of the petitioner's constitutional rights in a military detention following an attempted coup. On the other hand in **Peris Nyambura Kimani v Dalbit Petroleum Limited [2015] e KLR** and **Misia Manuguti Kadeyi v Masai Mara University & 3 others [2018] eKLR** the causes of action were founded on unfair termination of employment in the context of fair labour practices and fair administrative action under the current Employment Act which have been incorporated into the Bill of rights under the current constitution. The principle of fair termination of employment contract was not enacted under the repealed constitution and the Employment Act and as such the employer did not need to act fairly provided that that breaching party paid the other salary in lieu of notice.

## **Conclusion and disposition**

27. I have found that the suit before the court involves a private law dispute disguised as a constitutional petition to remedy infringement of the petitioner's fundamental rights and freedoms that allegedly occurred during the termination of contract of employment, over 22 years

ago. I have further found that, in his own words, the petitioner admitted that the cause of action for breach of the contract of employment is time barred, and had opted to approach the court by reference to the constitution, because the constitution is not subject to the statutory provision of limitation of time. In view of the aforesaid matters, the court returns that the petition herein is founded on an alleged breach of contract which is time barred under section 4 of the Limitation of Actions Act and section 90 of the Employment Act. I therefore uphold the respondent's Preliminary objection filed on 6.12. 2018 and proceed to strike out the petition with costs.

**Dated, Signed and Delivered in Open Court at Nairobi this 11th day of October, 2019**

**ONESMUS N. MAKAU**

**JUDGE**