



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 154 OF 2018

TITUS KABERIA KIRAGU.....CLAIMANT

-VERSUS-

HON ATTORNEY GENERAL.....1ST RESPONDENT

NATIONAL POLICE SERVICE COMMISSION.....2ND RESPONDENT

RULING

Introduction

1. The Petitioner was a Police Officer in the defunct National Police Force, the Predecessor of the 2nd Respondent herein. On 15.4.2006, he was dismissed from the force after undergoing an Orderly Room, proceedings which found him guilty of an act of the prejudice of good order and discipline contrary to Regulation 3(41) of the Police Regulations. Thereafter he was charged in court with stealing contrary to section 275 of the penal code in Criminal Case NO. 2340 of 2006 but the case was withdrawn on 6.3.2009 under section 87(a) of the Criminal Procedure Code.

2. On 31.12.2018, the Petitioner filed this suit alleging that the decision by the 2nd Respondent to dismiss him from his employment was constitutional illegal, unjust, unfair, capricious, oppressive, irrational, unreasonable and against the rules of natural justice. He further contended that the 2nd respondent failed to issue him with reasonable and adequate notice prior to the dismissal and she further failed to comply with the constitution of Kenya that obligates her to exercise fair administrative action. He also averred that the respondents caused him to be charged with the said criminal charges which were malicious, unlawful and baseless, that was meant to embarrass and oppress the Petitioner. He therefore prayed for the following reliefs.

- (a) A declaration that the 2nd Respondent's decision to terminate the Petitioner from employment was unlawful, unjust and unfair.
- (b) An order to reinstate the petitioner to employment by the 2nd Respondent forthwith.
- (c) A declaration that the Criminal Case No. 2340 of 2006 (Makadara) against the Petitioner were malicious and unlawful.
- (d) General damages
- (e) Salary arrears from the date of termination to the date of reinstatement.
- (f) Any other further relief that this Honourable Court may deem fit to grant.
- (g) Interest on above and costs of this Petition hereof.

3. In response to the petition, the respondents filed Notices of Preliminary Objection (PO) dated 3.4.2019 and 8.4.2019 respectively. The grounds for the PO by the respondents are:-

- (a) The suit is time barred
- (b) The suit is an abuse of the court process
- (c) The order of reinstatement is legally untenable
- (d) The outcome of criminal proceedings does not invalidate disciplinary proceedings and decisions.

4. The PO was disposed of by written submissions.

1st Respondent's Submissions

5. The first respondent filed submission on 22.5.2019 contending that the suit herein is time barred by dint of the time lines provided under the Limitation of Actions Act. That from 18.4.2006 when the claimant was dismissed from the Police Force, his right to sue lapsed in 2012 because under the Limitation of Actions Act, a claim founded on contract like in this case expires after 6 years from the date the cause of action arose. For emphasis, the respondent relied on several judicial precedents but the same were not served on the court to refer.

6. In addition, the 1st Respondent contended that the outcome of criminal proceedings does not invalidate disciplinary proceedings and decisions. That the termination of the Criminal proceedings in 2009 did not obligate her to reverse the internal disciplinary verdict of dismissal. She relied on several decisions which were also not availed to the court for reference.

7. Finally, she contended that the petition lacks particulars of the alleged violation and it is an abuse of the court process. She therefore prayed for the same to be dismissed.

2nd Respondent's Submissions

8. The submissions by the 2nd Respondent were filed on 2.5.2019 but they were not signed. Basically the respondent submitted that the suit is time barred by dint of section 90 of the Employment Act and Section 3(2) of the Public Authorities Limitation Act both of which bar the filing of claims based on contract against Government after the lapse of 3 years from the date when the cause of action arose. She contended that the claimant was dismissed on 18.4.2006 and as such the claim expired at the end of 3 years from that date, that is, on 18.4.2009. Consequently, in her view, filing this suit on 30.11.2018 was out of time and therefore the suit is time barred.

9. For emphasize, she relied on various judicial precedents but failed to provide copies to the court for reference.

Petitioner's Submissions

10. The Petitioner filed his submission on 4.7.2019. He submitted that the suit is not time barred because it is founded on the constitution. He contended that the constitution did not and has not set a time limit within which applications for enforcement of fundamental rights should be brought under Article 22 or 258 of the constitution. In his view, therefore the grant of constitutional reliefs or remedies is not subject to any statute or period of limitation either under the Limitation of Actions Act or the Law Reform Act. He contended that the charges brought against him were malicious and unlawful and violated his fundamental rights and were contrary to Article 25(a) & (c), 28, 31, 40, 47, 49, 50 and 51 of the constitution 2010 and as such, the claimant is entitled to reinstatement to his employment.

11. He relied on *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018]eKLR*, *Peter Kariuki v Attorney General [2014]eKLR*, *Kamlesh Mansuklal Damji Patni vs Republic [2013]eKLR* and *Johnstone Ogechi vs The National Police Service [2017]eKLR* to support his contention that the constitution did not set a time limit within which application for enforcement of constitutional rights should be brought.

12. Finally, the Petitioner submitted that the outcome of criminal proceedings should have an effect on the concluded internal disciplinary proceedings. That in this case, the termination of the criminal charges in favour of the Petitioner obligated the 1st Respondent to reinstate him to his job. He relied on *Joshua Mundi Mainji vs National Police Service Commission & 2 Others [2015]eKLR* and *Geoffrey Mworira v Water Resources Management Authority [2015]eKLR* to support his contention and prayed for the PO to be dismissed with costs.

Analysis and determination

13. There is no dispute that the petitioner was dismissed from the National Police Force on 18.4.2006 and filed this petition on 31.12.2018. The issues for determination are:

- (a) Whether the suit is time barred
- (b) Whether the reliefs sought in the petition are tenable.

(a) Whether the suit is time barred

14. The petition brings out two main claims. The first is the claim founded on contract of service in which the Petitioner seeks declaration that his dismissal from employment was unlawful, unjust and unfair and prays for reinstatement with benefits. The said cause of action is said to have occurred on 15.4.2006. According to the submissions filed by the respondents, the said claim is time barred by dint of section 90 of the Employment Act and Section 3(2) of the Public Authorities Limitation Act.

15. Section 90 of the Employment Act does not apply to this case because under section 3 of the Act, the provisions of the Act are not applicable to the members of the Police Service. It follows therefore that the applicable law is section 3(2) of the Public Authorities Limitation Act which provides that:-

“No proceedings founded on contract shall be brought against the Government or a Local Authority after the end of three years from the date when the cause of action accrued.”

16. According to paragraph 6 of the petition, the cause of action arose on 15.4.2006 when the petitioner was dismissed from service. Three years from 15.4.2006 ended on 14.4.2009. It follows therefore that filing the herein on 31.12.2018 was 9 years outside the limitation period set out by section 3(2) of the Act.

17. The second claim by the petitioner founded on the tort of malicious prosecution seeks for declaration that criminal charges against him in Criminal Case No. 2340 of 2006 (Makadara) were malicious and unlawful and prayed for General damages. The relevant provisions to the said tortious claim against the respondent is section 3(1) of the Public Authorities Limitation Act which provides that:-

“No proceedings found on tort shall be brought against the Government or a local authority after the end of twelve months from the date or which the cause of action accrued.”

18. In this case, the cause of action arose 6.3.2009, when the said criminal case was terminated in favour of the petitioner, according to paragraph 6 of the petition. It follows therefore that the cause of action expired on 5.3.2010 and as such, filing the suit herein on 31.12.2018 was outside limitation period set by the section 3(1) of the Act by 8 years.

19. In view of the foregoing analysis it is obvious that the two claims are both time barred. To circumvent the said provisions which bar the Petitioner from filing suit after the expiry of the limitation period, he mischievously hid under the provisions of the constitution and approached the court by the instant petition. The respondents have however noted that and objected to the Petition.

20. After considering the pleadings, the submissions and the law cited herein above, I find and hold that the petition before the court raises ordinary claim of breach of contract and tort of malicious prosecution, which should have been brought by a normal suit under a memorandum of claim and not constitutional petition. It is trite law, that where the constitution or a statute provides for a specific procedure for seeking redress from court, a party is not allowed to approach the court by a constitutional reference or judicial review. This court is therefore inclined to allow the P.O on ground that the suit is time barred. The corollary to the foregoing is that the court is barred by statute law from entertaining the suit and it must down its tools for lack of jurisdiction.

Whether the reliefs are tenable

21. In view of the finding herein above that the suit is time barred, it follows therefore that the reliefs sought are untenable. Even if the suit was not time barred the prayer for reinstatement would not be tenable because under section 12(3)(vii) of the ELRC Act, the court is barred from ordering reinstatement after the end of 3 years from the date of termination of the employment contract. In the end, the court upholds the P.O and as such the petition, dated 30.11.2018 is struck out. Each party to bear his or own costs.

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

ONESMUS N. MAKAU

JUDGE