



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 82 OF 2019

HUMPHREY MACKORI NYAGOE.....PETITIONER

VERSUS

KENYA AIRPORTS AUTHORITY.....1ST RESPONDENT

HON. ATTORNEY-GENERAL.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 1st November, 2019)

RULING

The petition was filed on 14.05.2019 through OP Ngoge & Associates Advocates. The petitioner's case is that he was employed by the Aerodromes Department in the Office of the President effective August 1977 to 01.07.1992 when he was deployed or seconded to the Kenya Airports Authority after the establishment of the Kenya Airports Authority (KAA) as a state corporation. The petitioner continued to work for KAA until February 2004 when he says he was subjected to arbitrary early retirement by KAA. In computing his terminal benefits, the petitioner's case is that the 1st respondent fraudulently, deliberately and or unconstitutionally failed to take into account a massive aggregate of 26 years and 8 months being the combined years and months of service rendered by the petitioner at the Aerodromes Department and at the KAA. The petitioner alleged discrimination with impunity; cruel, degrading and unlawful treatment, and subverting the socio-economic rights of the petitioner and his family with a lot of impunity contrary to Articles 10, 27, 28, 29, 40, and 43 of the Constitution; and contrary to Articles 1, 2, 3, 4, 5, 14, 15, 16, 17, and 18 of the African Charter and the preamble of the African Charter meriting the urgent intervention of the Honourable Court. The claimant prayed for:

- a) Kshs. 10, 446, 605.00 being the petitioner's unaccounted for terminal benefits with interests to be calculated from 31.03.2004 until payment is made in full.
- b) General and exemplary damages for deliberately curtailing the fundamental human rights of the petitioner as stated in the petition.
- c) Costs of the suit plus interest.
- d) Any other or further reliefs which the honourable court deems fit and just to grant in the circumstances.

The petitioner has pleaded that he was not paid terminal dues with respect to his full service period. By that reason, his monthly pension continues to be underpaid and the maximum cash lump-sum payable to the petitioner was equally underpaid and he continues to suffer the underpayment.

The 2nd respondent filed the grounds of opposition to the petition on 11.07.2019 through learned Senior State Counsel Christine Oyugi. The 2nd respondent filed a notice of preliminary objection on 13.09.2019 through the Federation of Kenya Employers as follows:

- a) Section 4(1) (a) of the Limitation of Actions Act Cap 22 states that an action founded on contract may not be brought after the end of 6 years from the date on which the cause of action accrued.
- b) Section 90 of the Employment Act, 2007 provides that notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap 22), no civil action or proceedings based or arising out of the Act or a contract of service in general shall lie or be instituted unless it is commenced within 3 years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.
- c) The petitioner invokes the rights in the Constitution of Kenya 2010 which was not in place as at the time of the early retirement more than 15 years prior to the filing of the petition.

The Court has considered the parties' submissions on record together with the petition, supporting affidavit and the exhibits. The evidence by the petitioner and which has so far not been rebutted by the respondents is that upon retirement in February 2004, his terminal dues were miscalculated because his period of pensionable service was reckoned by leaving out a substantial number of served years with the consequence that his lump-sum pension and monthly pension were underpaid. The petitioner continues to suffer underpayment of pension. The Court readily finds that in terms of section 90 of the Employment Act, 2007 the petitioner continues to suffer a continuing injury, namely underpayment of pension including monthly pensions which continue to be underpaid and that continuing injury has never ceased. The Court returns that the cause of action is active and alive and continuing. In so far as the injury is continuing, the petitioner is entitled to invoke alleged violation of rights and freedoms as provided for in the Constitution of Kenya, 2010 and as attaches to the alleged continuing injury. Accordingly, the Court returns that the preliminary objection was misconceived and is liable to dismissal with costs.

For avoidance of doubt, the Court returns that the 2nd respondent is a necessary and proper party to the suit in so far as the petitioner served as a civil servant in Aerodromes Department prior to employment by the 2nd respondent.

In conclusion the preliminary objection dated 11.09.2019 and filed for the 1st respondent on 13.09.2019 is hereby dismissed with costs and directions that parties to take prompt steps towards the expeditious determination of the petition.

Signed, dated and delivered in court at Nairobi this Friday, 1st November, 2019.

BYRAM ONGAYA

JUDGE