



IN THE REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 60 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 15th February 2018)

AG. SP. JOB CHERUIYOT KERUI..... CLAIMANT

VERSUS

H. ATTORNEY GENERAL.....1ST RESPONDENT

NATIONAL POLICE SERVICE COMMISSION2ND RESPONDENT

INSPECTOR GENERAL OF POLICE3RD RESPONDENT

RULING

1. The Respondents herein have filed a Preliminary Objection on the following issues:-

1. That the suit is time barred and offends the mandatory provisions of Section 90 of the Employment Act 2007 and the Limitation of Acts – Act Cap 22 of Laws of Kenya.

2. That the suit is an abuse of the Court process.

3. That this suit is incompetent and ought to be struck out.

2. The Court directed that the parties file their submissions on the Preliminary Objection which they did.

3. The Respondents have submitted that the Petition is time barred as the Petitioner was dismissed from service on 13th January 2006. He subsequently lodged appeal letter to his dismissal vide a letter dated 19th May 2006 and 22nd September 2006 which were subsequently dismissed. He then filed this Petition on 26th June 2015.

4. The Respondent submit that Section 90 of Employment Act states as follows:-

“Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted un less it is commenced within three 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”.

5. They aver that the language of Section 90 of Employment Act is couched in mandatory terms and the Court has no jurisdiction to extend time to file suit out of time.

6. They cited **Joseph Ndungu vs Henkel Chemicals (EA) Limited 2013 eKLR** (Mombasa Industrial Court) Petition 1/2013 where Hon. J. Radido declined to entertain a Petition filed after 3 years stating that it was time barred. They also cited Court of Appeal in **Beatrice Kahai Adagala vs Postal Corporation of Kenya (2015) eKLR** which stated as follows:-

“Much as we sympathize with the Appellant if that is true, we cannot help him as the law ties our hands. Section 90 of Employment Act 2007 which we have quoted verbatim herein above, is in mandatory terms. A claim based on a contract of

employment must be filed within 3 years. The limitation period is never extended in matters based on contract... “.

7. The Claimants opposed this Preliminary Objection in their submissions. They cited Employment & Labour Relations Court Petition No 32/2014 **Corporal Henry Chogo & Another vs Attorney General and 3 Others** where this Court upheld the Petitioners right to fair hearing in the following terms at page 43 of the Judgement.

8. It is therefore the finding of this Court that in the instant matter, though events complained of occurred in 2003, limitation will not bar the Petitioner from seeking relief for constitutional violations.

9. The Court referred to **Leonard Mutua Munyao and Another vs Attorney General and Another** Petition No. 229/2013 where the Petitions claimed infringement of their rights in 2003 which claim the Court entertained for the reason that a claim for constitutional infringement cannot be defeated by reasons of limitation.

10. I have considered the submissions of the parties herein. The Petitioner herein has pleaded infringement of his rights under the former Constitution at Section 77 amongst others. The Petitioner herein seeks reliefs for infringement of various provisions of the Constitution, which conferred rights upon the Petitioner. The Petition is therefore not an ordinary employment contract claim. In ordinary employment claim, Section 90 of Employment Act must be considered.

11. The issues before me concern infringement of the Petitioner’s rights under the Constitution. As stated in the case of **Henry Chogo (supra)** the issue of limitation will not be a bar on the Petitioner from seeking constitutional reliefs.

12. This position has been stated and restated in many cases (see **Leonard Mutua Munyao & Another vs Attorney General & Another Petitioner No. 229/2013 (2014) eKLR** where the Court entertained a claim by the Petition for infringement of their constitutional rights accruing in 2003.

13. This was also the finding in the case of **Richard Wasilwa Wafula vs Commissioner of Police and 2 Others (2014) eKLR** where Hon. J. Majanja found for the Petitioner in Petition filed in 2012 for atrocities committed in 1995. J. Majanja opined as follows:-

“Before I consider the facts as presented, I must state that it is well established fact the law concerning limitation of actions cannot be used to shield the state or any person from claims of enforcement of fundamental rights and freedoms protected under the bill of rights”.

14. Having made my findings as above, it is my position that the Preliminary Objection has no merit and the same is dismissed accordingly.

Read in open Court this 15th day of February, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Odukenya for Respondent – Present

Petitioner – Absent