



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 31 OF 2017

(Formerly Kakamega High Court Petition No. 8 of 2017)

(Before Hon. Justice Mathews N. Nduma)

NAPHTALY OMIDO.....APPLICANT

=VERSUS=

THE SECRETARY, BOARD OF MANAGEMENT, NAMUNDERA

MIXED SECONDARY SCHOOLRESPONDENT

R U L I N G

1. The Respondent has brought a Preliminary Objection to the Petition on grounds that:-

(i) Pursuant to the provisions of **Article 162(2)(a), 165 (5)** and **Section 12** of the Employment and Labour Relations Act, this Honourable Court has no Jurisdiction to hear and determine the Petition.

(ii) Pursuant to the provisions of **Section 7** of the Civil Procedure Act Cap 21, the matter before the Honourable Court is **Res Judicata** and ought to be struck out having been fully determined in **Kakamega Judicial Review No. 7 of 2016**.

(iii) The Petition is frivolous, vexatious, bad in law and amounts to an abuse of the court processes.

2. In the application filed at the High Court at Kakamega on 18th June 2017 and subsequently transferred to this court, the applicant prayed for the following reliefs:-

(a) **THAT** declare invalid the Respondent's proceedings issued to the applicant by the Respondent dated 17th April, 2009 and 25th September, 2009 as being unable to provide proof to the authenticity of the 22nd May 2009 proceedings.

(b) **THAT** this honourable court reviews the disciplinary verdict of the Respondent dated 2nd May 2009 in relation to the applicant.

(c) **THAT** notwithstanding prayer (b) above, make a determination whether a public secondary school board of governors has competent jurisdiction to entertain litigation on a crime allegedly committed at the DEO's, PDE's and TSC headquarters and render a verdict accordingly.

(d) **THAT** if the process in (b) above is ascertained unfair, quash the said verdict and expunge it from the applicant's files at school, district, county and TSC national headquarters.

(e) **THAT** the Respondent compensates the applicant for the unfair trial.

3. The Respondent submits that the matter is *resjudicata* on the basis that the issues in dispute were determined in a Ruling delivered by Hon. Justice J. Njagi on 16th May, 2017 in Kakamega JR No. 7 of 2016.

4. In the JR, application, the court ruled that it had jurisdiction to hear the matter and granted the application dated 23rd November in terms of prayer 2(a) and (b) of the Notice of Motion. The effect of the orders was to direct the Respondent to provide the Applicant with the minutes of the board that preceded the meeting of 22nd May, 2009 to ascertain whether there was such a Board Meeting.

5. The Applicant had also filed an application dated 28th December, 2016 in which he sought prerogative orders of certiorari and mandamus to remove to the court the decision of the Board of governors of the Respondent in relation to the application dated 22nd May, 2009, to expunge the Board's decision from the Applicant's files at school, TSC County Directors file and Teachers Service Commission Head-Quarters files and the Applicant be paid damages by the Respondent for transgressing on his fundamental rights to fair trial.

6. The application was dismissed as it was time barred by virtue of order 53 Rule 4 of the Civil Procedure Rules 2010. Order 53 Rule 4(1) required leave of court to be obtained not more than six months after the decision sought to be quashed is made.

7. The decision complained of was eight (8) years old and the delay was not properly explained. The court noted that the applicant had the option of pursuing other mechanisms of appeal provided by the relevant Act. The JR application was dismissed.

8. The petition was filed immediately after this Ruling and substantially seeks the same orders sought in the JR application which is to declare invalid the proceedings by the Board that preceded the disciplinary hearing and the court to review the decision of the disciplinary committee.

9. The matters raised in the petition are mundane employment and labour disputes, which the petitioner seeks to elevate to constitutional matters so as to circumvent the limitation period, the petition having been filed more than eight (8) years from the date the cause of action arose.

10. The issue of limitation of time with regard to a JR application was dealt with by Hon. Njagi J and the suit was dismissed on that basis.

11. Filing the matter as a petition does not cure that defect, since this is a matter arising from a contract of employment between the Petitioner and the Respondent and the same cannot be litigated more than three (3) years from the date the cause of action arose in terms of section 90 of the Employment Act, 2007.

12. Accordingly, the issues raised in this petition are not only *resjudicata* by virtue of the Ruling by Hon. Njagi J in Kakamega JR No. 7 of 2016 but the same is time barred by dint of section 90 of the Employment Act, 2007 as read with section 27 of the Limitation of Actions Act, Cap 22 Laws of Kenya. The preliminary Objection is upheld with the result that the petition is dismissed with costs.

Judgment Dated, Signed and delivered this 15th day of March, 2018

MATHEWS N. NDUMA

JUDGE

Appearances:-

Petitioner in Person

Mr. Anyuor for Respondent

Chrispo: Court Clerk