



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 94 OF 2017

(Before Hon. Lady Justice Hellen S. Wasilwa on 27th April, 2018)

LOICE MUTAI.....PETITIONER

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

1. The Application before me is the Preliminary Objection dated 18/12/2017 and filed in Court on even date. The Respondent herein raises the Preliminary Objection on the ground that the Petition is time barred under the provisions of Section 90 of Employment Act and therefore this Court lacks jurisdiction to entertain the Petition.

2. The Respondent/Applicant also avers that the Petition is an abuse of the Court process and should therefore be dismissed with costs to them.

3. This Preliminary Objection is based on the following grounds:-

1. THAT the Petition is an abuse of the Court process following withdrawal of Nairobi ELRC No. 725 of 2017 which was seeking similar orders, before it was heard on merits.

2. That the determination as to the legality of the suspension or otherwise of the delay in taking administrative action would have been best explained by way of oral evidence upon presentation of facts in Nairobi ELRC No. 725 of 2017 which was withdrawn.

3. The Petition flies in the face of the ruling of Lady Justice Ndolo of 13th October 2017 who made a finding that “an employee seeking reinstatement must earn their stripes by going through a full trial”.

4. That under the circumstances, the Petition is untenable and should be dismissed with costs to the Respondent.

4. The Respondent have referred to several authorities including **Loice Mutai vs Kenya Revenue Authority (2017) eKLR, Stephen Karithi Gakula vs Teachers Service Commission (2017) eKLR, Josephat Ndirangu vs Henkel Chemicals (EA) Limited (2013) eKLR and Julius Situma vs Teachers Service Commission (2015) eKLR** where the decision of the Court was that the issues of employment law is in purview of private law and therefore Article 47 of Court does not apply.

5. In Cause No. 725/2015 **Loice Mutai vs Kenya Revenue Authority** vide a ruling delivered by Hon. Ndolo on 13.10.2017, the Hon. Judge dismissed the Claimant/Respondent’s application for reinstatement and termination of the disciplinary process against her wherein the decision of the disciplinary committee had not been communicated to her from 24th November 2015.

6. The Claimant opposed the Preliminary Objection. They filed their Grounds of Opposition on 9.1.2018 stating as follows:-

1. The Petition is not time barred and provisions of Section 90 of the Employment Act do not apply as the Petitioner is on suspension.

2. The Honourable Court has jurisdiction to entertain the Petition.

3. The Petition is not an abuse of the Court process and parties will be accorded an opportunity to present their case in the manner they so wish subject to directions of the Court, the overriding objective being dispensation of justice.

4. The Respondent is only keen on delaying the hearing of the Petition and delivery of justice contrary to the provisions of the Constitution of Kenya, 2010.

7. They prayed that the Preliminary Objection be dismissed. The Claimants also filed their submissions stating that the application is not in the nature of a Preliminary Objection as the principle in **Mukisa Biscuit** case had not been established.

8. On limitation, they also submitted that the Petitioner is still on suspension and is alleging violation of her constitutional rights. They aver that this being an issue of suspension and not dismissal, the provisions of Section 90 of Employment Act do not apply.

9. I have considered the submissions of both parties. From the Petition filed herein, the Petitioner is seeking a declaration that her suspension is a gross violation of her constitutional rights. There is no indication that the Petitioner has been dismissed or termination.

10. 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 unless it is commenced within three years next after the act, neglect or default complained of or in the case of continuing injury or damage within twelve months next after the cessation thereof”.

11. This Section therefore deals with issues of dismissal or termination. Given that the Petitioner is on suspension, she is basically still an employee of the Respondent and therefore the provisions of Section 90 of Employment Act will not apply. That being the case, I do not find the Preliminary Objection merited. I therefore dismiss the same with costs to the Petitioner/Respondent.

Dated and delivered in open Court this **27th day of April, 2018**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Odhiambo for the Petitioner

Chabala for Respondent