



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 138 OF 2016**

**PROF. DR. MONI WEKESA.....PETITIONER**

**- VERSUS -**

**MOUNT KENYA UNIVERSITY.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 11<sup>th</sup> May, 2018)

**RULING**

The petitioner filed on 11.11.2016 the petition dated 07.11.2016 and through Moni Wekesa & Company Advocates. The prayers are for judgment against the respondent for:

- a) A declaration that the retrenchment of the petitioner was unlawful and wrongful.
- b) A declaration that the retrenchment of the Petitioner violated his right to fair labour practices.
- c) A declaration that the retrenchment of the Petitioner violated his right to dignity.
- d) A declaration that the retrenchment of the petitioner has violated his right not to be discriminated against.
- e) A declaration that the retrenchment of the petitioner denied him the right to enjoy all other rights provided for under chapter four of the Constitution of Kenya 2010.
- f) Payment of Kshs. 58, 130, 895.00 being 12 months' compensation, severance pay, underpayment, pay in lieu of notice, pay on remainder of contractual term, aggravated damages and punitive damages.
- g) Reinstatement.
- h) Costs of the suit plus interest at Court rates.

At paragraph 22 of the petition, the petitioner has alleged infringement of various rights including the right to fair labour practices under Article 41(1); the right to dignity under Article 28; the right not to be discriminated against under Article 27(5); and the right to enjoy all other rights provided for under chapter four of the Constitution of Kenya, 2010.

On 12.04.2017 the respondent entered appearance through Adera & Kenyatta Advocates and on 16.06.2017 filed the replying affidavit of Professor Evans Kerosi. On 31.10.2017 the respondent filed a notice of preliminary objection that the petition be struck out upon the following grounds:

- a) The petition does not disclose any violation of the Constitution hence fatally defective and incurably incompetent.
- b) The petition does not meet the threshold of a constitutional petition hence liable to be struck out as an abuse of court process.

The petitioner filed on 03.11.2017 grounds of opposition to the preliminary objection and the same can be summed up as follows:

- a) The Court of Appeal has held that the Constitution does not lionize form over substance. That the primary purpose of pleadings is to

communicate with an appreciable degree of certainty and clarity the complaints that a pleader brings before the court and to serve as sufficient notice to the party impleaded to enable him to know what case to answer.

b) The Constitution of Kenya 2010 presents an epical shift that would preserve informal pleadings that would otherwise have been struck out in former times and Article 159 of the Constitution applies.

Parties filed their respective submissions on the preliminary objection.

The 1<sup>st</sup> issue for determination is whether the petition does not disclose any violation of the Constitution hence fatally defective and incurably incompetent. The Court considers that at this preliminary stage, whether the petition discloses any alleged violation of the Constitution is a matter of pleading. The Court has perused the petition and returns that the petition like in the cited paragraph 22 clearly alleges violation or infringement of constitutional rights. Paragraphs 29, 30 and 31 of the petition set out details on alleged violation of the petitioner's right to dignity. The Court has perused the petition and returns that on the face of it, it cannot be said that the petition has failed to disclose a cause of action for enforcement of fundamental rights and freedoms as enshrined in the Constitution.

While making that finding, the Court considers that where a respondent raises the defence that the petition raises no constitutional issue in circumstances whereby the petitioner has clearly alleged violation of the constitutional provisions or the fundamental rights and freedoms in the Bill of Rights, such defence would best be urged as a substantive issue in the petition rather than as a preliminary objection. The Court follows the opinion in Beatrice Wanjiru –Versus- The Attorney General and Another [2017]eKLR thus:

**“The court has considered whether it was appropriate to take up the issue of limitation of time as a substantive issue rather than a preliminary issue in the suit. As a preliminary issue, the court would be restricted to examining the pleadings without having to go into the merits of the case and the possible evidence that would be available only at the full hearing. In that event, looking at the pleadings, a case for “no constitutional issue” would not have been successfully urged for the 2<sup>nd</sup> respondent because, the petitioners had clearly pleaded allegations and claims of violation of rights and fundamental freedoms. The court has returned that there was no constitutional issue after examining the evidence and taking into account the full merits of the case. The court therefore holds that in a case in which the petitioner has on the face of the pleadings clearly alleged and claimed violation of rights and fundamental freedoms, a challenge based on the limitation period will invariably be best argued at the full hearing of the petition where and when the evidence and full merits of the case are evaluated. Thus, in such cases, the court returns that the issue of limitation period for filing the petition becomes a substantive rather than a preliminary issue. Accordingly, the court returns that the issue of limitation period for filing the present petition was properly urged as a substantive issue in the petition.”**

The 2<sup>nd</sup> issue for determination and which is related to the 1<sup>st</sup> issue is whether the petitioner should have filed an ordinary action and not a constitutional petition. The Court has reconsidered the pleadings and the reliefs sought. It is submitted for the respondent that the case is purely one of alleged breach of contract to be pursued by way of an ordinary action by filing a memorandum of claim as provided at Rules 4 and 7(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016. The respondent has cited Hon. Uhuru Muigai Kenyatta –Versus- The Nairobi Star Publications Limited [2013]eKLR where Lenaola J (as he then was) held that if there is a remedy in Civil Law, a party should pursue that remedy since not every ill in society should attract a constitutional sanction.

For the petitioner it is submitted that Rule 7(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides that a party who wishes to institute a petition shall do so in accordance with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules. Rule 7(3) thereof then provides that notwithstanding anything contained in this rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the court.

The Court holds that the cited Rules 7(2) and (3) are carefully designed to emancipate litigants from burdensome procedural slavery and the same is in line with Article 159 (2) (d) which states that in exercising judicial authority, the courts and tribunals shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities. Thus, the Court holds that a litigant does not need to file an ordinary action and at the same time file a petition with respect to the same facts and transaction but for separate reliefs envisaged under an ordinary action and the petition. The Rule aims at making litigation efficient and cost effective without burdening the litigant with filing of numerous suits arising from the same transaction or set of facts so that all conceivable reliefs are made available in a single legal process or action.

Thus, Article 22 of the Constitution confers every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. Article 19(3)(b) provides that the rights and fundamental freedoms in the Bill of Rights do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with Chapter 4 of the Constitution on the Bill of Rights. Under Article 23(3) the remedies available in cases of contravention of a right or fundamental freedom include a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24, an order of compensation, and an order of judicial review. Then, Article 258 confers every person the right to institute court proceedings claiming that the Constitution has been contravened, or is threatened with contravention.

The Court has considered the foregoing constitutional provisions and follows its opinion in Peter Muchai Muhura –Versus- Teachers Service Commission [2015]eKLR thus: **“It is the opinion of this court that the barriers or ridge or valley between judicial review proceedings and the ordinary actions as they were has been collapsed by the Constitution of Kenya, 2010. The Constitution has opened avenues to access to justice and all stipulated remedies in the same proceedings; ordinary action or prescribed application. Thus, litigants need not file separate processes to access the different available remedies. It is true that universal procedural rules have not yet fully evolved in our judicial system to keep pace with the constitutional liberation of litigants; a legitimate and urgent project towards full realization of the constitutional principles in Article 159 that justice shall not be delayed; justice shall be administered without undue regard to procedural technicalities; and the purpose and principles of the Constitution shall be protected and promoted.”**

Again, in Professor Elijah Biama –Versus- University of Eldoret and 2 Others [2014]eKLR the court stated as follows, “...The court holds that a venture to distinguish the manner a litigant approaches or ought to approach the court merely on the basis of the remedy or the situ (prescription of the right or fundamental freedom as embedded in the Constitution or legislation or other formal source) of the right or fundamental freedom in issue is long dead under the former constitutional dispensation as the new constitutional order prescribes and favours universal approach towards the realization of the rights and fundamental rights irrespective their primary formal situ. In the opinion of the court, future measures of aligning court procedures to the new constitutional order will entail universal procedure for realization and enforcement of the rights and freedoms irrespective the formal source or residence of the right or fundamental freedom because the Constitution incorporates all as part of the Bill of Rights. If every dispute that comes to court entails enforcement of some legitimate right or fundamental freedom which the Constitution has incorporated in the constitutional Bill of Rights, then, in the court’s opinion, time for a universal procedure by which parties should move the court has come and it would be pursuit in vanity to look for and attempt to sieve rights and fundamental freedoms that are expressly provided for in the Bill of Rights as was the case in the days of Harriksion –Versus- Attorney General of Trinidad and Tobacco (1980) AC 265. For the time being that the universal procedure is not in place, it is the opinion of the court that litigants will not be faulted for the option they shall adopt of the myriad procedural options that continue to peep their souls from the former constitutional dispensation to the new constitutional order.”

The Court observes that from the pleading, the petition indeed sets out alleged violations of the constitutional rights, while at the same time, makes claims for breach of the contract of service capable of being pursued in an ordinary action. The Court returns that it will be just, expeditious and proportionate for the matters to be heard and determined in the petition as envisaged in section 3 of the Employment and Labour Relations Court Act, 2011. In that regard the Court follows the opinion of the Court of Appeal in Prof. Daniel N. Mugendi –Versus- Kenyatta University and 3 Others, Civil Appeal No. 6 of 2012, where the Court stated thus, “The question now is whether the appellant should go back and ‘sever’ the composite petition alleging violation of his fundamental rights and breach of contract of employment. Much as severance would entail time and resources to effect the necessary amendments and make due motions, we are of the view that with necessary amendments, which appear imperative to make out a clear use of breach of rights being effected, the appellant can and should be heard by the Industrial Court on the two claims i.e. violation of rights and breach of contract of employment. The position that the Industrial Court can and should entertain the claim as laid by the appellant, is in line with the decision of Majanja, J. in Petition No. 170 of 2012 – United States International University(USIU) –Versus- The Attorney General & Others.”

The 3<sup>rd</sup> issue for determination is whether the petition fails to meet the threshold for a constitutional petition because the petitioner has failed to demonstrate existence of a public right or interest or state-role as a prerequisite for a valid constitutional petition. It is submitted for the respondent that the petition is between two private persons, the individual petitioner and the respondent being a private chartered university. Thus, it is submitted that the petition must fail because the petitioner has failed the tests in those regards. For the petitioner it was submitted that the Bill of rights applies to the state and its agents as much as to private persons, natural and artificial.

The court agrees with the petitioner’s submission and follows its opinion in the ruling in Gabriel Keya –Versus- Nick Emson and Another [2016]eKLR thus, “The 2<sup>nd</sup> issue is whether the claimant should have filed an ordinary action and not a constitutional petition. It was submitted for the respondents that a constitutional petition could only be brought against the government or a public body or agency and a public interest had to be established in that regard. Article 3(1) of the Constitution states that every person has an obligation to respect, uphold and defend the Constitution. Article 10(1) provides that the national values and principles of governance in the Article bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. Article 20(1) provides that the Bill of Rights applies to all law and binds state organs and all persons. Article 22(1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened ( the court considers that the provision does not limit the right to institute court proceedings to instances where denial, violation, infringement or threat is by the state, state organ, state officer or public officer - proceedings could be instituted even where the denial, violation, infringement or threat is by any other person, natural or artificial, and proceedings in such cases would be against such individual person). The court has considered the cited provisions of the Constitution and returns that nothing in the Constitution precluded the petitioner from filing the petition against the respondent and seeking the kind of remedies that were prayed for. As was held in Satrose Ayuma & 11 Others –Versus- Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others [2013]eKLR the Bill of Rights binds all state organs and all persons, whether they are public bodies or juristic persons. Further, as was held in that case, from the wide definition of the word “person” in Article 260, the intention of the framers of the Constitution was to have both a vertical and horizontal application of the Bill of Rights. Thus, the court returns that the petitioner was entitled to file the petition under Article 22 seeking remedies as provided for in Article 23 of the Constitution. As submitted for the petitioner, under rule 20(1) of the the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 the hearing of the petition is by way of affidavits, written submissions or oral evidence and the parties will have chance to take directions in that regard towards ends of justice in the present petition.”

Thus, the Court returns that the petition will not fail for want of a public right or interest or state-role as the same are not a prerequisite for a valid constitutional petition to enforce rights, freedoms or other constitutional provisions.

In conclusion, the notice of preliminary objection dated 31.10.2017 and filed on 31.10.2017 is hereby dismissed with costs in the cause. Parties are now invited to take directions on further steps in the petition.

**Signed, dated and delivered** in court at Nairobi this Friday 11<sup>th</sup> May, 2018.

**BYRAM ONGAYA**

**JUDGE**