



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
PETITION NO. 16 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 33, 47, 48, 50, 75, 163, 168 AND 172 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUALS AS ENSHRINED UNDER ARTICLE 27, 28, 29, 33, 47 AND 48 OF THE CONSTITUTION

AND

IN THE MATTER OF SUCCINCT PRINCIPLE OF NATURAL JUSTICE

AND

IN THE MATTER OF PRINCIPLES OF REASONABLENESS AND LEGITIMATE EXPECTATIONS

AND

IN THE MATTER OF THE TEACHERS SERVICE COMMISSION ACT

ZACHARY ONYAMBU MANANI.....PETITIONER

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

Before me is a notice of preliminary objection filed by the respondent on grounds that the petition herein is time barred and grossly offends the mandatory provisions of Section 4(1)(a) of the Limitation of Actions Act and Section 3(2) of the Public Authorities Limitation Act. The respondent prays that the petition be struck out with costs to the respondent.

In the respondent’s submissions in support of the preliminary objection it is urged that the petitioner was employed by the County Council of Kisii (now defunct) on 1st January 1964 as an untrained teacher and posted to Nyacheiki Primacy School in the Nyamache District. He served in various schools under the employment of the respondent until 1st May 1992 when he retired from service. That the petitioner in his affidavit confirms these facts.

It is submitted that the petitioner having retired on 1st May 1992, any action relating to his employment contract should have been filed within 6 years as provided under Section 4(1) of the Limitation of Actions Act. The respondent relied on the following cases –

The Court of Appeal in **CIVIL APPEAL NUMBER 142 OF 1997: DIVECON LIMITED VS. SHIRINKHANU SADRUDIN SAMANI** held:

"To us, the meaning of section 4 (1) of the Limitation of Actions Act is clear and beyond doubt. It means no one shall have the right or power to bring after the end of six years from the date on which the cause of action accrued in an action founded in contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action."

"..By the time the Respondent's Suit was brought, the limitation period of six years had already elapsed and since this period cannot be extended, the suit with respect to a breach of contract if that was so, was properly time barred."

In **MOMBASA INDUSTRIAL CAUSE NO. 214 OF 2013: MARY KASIWA VS. SCORPIO ENTERPRISES LIMITED**: The Court held;

"Section 4 (1) of The Limitations of Actions Act amended by section 90 of Employment Act is not merely procedural but substantive provision. It affects rights which persons such as the Claimant enjoyed...in the instant case, the Claimant should have filed her claim on or before July 2012, but instead she filed the cause on 22nd July 2013. The claim was filed outside 6 year period and it must be struck out."

In **PETITION NO. 1 OF 2013: JOSEPHAT NDIRANGU VS. HENKEL CHEMICALS (EA) LIMITED**: Justice Radido held:

"The court's answer and what I understand to be the correct legal position is that the court has no jurisdiction to extend time to commence claims arising out of contract, employment contract included once time has expired or lapsed."

"Secondly, the Respondent submits that the matter before you though framed as a Constitutional Petition inform, is a contractual dispute in substance emanating from an employment relationship."

The respondent submitted that the petitioner's employment with the respondent was contractual and falls under the purview of the Employment Act and does not extend to the realm of constitutional platform, that the petitioner has improperly invoked the constitutional jurisdiction of this court.

It is submitted that the petitioner's terms of service were regulated by the Code of Regulations for Teachers, the Teachers Code of Conduct and Ethics and the Employment Act, that it is a contractual matter that should not be elevated to a constitutional petition. It is submitted that the matter has been disguised as a petition purposely to evade the rigours of the law regulating limitation.

That the court's jurisprudence is clear that a simple labour dispute cannot jettison the application of the substantive and procedural law on employment.

The respondent submits that Justice Nduma Nderi in **JOHN MIRITI MBARIRE VS. AG: INDUSTRIAL COURT PETITION NO. 19 OF 2014** held:

"The Petitioner argues that because his claim is brought by way of a petition under the Constitution, then he is not bound by the provisions of limitation. In the submissions filed on his behalf the Court was referred to several authorities on the point that actions for breach of fundamental rights and freedoms are not bound by limitation of time. While I fully agree with these authorities, I do not think that every action that is brought by way of a petition falls under this insulation."

*In the case of **KEMRAJH HARRIKISSOON VS THE ATTORNEY GENERAL OF TRINIDAD AND TOBAZO 119791 UKPC 3** the Court held that the value of the right for redress for breach of fundamental rights and freedoms is diminished when it is misused as a general substitute for the normal procedures for invoking judicial control of administrative action. I am persuaded that this is the correct interpretation of our jurisprudence even against the backdrop of the current Constitution which elevates labour rights to the Bill of Rights. I do not think that this elevation jettisons the applicable substantive and procedural law on employment and labour relations."*

In view of the foregoing, the Court finds that the Petitioner's claim is founded on contract and is therefore subject to limitation. According to the pleadings filed in Court, the Petitioner's commission was terminated effective 5th August 1995 giving rise to the cause of action herein. Even taking the six year limitation period provided under the Limitation of Actions Act, the Petitioner's claim is way out of time."

Justice Stephen Radido reiterated the above Principle in **MOMBASA INDUSTRIAL COURT PETITION NO. 1 OF 2013: JOSEPHAT NDIRANGU V HENKEL CHEMICALS (EA) LIMITED** when he held:

"In my view, a litigant should not avoid the provisions of the Employment Act regarding unfair termination or wrongful dismissal by going behind the statue and seeking to rely directly on Article 41 of the Constitution on the right to fair labour practices. The purpose of the Constitution is that the right to fair labour practices is given effect in various statutes. The Employment Act and the Labour Relations Act are primary."

In **PETITION NO. 187 OF 2012: UHURU KENYATTA VS. STAR PUBLICATIONS LIMITED**: Justice Lenaola held:

"I need say no more. Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG VS S.K. DUTAMBALA CR. APPEAL NO.37 OF 1991 (TANZANIAN COURT OF APPEAL), such sanctions should be reserved for appropriate and really serious occasions"

In **JOSEPH MUTURI MBERIA & ANOTHER VS. COUNCIL OF JKUAT (2013) eKLR** Justice Mbaru held:

"Direct reliance on fundamental rights as contained in the constitution is impermissible when the right in issue is regulated by legislation, as is actually the case with the Employment Act which directly regulates fair labour practices, which includes suspension, termination and dismissal. When a legislation is enacted to give effect to a constitutional right, a litigant cannot by pass the legislation and rely directly on the constitution without challenging that legislation as falling short of the constitutional standard."

The respondent further submitted that the court has no jurisdiction to determine the issues raised in the petition for reasons that the petition is based on a cause of action which is statute barred. The respondent relied on the decision in **CIVIL APPEAL NO. 142 OF 1997: DIVECON LIMITED -V- SHIRNKHANU SADRUDIN SAMAMNI** in which the court stated –

"To us, the meaning of section 4(1) of the Limitation of Actions Act is clear and beyond doubt. It means no one shall have the right or power to bring after the end of six years from the date on which the cause of action accrued in an action founded in contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action."

The respondent prays that the petition be struck out or dismissed for want of jurisdiction.

Petitioner's Case

For the petitioner it is submitted that the petition is based on the provisions of the old and current constitutions that the Limitation of Actions Act does not apply to constitutional actions or petitions, that under the Judicature Act the constitution is the supreme and overriding law and a statute cannot supersede or override the provisions of the constitution and the fundamental rights enshrined therein. The petitioner submits that the constitution safeguards the hearing and determination of matters by courts on merit and without undue regard to technicality.

Determination

I have considered the rival submissions of parties on the grounds of preliminary objection. I have also considered the law and the authorities cited. The issue for determination is whether is not the cause of action in the petition is subject to limitation.

I have looked at the petition. The only provision of the constitution mentioned is Article 27 and this is in the prayers. There is no mention of any provision of the Constitution in the body of the petition bringing to the fore the pains at which the petitioner was in to try and fit his cause of action into a constitutional matter. The gist of the petition is that the petitioner was retired early before he attained the mandatory age of retirement. The constitution does not concern itself with retirement age.

I thus agree with the respondent that this is a contractual matter that is governed by employment law and that the only reason the petitioner filed a petition was in the hope of evading the law on limitation.

The petitioner does not deny that the cause of action is statute barred under the Limitation of Actions Act.

As was stated by the court in the cases cited by the respondent being **JOHN MIRITI MBARIRE -V- THE ATTORNEY GENERAL, JOSEPHAT NDIRANGU -V- HENKEL CHEMICALS (EA) LIMITED** and **JOSEPH MUTURI MBERIA & ANOTHER -V- COUNCIL OF JKUAT**, the framing of a cause of action does not jettison the applicable substantive and procedural law on employment and labour relations. The courts must guard against distortion or manipulation of the constitutional jurisdiction to escape the consequences of limitation.

For the foregoing reason the preliminary objection succeeds with the consequence that the petition filed herein being anchored on a cause of action that is statute barred, the court has no jurisdiction to determine the same. The petition is accordingly struck out with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF JULY 2018

MAUREEN ONYANGO

JUDGE