



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 45 OF 2017

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

JOHN OMOLE OWUOR.....PETITIONER

- VERSUS -

TECHNICAL UNIVERSITY OF KENYA.....RESPONDENT

RULING

1. The Application before Court is the Preliminary Objection that has been raised by the Respondents herein dated 29th March 2018. The Respondent raised this Preliminary Objection to the effect that:-

- 1) *The subject matter of this Petition is statute barred hence incompetent and incurably defective.***
- 2) *That this Court lacks jurisdiction to hear and determine this Petition and***
- 3) *That this Petition be dismissed with costs.***

2. The Parties agreed to dispose of this Preliminary Objection through written submissions.

3. The Applicant/Respondent have submitted that the Petitioner left its employment in 2009 and as such this is a matter falling purely under the employment contract and which matter should be filed within 3 years since the time the cause of action arose. They relied on Section 90 of Employment Act.

4. The Petitioner avers that he received the final communication of none reinstatement in September 2015 and this is when it was confirmed that he could not be reinstated.

5. He avers that the Petition is not just about an employer-employee relationship but also about his right to be employed.

6. He submitted that the Petition is not time barred as the Petition is *sui generis* and is about the refusal by the Respondent to recognize the Petitioner as its employee.

7. I have looked at the Petition as filed. The Petitioner seeks declaratory orders on the infringement of his rights under Article 27, 41, 47 of the current Constitution and Section 82 of the Repealed Constitution.

8. He also seeks an order for mandamus compelling the Respondent to reinstate him on his former capacity as an employee of the Respondent amongst other prayers.

9. My view is that this Petition seeks an interpretation of the Petitioner's constitutional rights as allegedly violated.

10. In **Wellington Nzioka vs Attorney General (2018) eKLR**, the Court of Appeal addressed this issue and stated as follows:-

“We cite with approval the following finding by Majaja J in James Kanyita Nderitu vs Attorney General and Another, Petition No. 180 of 2011.

“Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under section 84 of the constitution, is entitled to consider whether there has been inordinate delay in lodging the claim. The Court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, should be vexed by an otherwise stale claim. Just as a petitioner is entitled to enforce its fundamental rights and freedoms, a respondent must have a reasonable expectation that such claims are prosecuted within a reasonable time.”

11. In the current Petition, in considering whether the matter is time barred or not, I note the period in question is between 2009 and 2015. The Court will have to consider when the cause of action arose and this will be after considering evidence. This cannot be done in a preliminary manner as submitted by the Respondent. That notwithstanding, the period between 2009 and 2015 cannot be a period of inordinate delay.

12. In this case then and following the Court of Appeal decision above (Wellington Nzioki Kioko vs Attorney General and Another) supra, I find that the Petition is not time barred.

13. On jurisdiction, this Court’s jurisdiction to handle rights issues emanating from an employment contract has already been settled. This Court draws its jurisdiction from Article 162(2) of the Constitution. The Court deals with any matter arising between an employee and an employer and therefore the Court’s jurisdiction to handle this Petition is a foregone cause.

14. I find I have jurisdiction to handle this Petition and therefore find that the Preliminary Objection raised has no merit. It is dismissed and I direct that the main Petition proceeds for hearing and determination.

15. Costs in the cause.

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

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mugo holding brief for Kuloba for the Applicant – Present

Respondent – Absent