



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO.100 OF 2015

IN THE MATTER OF BREACH OF FUNDAMENTAL RIGHTS AND FREEDOMS AS ENshrINED IN THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF BREACH OF THE RIGHTS OF AN EMPLOYEE

AND

IN THE MATTER OF ARTICLES 22, 23, 30, 47, 50 AND 162 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 62(1) OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003

BETWEEN

EDEN ROBINSON ODHIAMBO

PETITIONER

v

BOARD OF TRUSTEES TOURISM FUND

RESPONDENT

JUDGMENT

1. On 5 April 1991, Eden Odhiambo Robinson (Petitioner) was offered employment by the Catering Levy Trustees (succeeded by Board of Trustees Tourism Fund in 2012) (the Respondent) as Management Trainee (Assistant Levy Collector). In the course of time the Petitioner rose to the position of Levy Manager. He also acted in the position of Chief Executive Officer in the absence of the substantive office holder.
2. On 30 January 2012, the Petitioner was appointed as the Head of Levy Operations.
3. Sometime in 2007, the Petitioner was appointed to serve as the Chairman of the Tender Committee.
4. On 4 October 2012, the Petitioner and other members of the Tender Committee were charged in Court with economic crimes/procurement offences (Anti- Corruption Case No. 14 of 2012) as a consequence of which the Petitioner offered to step aside on 5 October 2012.
5. The Respondent suspended the Petitioner on 10 October 2012 on account of criminal charges and the suspension letter cited section 62 of the Anti-Corruption and Economics Crimes Act, 2003.
6. On 4 December 2015, the Petitioner wrote to the Respondent seeking to be reinstated on the ground that his suspension pursuant to section 62(1) of the Anti-Corruption and Economic Crimes Act should not have exceeded 24 months.
7. The Respondent replied on 7 December 2015 advising the Petitioner that it would await for a clarification from the Office of the Attorney General on the issue.
8. The Petitioner appears to have been of a contrary view for on 15 December 2015 he moved the Court alleging that pursuant to the amendment in 2014 to section 62(1) of the Anti-Corruption and Economic Crimes Act, the suspension should not have exceeded 24 months.
9. The Petitioner contended that he should have been reinstated and that the failure to reinstate him violated the right not to be held in slavery

or servitude (Article 30); the right to fair administrative action (Article 47) and the right to a fair hearing (Article 50) of the Constitution.

10. The Petition was accompanied with a motion under certificate of urgency, and in a ruling on 22 December 2015, the Court held that the amendment to section 62(1) of the Anti-Corruption and Economic Crimes Act did not apply retrospectively and directed that the Petition be heard on a priority basis.

11. At the same appearance, the Court directed that the Petition be heard on 1 February 2016 (Respondent was directed to file and serve responses).

12. However, the Petitioner did not appear for the hearing on 1 February 2016 and the hearing was adjourned with an order that the Petitioner pay adjournment fees and costs of the Respondent before any further steps could be taken (there is no evidence of compliance).

13. On 30 March 2016, the Petitioner moved Court seeking leave to amend the Petition alleging constructive dismissal on account of the fact that the Respondent had advertised his position.

14. The Court granted an *ex parte* order stopping the Respondent from proceeding with the recruitment process.

15. In the meantime, the Magistrate's Court acquitted the Petitioner of the charges he was facing on 31 July 2017, and on 15 August 2017, the Petitioner wrote to the Respondent seeking reinstatement.

16. The Respondent wrote to the Petitioner on 24 August 2017 informing him that after a Board meeting it had been resolved that he be redeployed as *Head of Business Development* with all other terms and conditions remaining the same.

17. When the parties appeared in Court on 7 March 2018, the Petitioner indicated that he was abandoning the application filed in Court on 30 March 2017. He also made an oral application to amend the Petition.

18. The Court allowed the oral application and directed that an amended Petition be filed and served before 15 March 2018. The Respondent was allowed time to file an amended Response.

19. The Petitioner did not comply with the timelines and on 19 March 2018 the Petitioner filed a fresh application seeking leave to amend the Petition (the Court will take it that the Petitioner's case is embodied in the Amended Petition dated 16 March 2018 and which was filed as an annexure to the application).

20. The Court is at loss as to why the Petitioner was filing the fresh application only days after he had already secured leave.

21. When the parties appeared before Court on 5 April 2018, the Court directed that an amended Response be filed within 20 days.

22. On 12 June 2018, the Court directed that submissions be filed and the Petitioner filed his submissions on 20 July 2018 (should have been filed on or before 27 June 2018) while the Respondent filed its submissions on 17 August 2018.

23. The Court has considered the material on record including the submissions. Two issues stand out and they are the applicability of the amended section 62(1) of the Anti-Corruption and Economic Crimes Act and alteration of terms and conditions of service/constructive dismissal.

Evaluation

Section 62(1) of Anti-Corruption and Economic Crimes Act

24. The substratum of the *Amended Petition* herein is the legality of the Petitioner's suspension beyond 24 months in light of the provisions of section 62(1) of the Anti-Corruption and Economic Crimes Act, and the alteration/variation of the terms and conditions of service.

25. This Court (Nzioki wa Makau J) substantively dealt with the question of suspension beyond 24 months in its *ex tempore* ruling of 22 December 2015.

26. This Court therefore cannot revisit the constitutionality of that section and whether and how it applied to the case of the Petitioner.

27. This Court had made a determination that the amendment did not apply retrospectively and it would be sitting on appeal of its decision to revisit the question.

Alteration of terms of service

28. The Petitioner admitted that he had filed Nairobi Cause No. 2172 of 2016, *Eden Robinson Odhiambo v Board of Trustees of the Tourism Fund* where he is alleging violations of his rights (alteration of terms of employment). The Cause is still pending.

29. On this issue of alteration/variation of terms and conditions of employment by redesignating/redeploying the Petitioner, it is the view of the Court that the alteration of the terms of service and/or constructive dismissal can competently be dealt with under statute in the pending Cause (Cause No. 2172 of 2016) and not under the Constitutional jurisdiction.

30. In this respect the words of Lord Diplock in *Harrikissoon v Attorney General of Trinidad and Tobago (1980) AC 265* are apposite

The right to apply to the High Court... for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control...

31. Within our jurisdiction, the High Court in *Benard Murage v Fine serve Africa Limited & 3 others (2015) eKLR* stated that

Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.

32. This Court finds the principles set out in these two decisions applicable in the present case.

33. Further, because the Petitioner had raised the same questions in Cause No. 2172 of 2016, it was not open to him to institute this Petition, alleging the same facts and issues.

34. It can therefore be said that the Petitioner was not only abusing the Court process but attempting to play roulette with the Court.

Conclusion and orders

35. For the above reasons, the Court finds no merit in the Petition and orders that it be dismissed with costs to the Respondent.

Delivered, dated and signed in Nairobi on this 16th day of November 2018.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Okubasu instructed by Okubasu & Munene Advocates

For Respondent Mr. Muyuri instructed by Ogetto, Otachi & Co. Advocates

Court Assistant Lindsey