



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 106 OF 2017**

**IN THE MATTER OF ARTICLES 19, 22(1),(2)(b) AND 260 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ARTICLES 162(2)(a) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL**

**RIGHTS AND FREEDOMS UNDER ARTICLES 27(2),**

**41 AND 47(1),(2) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE THREATENED TERMINATION OF EMPLOYMENT**

**WITHOUT SUBSTANTIVE AND PROCEDURAL FAIRNESS**

**AND**

**IN THE MATTER OF PART VI OF THE EMPLOYMENT ACT CAP 266 LAWS OF KENYA**

**BETWEEN**

**NAOMI NZILANI MWOLOLO.....PETITIONER**

**v**

**PRUDENTIAL GROUP LIMITED.....1<sup>st</sup> RESPONDENT**

**EMPIRE MICROSYSTEMS LIMITED.....2<sup>nd</sup> RESPONDENT**

**PIONEER FSA LIMITED.....3<sup>rd</sup> RESPONDENT**

**RULING NO. 2**

1. On 13 October 2014, Empire Microsystems Ltd (2<sup>nd</sup> Respondent) offered the Petitioner a contract as a Finance Manager for 3 years (renewable).
2. Around 1 July 2017, the Petitioner gave notice of resignation but the 2<sup>nd</sup> Respondent declined to accept the resignation and prevailed upon her to serve the contract to expiry, and thereafter take up a new contract with Prudential Group Ltd (the 1<sup>st</sup> Respondent).
3. On 8 September 2017, the Petitioner took up an offer to serve as Group Finance & Administration Manager with the 1<sup>st</sup> Respondent on a 2

year contract.

4. In October 2017, the Chief Executive Officer of Pioneer FSA Ltd (3<sup>rd</sup> Respondent) proposed to the Petitioner to take up full time employment with the 3<sup>rd</sup> Respondent but under the prevailing terms with the 1<sup>st</sup> Respondent, but when the letter of offer came on 22 November 2017, it had different terms.

5. The Petitioner rejected the offer and thereafter received an email on 1 December 2017 informing her of the termination of her employment.

6. The email prompted the instant proceedings in which the Petitioner alleged that *the alteration of the terms of employment* contravened her rights to fair administrative action; fair labour practices and protection to equality and freedom from discrimination.

7. At the time of filing the Petition, the Petitioner also filed an application seeking interim interdicts against the Respondents from terminating her employment. The application was dismissed in a ruling given on 9 February 2018.

8. On 8 March 2018, an *Amended Petition* was filed and this prompted the Respondents to file an *Answer to Amended Petition* on 3 April 2018.

9. The reliefs sought in the *Amended Petition* were

c) A declaration that the respondents' actions of reducing the petitioner's salary without her consent and constructively to terminate **terminating** her employment amount to unfair labour practice and infringes on the petitioner's constitutional rights.

d) One (1) month's salary in lieu of Notice – Ksh. 120,000

e) Unpaid salary for December 2017 – Kshs. 120,000

f) Compensation for unfair termination – 1,440,000 g) General damages for breach of constitutional rights and freedoms

h) Certificate of Service

i) Cost of the suit

j) Interest on the above at court rates

k) Any other relief this honorable court may deem fit to grant.

10. At the same time, the Respondents filed a Notice of Preliminary Objection on the grounds

1. The Petition is bad in law as it offends the mandatory provisions of the Employment Act, 2007 and the Employment and Labour Relations Court (Procedure) Rules, 2016.

2. The Petitioner is circumventing the Employment Act and the Procedure Rules by seeking reliefs not attainable under a Petition.

3. The Petition is an abuse of the court process.

4. The Petition is incompetent and ought to be struck out with costs.

11. The Court heard submissions on the objection and reserved ruling to today.

12. This is not the first time that the mode of approaching the Court in a case of *unfair termination of employment* is coming under challenge, and more so where the Constitutional Petition route has been chosen instead of the normal route as envisaged under the Employment and Labour Relations Court (Procedure) Rules, 2016.

13. In the instant case, the cause(s) of action advanced by the Petitioner are circumscribed by statute and more so the Employment Act, 2007. *Unfair termination of employment* and *discrimination* in employment are all governed by the statute and appropriate remedies made available thereunder.

14. In this respect, the words of the Privy Council in *Kemrajh Harrikissoon Vs the Attorney General of Trinidad and Tobago (1979) UKPC 3* become apt

*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.*

15. In the Court's view and it so finds, the Petitioner was abusing the Court process by invoking the constitutional jurisdiction when the dispute advanced could appropriately be adjudicated on under statutory law.

16. Considering that the dispute is not yet caught up by the law of limitation, the Court upholds the preliminary objection and strikes out the Petition with costs.

**Delivered, dated and signed in Nairobi on this 9<sup>th</sup> day of November 2018.**

**Radido Stephen**

**Judge**

**Appearances**

For Petitioner                      Mr. Thiongo instructed by Githinji & Koki Advocates

For Respondents                  Ms. Alogo instructed by J.M. Njengo & Co. Advocates

Court Assistant                    Lindsey