



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

CONSTITUTIONAL PETITION NO. 25 OF 2018

IN THE MATTER OF ARTICLES 22(1) AND 23(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS PURSUANT TO SECTIONS 27(1), 47(1), 48 AND 50(1) AND (2) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF RULES 4 AND 10 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

LYDIA KAIMURI GIKUNDI.....PETITIONER

AND

POSTAL CORPORATION OF KENYA.....RESPONDENT

RULING

1. The Respondent's preliminary objection dated 5th June 2018 is what is due for determination. The notice of preliminary objection is to the effect that:-

- a. the Petition filed on 18th May 2018 is incompetent, misconceived, fatally defective and bad in law;
- b. the court lacks requisite jurisdiction to hear and determine the case;
- c. the suit is itself time barred given the fact that 10 years since dismissal. It violates Section 90 of the Employment Act.
- d. the prayers herein are unsustainable and are therefore unavailable to the Petitioner;
- e. the petition is tantamount to trifling with the court and is an abuse of this honourable court.

2. The Petitioner is a former employee of the Respondent who was dismissed on 3rd January 2008, charged in a criminal court and discharged under Section 87 of the Criminal Procedure Code. The Petition seeks declaration that her dismissal was unlawful, unfair and unreasonable; an order directing the Respondent to pay the Petitioner her gross salary to retirement; an order directing the Respondent to pay 12 months salary for notice in lieu of termination; an order directing the Respondent to pay accrued pension up to retirement; an order directing the Respondent to pay accrued leave allowance up to retirement; compensation for defamation and loss of career and golden opportunities; an order directing the Respondent to pay house allowance up till retirement; and costs of the suit and interest.

3. The parties filed submission in support and opposition of the preliminary objection. The Respondent submitted that the twin issues that are for determination at this stage is whether the Petition suffices as a constitutional petition and whether the honorable court has jurisdiction to entertain the suit. The Respondent submits that the petition before the court does not at the very least meet the threshold of being a constitutional petition. The case of **David Ramogi & 4 Others v The Cabinet Secretary, Ministry of Energy and Petroleum & 7 Others**

[2017] eKLR was cited in support of arguments that the petition is a memorandum of claim cleverly disguised as a constitutional petition. The Respondent submits that a reading of the Petition does not reveal what specific actions of the Respondent were unconstitutional and by extension a violation of her constitutional rights. The case of **Kenya Pharmaceutical Association & Another v Nairobi City County and the 46 other County Governments & Another** [2017] eKLR was relied on for the proposition that a constitutional petition must be pleaded specifically and with particularity. The Respondent submits that the reason for the filing a petition was to defeat the provisions of Section 90 of the Employment Act which limits the filing of a suit beyond the 3 year limitation period. The Respondent relied on the case of **G4S Security Services (K) Limited v Joseph Kamau & 468 Others** [2018] eKLR on the issue of limitation and also the case of **Aviation Cargo Support Limited v St. Mark Freight Services Limited** [2014] eKLR on the issue of inordinate delay. The Respondent relying on the case of **Owners of the Motor Vessel Lilian 'S' v Caltex Oil (K) Ltd** [1989] KLR 1 submitted that jurisdiction is everything and without it a court can do nothing. The Respondent cited the cases of **In Re The Matter of the Interim Independent Electoral Commission** [2011] eKLR a Supreme Court of Kenya decision, **Bosire Ogeto v Royal Media Services** [2015] eKLR and **Masagu Ole Koitalel Naumo v Principal Magistrate Kajiado Law Courts & Another** [2014] eKLR for arguments that once limitation sets in the rights inherent in the matter dissipate and the petition is a nullity. The Respondent submitted that both equity and justice abhor a claimant's indolence and the overall rationale for the statute of limitations is to protect the system from stale claims. The case of **Kahindi Ngala Mwangandi v Mtana Lewa** [2014] eKLR was cited in support of this argument. The Respondent urged that the Petition be dismissed.

4. The Petitioner submitted that the preliminary objection is misconstrued, bad in law and incompetent as it offends the provisions of Article 20 of the Constitution. It was the Petitioner's argument that the preliminary objection offends the court's holding in **Mukisa Biscuits Manufacturing Co. Ltd. v West End Distributors Ltd.** [1969] EA 696, **Clement Ernest Opiyo Murenga v Principal Secretary, Treasury and Another** [2017] eKLR, **Henry Nyakoe Obuba v National Police Service Commission & 3 Others** [2015] eKLR, **Jane Atieno Otieno v National Police Service & 3 Others** [2018] eKLR and **John Muruge Mbogo v Chief of the Kenya Defence Forces & Another** [2018] eKLR. The Petitioner thus sought the dismissal of the preliminary objection with costs.

5. The law of limitation is intended to bar plaintiffs from instituting claims that are stale and aimed at protecting defendants against unreasonable delay in bringing of suits against them. In the cases cited by the Petitioner on limitation, the position taken by Ongaya J. in the cases of **Henry Nyakoe Obuba v National Police Service Commission & 3 Others** and **Jane Atieno Otieno v National Police Service & 3 Others** (*supra*) are merely persuasive. The decision of the Court of Appeal in **Clement Ernest Opiyo Murenga v Principal Secretary, Treasury & Another** (*supra*) is distinguishable. The matter was before the High Court and was set for a judgment when the High Court transferred it to the Industrial Court. In the case of **Henry Nyakoe Obuba v National Police Service Commission & 3 Others** [2015] eKLR, **Jane Atieno Otieno v National Police Service & 3 Others** where Mwita J. found in favour of the petitioner who was a former military officer is merely persuasive and also distinguishable. In that case, the petitioner was tortured, detained without any colour of right after the coup d'état of 1982. The Court of Appeal in the **Murenga** case held that the former and current Constitution did not place a limitation on the articulation of rights that are violated in the constitutional sphere. In this case, the Petitioner does not set out any constitutional infringements and only seeks remedies that are availed under the Employment Act including the 12 months compensation and her salary, house allowance etc. the Petition is a cleverly disguised memorandum of claim with a semblance of a constitutional petition in title only. The Petition is time barred and as a consequence the court lacks jurisdiction. In **Owners of the Motor Vessel Lilian 'S' v Caltex Oil (K) Ltd** [1989] KLR 1 the Court of Appeal per Nyarangi JA famously held that jurisdiction is everything and without it a court can do nothing. The Petition before me is incapable of being sustained in this court as I have no jurisdiction to entertain it due to limitation and the only order that commends itself for me to make is one striking it out. I make no order as to costs.

It is so ordered.

Dated and delivered at Meru this 5th day of November 2018

Nzioki wa Makau

JUDGE