



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 38 OF 2016

JACKSON MACHARIA MAINACLAIMANT

VERSUS

THE HON. ATTORNEY GENERAL1ST RESPONDENT

KENYA POWER AND LIGHTING COMPANY LIMITED2ND RESPONDENT

Nyarango for petitioner

Sing'oei for 2nd respondent

RULING

1. Notice of preliminary objection dated 2/6/2016 and filed on even date was raised to wit;
2. The petitioner's petition here in is time barred and grossly offends the mandatory provision of Section 90 of the Employment Act No. 11 of 2007 and Section 4(1) of the limitation of Action Act, Chapter 22 of the laws of Kenya and that the entire petition be struck out with costs to the 2nd respondent.
3. The respondent also filed a replying affidavit to the petition on 2nd June 2016.
4. The objection was argued by counsel for the parties in court.
5. A perusal of the petition shows that the petitioner alleges violation of petitioner's right under Article 28, 29(d) (f) 32, 33 and 35 of Constitution Article 41(1) 27 (1), (4) and 5 and Article 43(1) (e), 47, 48 and 50 (1).
6. The petitioner seeks declarations in that respect and reinstatement to his job or compensatory damages in lieu of an order for reinstatement.

Determination

7. The court has carefully considered the facts of the case set out in the supporting affidavit of the petitioner which may be

summarised as follows;

8. The petitioner was employed by the respondent in June 1986 up to 1989 as a casual employee in central construction and in August 1989 was converted to a permanent employee as a general worker. His salary rose to a gross salary of Kshs.57,002.00/=

9. The petitioner worked continuously until 9th July 2009 when the 2nd respondent terminated his employment under Clause 25 of the 2009/2010 CBA on allegation of theft of two transformers from its Royisambu Depot.

10. The petitioner was in June 2009 arrested and charged with theft at the behest of the 2nd respondent.

11. The petitioner was subsequently acquitted of the charges.

12. The petitioner alleges the charges were malicious, unfounded and false hence the petition before court.

13. The petition was filed on 4th April 2016 about seven (7) years from the date the cause of action arose without seeking leave to file the suit out of time.

14. A careful consideration of the petition indicates that this is a typical claim for compensation and payment of terminal benefits for alleged unlawful and unfair termination of employment and almost all reliefs sought except prayer 3 are against the 2nd respondent – the former employer of the respondent.

15. The basis of the claim is purely contractual as against the 1st respondent.

16. Prayer 3 seeks a declaration against the 1st respondent. The Hon. Attorney General for the alleged contravention of Article 157 (11) of the constitution which article reads.

“157 (11) In exercising the powers conferred by the Article, the Director of Public Prosecutors shall have regard to the public interest, the interests of the administration of justice and need to prevent and avoid abuse of the legal process.” This prayer raises constitutional issues.

17. In High Court petition No. 29 of 2013, Daniel Ochengo Oendo versus David Okerio Ogechi and 3 others [2015] eKLR Justice Sitati held that;

“It is now widely accepted by the courts that a person who raises issues regarding actual or alleged violation of constitutional rights has the right to be heard whether or not he eventually succeeds. That being the case, there is no time bar to such a claim. Time is therefore not of the essence in matters of this nature. What the petitioner is required to show is that the rights were violated or were threatened to be violated. The court therefore finds that the preliminary objection has no basis and it is accordingly dismissed.”

18. It is not in dispute that the suit was filed about seven years from the date the cause of action arose with no application for extension of time.

19. This being the case, the suit against the 2nd respondent the employer raises no constitutional issues and is a simple claim for unlawful and unfair dismissal. This is different with respect to the claim against the Hon. The Attorney General.

20. Accordingly the court strikes out the suit as against the 2nd respondent and directs the matter to proceed to hearing in respect of the 1st respondent.

21. No order as to costs.

Dated and delivered at Nairobi this 24th day of February 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE