



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
PETITION NO. 33 OF 2017

(Before Hon. Lady Justice Hellen S. Wasilwa on 29th June, 2017)

LUKA CHEBII MITEI CLAIMANT

VERSUS

BOARD OF TRUSTEES

NATIONAL SOCIAL SECURITY FUNDRESPONDENT

RULING

1. Before the Court is a Preliminary Objection to the Notice of Motion Application and Petition dated 12th April 2017 on the following grounds:

1. “The Court has no jurisdiction as the cause of Action arose on the 16th of July 2010 when the Petitioner was summarily dismissed. The prayers sought under the application are barred by limitation under Section 90 of the Employment Act which states that:

“Notwithstanding the provision of Section 4(1) of the Limitation of Action Act Cap 22 no civil action or proceedings based on arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in case of continuing injury or damage within twelve months next after the cessation thereof”.

2. That the matter is Res Judicata as the Petitioner had earlier filed a Memorandum of Claim in the Industrial Court Cause No. 1315 of 2010 which sought for similar prayers.

3. That the matter is vexatious and an abuse of Court Process as the reliefs sought have been canvassed and determined in Industrial Court Cause No. 1315 of 2010. Further, under Section 12 of the Employment & Labour Relations Court Act and Rule 17 (10) of the ELRC (Procedure) Rules 2016, the prayer for reinstatement can only be considered within 3 years from the date of separation. The suit is therefore an abuse of the court and the prayers sought untenable and should be dismissed”.

2. The parties made oral submissions in Court. The Applicant submits that the Preliminary Objection is premised on the fact that the application is time barred as it came to Court over 3 years since the cause of action arose. It should have been filed in 2013 and not in 2017.

3. They further submit that the Petitioner has come to Court in cause No. 1315 of 2010 which has been attached in Memorandum of Claim which sought the same prayers sought in the Petition. The claim is therefore *Res Judicata*.

4. They submit that the Claimant was not satisfied in the earlier cause and have come here which is an abuse of the Court process. They pray that the Petition is dismissed.

5. In response, the Respondents submit that suit 1315 of 2010 was never determined. It was never heard and was withdrawn on the 5th of April 2017.

6. They submit that there is no limitation period on Constitutional Petition and that page 18 and 19 of the Petition state the main issues as vindication of his constitutional rights.

7. They pray for the Preliminary Objection to be dismissed.

8. I have considered the Preliminary Objection before Court in the Petition filed before me, the Petitioner alleges breach of his fundamental rights under the Constitution, Article 236, and other attendant Legislation being Fair Administrative Action No. 4 of 2015, Employment Act 2007 and against rules of natural justice.

9. It is also true that the Claimant had previously filed Case No. 131/2010 against the Respondent which claim was withdrawn by the Claimant on 5.4.2017 before its determination.

10. The issue to determine then is whether this Petition as filed is time barred and/or whether it is *res judicata*.

11. On the issue of *res judicata*, I note that Case No. 1315/2010 was withdrawn on 5.4.2017 and was never determined by Court. They said that it was also a claim brought under the Employment Act for wrongful termination as opposed to the current Petition which seeks constitutional declaration.

12. The Claim No. 1315/2010 and this Petition cannot therefore be said to be the same. The Petition is therefore not *res judicata*.

13. On the issue of Limitation of time, the Respondents have submitted that this Petition is time barred, the cause of action having arisen way back in 2010. The Petitioner has submitted that there is no limitation of time on constitutional Petition.

14. In Petition No. 204/2013 **Njuguna Githiru vs. Attorney General**; the issue of limitation of time was considered as this Petition by Hon. J. Isaac Lenaola (as he then was) citing **Joan Akinyi Kabasellah & 2 Others vs. Attorney General, Petition No. 41 of 2014** stated:

“(24). Nonetheless, I take into account the views of the Court with regard to limitation in respect of claims for enforcement of fundamental rights. In a line of cases such as Dominic Arony Amolo vs. Attorney General, Nairobi High Court Misc. Civil Case No.1184 of 2003 (OS) (2010) eKLR, Otieno Mak’Onyango vs. Attorney General and Another, Nairobi HCCC No.845 of 2003 (unreported), Courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.

(25). I note also the sentiments of the Court in James Kanyiiita vs. Attorney General and Another, Nairobi Petition No. 180 of 2011 that: ‘Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the Courts 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’.

15. My understanding in regard to case law then is that whereas there is no limitation of time in respect of constitutional petition alleging breach of fundamental rights, the Courts should go an extra mile and determine whether there are any valid underlying reasons that occasioned the delay.

16. In this Petition the Petitioner was apparently dismissed in 2010. He should have filed his Petition by 2013 but filed this in 2017 and the Petitioner has not explained any reasons as to why he is filing this Petition after seven years.

17. The Petitioner was served with the Preliminary Objection but he failed to file any response accordingly. He did not explain why he is filing this Petition late but asked Court to dismiss it accordingly.

18. In **Joan Akinyi Kabasellah (supra)** case the Judge explained him as follows:

“(36). There is a great danger that parties are abusing the constitutional protection of rights to bring claims before the Court whose sole aim is enrichment rather than vindication of rights. A delay of 10 years or more before one comes to Court to allege violation of rights is clearly not justifiable. As Nyamu J observed in Abraham Kaisha Kanzika and Another vs. Central Bank of Kenya (supra): “even where there is no specified period of limitation, it is proper for the Court to consider the period of delay since the accrual of the claim and the reasons for the delay. An Applicant must satisfactorily explain the delay. In this case a delay of 17 years is inordinate and it has not been explained. The prosecution of the Claimant took 6 years and although he gives this as the reason for the delay, he has not explained the balance of eleven years”.

19. In agreeing with the above position, it is my finding that the Petitioner failed to institute his Petition in time since his dismissal in 2010 a delay of 7 years in employment contracts is inordinate delay.

20. I am persuaded to agree with the Respondents herein and I allow the Preliminary Objection and find that this Petition has been filed late and without any justification and the same is therefore dismissed.

21. Each party will meet costs of this Petition.

Read in open Court this **29th day of June 2017.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mitei for the Petitioner

No appearance for Respondent