



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI
PETITION NO.37 OF 2017

FRANCIS ATONYA AYEKA.....CLAIMANT

VERSUS

THE KENYA POLICE SERVICE.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. The ruling herein relates to Notice of Preliminary Objections filed by the respondent on the 16th May, 2017 and on the grounds that;

a) The suit is time barred and offends the mandatory provisions of section 90 of the Employment Act, 2007.

b) The Petitioner is circumventing the Employment Act and the Labour Relations Act by relying on the constitutional provisions having realised the matter is statute barred under the parent Act which give effect to constitutional rights.

c) The suit is an abuse of the court process.

d) The suit is incompetent and ought to be struck out with costs.

2. Both parties filed their written submissions.

3. The respondent submits that the petitioner filed the petition alleging that his employment was dismissed in January, 2011 from Kenya Police Service. The petitioner was charged with the offence of desertion from duty vide Kapsabet Criminal Case No.125 of 2011. The petitioner was arraigned in court on 28th March, 2014 and acquitted of the charges vide ruling on 14th October, 2015. The petitioner now is seeking orders for reinstatement.

4. By application and principles set out in the **Mukisa Biscuits Manufacturing Ltd case** the objections herein are based on points of law. The petitioner does not state the date of his dismissal from employment save that he alleges to have been sent home in January, 2011. As such by his averments the petition is time barred by virtue of section 90 of the Employment Act, 2007.

5. In **BIFU versus Bank of India, Cause No.1201 of 2012** the court in dealing with the question of

limitation in an employment dispute held that the limitation period is regulated under section 90 of the Employment Act, 2007. The petitioner herein was dismissed in January, 2011 and filed suit in 2017 way after the limitation period lapsed.

6. The petitioner being charged with a criminal charge does not remedy the time period in law as held in **Fredrick Otieno Onono versus the AG, Misc. Appl. No.99 of 2015**. Even where there are criminal proceedings on-going, such is not a bar to filing claim before court to secure any employment and labour relations rights. Where there is a claim for unfair labour practice, such should be filed within 3 years from the date when the cause of action arose.

7. In **Ndirangu versus Henkel Chemicals (EA) Ltd [2013] eKLR** and the court held that section 90 now regulates time in employment contracts to three years and the employee who fails to file suit within that time cannot argue that the limitation is 6 years.

8. The respondent also submits that the petitioner has circumvented the Employment Act, 2007 to avoid the provisions of section 90 and filed a petition. Even where there is no time limitation to violation of fundamental rights under the constitution, parties cannot circumvent the clear statutory provisions and file a petition. Employment and labour relations is regulated under statute and section 90 of the Employment Act, 2007 requires such claims be filed within 3 years. In **Josephat Ndirangu versus Henkel Chemicals case**, the court held that litigants should not avoid the provisions of the Employment Act, 2007 regarding unfair termination or wrongful dismissal by going behind statute and seeking to rely directly on article 41 of the constitution. The primary legislation should not be circumvented.

9. In this case the petitioner's case is clearly an employment and labour relation matter filed out of the statutory limitation period and thus time barred and should be dismissed with costs.

10. The petitioner submit that the petition is grounded on the 1st respondent's violation of the petitioner's rights under articles 10, 20, 21, 27, 41, 165 and 258 of the constitution. Such rights were violated when the respondent denied the petitioner his right while serving under the Kenya Police Force as his term of retirement had not reached. There was no fair administrative action and the petitioner cannot be locked out of his employment after false charges had been brought against him were dismissed by a competent court.

11. The rights accruing to the petitioner regarding his employment are secondary to his constitutional rights which take precedence over any other rights. The petitioner cannot be restrained from seeking for the protection of his constitutional rights. The respondent has never communicated their decision to terminate the employment of the petitioner in writing but have removed him from the payroll since 2011. Criminal proceedings commenced against the petitioner were dismissed in 2015 and thus he is in good time to file this petition and the objections made should be dismissed with costs.

12. In **Gerald Juma Gichohi & 10 Others versus the AG, Petition No.587 of 2012** the court held that there is nothing wrong in filing a constitutional claim on labour contract before the right court. In **David Gitau Njau & 10 Others versus the AG Petition No.340 of 2012** the court held that there is no limitation period imposed by the constitution in seeking redress for violation of fundamental rights and freedoms.

Determination

13. In the petition it is pleaded that the petitioner was in January, 2011 while at Singor Police Station accused and charged with desertion from the Police Force and he was charged in court. That he was then locked out of his employment by the 1st respondent who has since refused to reinstate him despite the petitioner being acquitted in the criminal case against him. The orders sought in the petition are that there be a declaration that the petitioner remains and continues to serve in the force as a police officer until his term expires; that there be a declaration that the removal of the petitioner from the police force was contrary to the law and in the alternative the petitioner be paid damages for the unlawful and unconstitutional removal from the service.

14. The petition is therefore anchored on the petitioner's employment with the 1st respondent as a Police Officer. The orders sought also relates to remedies set out under section 49 of the Employment Act, 2007. Removal from office, reinstatement thereof and or the payment of damages or compensation for unlawful or wrongful removal from office is matters addressed in a substantive legislation, the Employment Act, 2007.

15. Article 162(3) of the constitution has mandated parliament to specifically enact legislation giving this court jurisdiction and set out matter that this court should address as separate and distinct from the High Court. The Employment and Labour Relations Court Act, 2011 is enacted by Parliament to ensure that all employment and labour relation smatters are addressed by this court.

16. The petition thus anchored on the employment of the petitioner and noting the orders sought, in their nature, reference and regard must be given not just to the constitutional violations but the application of the constitutive legislation for the court, the Employment and Labour Relations Court Act, 2011 and the Employment Act, 2007. In any event the rules of the Court, the Employment and Labour Relations Court (Procedure) Rules, 2016 allow a party to file a Memorandum of Claim and include any constitutional violations and seek remedies thereof. Rule 7(3) provides as follows;

(3) Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court.

17. It is therefore not the name assigned to the pleadings, a *petition* of a *memorandum of Claim*, rather, the nature of claim and remedies sought. Such must be put into account.

18. In **Gerald Juma Gichohi & 9 Others versus the AG**, the court while addressing the question of dismissal from service held that there were no specific orders sought by the petitioner with regard to any benefits or pay for the days they were held in detention as serving officers. The court thus addressed constitutional violations and did not award any remedy with regard to employment and labour relations as such matters were held to be the preserve of this court under article 162(2) of the constitution.

19. In this regard therefore, this court in **Peter Lubale Lubullellah versus Teachers Service Commission, Petition No.145 of 2016** held as follows;

To name the matter herein as a Petition and claim constitutional violations, the facts appurtenant thereto are clear. The cause of action arose in employment where the petitioner is seeking a benefit out of his employment and or service with the respondent. Where a memorandum of Claim was filed or a petition, the cause of action does not change due to the name assigned to the pleadings. Even where there is no challenge to the claims made by the respondent, it is obvious, the claim is for gratuity payment for the employment period of the petitioner is filed way out of time as required under section 90 of the Employment Act, 2007.

20. the above position is reiterated in **Josephat Ndirngu versus Henkel Chemicals (EA) Ltd**, and the court findings as follows;

a litigant should not avoid the provisions of the Employment Act regarding unfair termination or wrongful dismissal by going behind the statute and seeking to rely directly on Article 41 of the Constitution on the right to fair labour practices. The purpose of the Constitution is that the right to fair labour practices is given effect in various statutes of which the Employment Act and the Labour Relations Act are primary.

The primary legislation should not be circumvented by seeking to rely directly on a constitutional provision. Both the Employment Act and the Labour Relations Act give effect to constitutional rights.

It is clear to my mind that the Claimant filed the Petition after realizing that the Cause he had filed

was under legal attack and there was not any legal defence to the attack on the ground of time bar.

21. Thus time in employment and labour relations claims cannot be extended by virtue of criminal proceedings or any other device of the parties. In employment and labour relations claims, section 90 of the Employment Act, 2007 is clear to the extent that all such claims ought to be filed with the court within 3 years from the time the cause of action complained of arose. Such is with the exceptional where there is a continuing injury and this is not the case here. Thus, in the case of **Beatrice Kahai Adagala v Postal Corporation of Kenya [2015] eKLR**, the Court of Appeal sitting in Kisumu held as follows;

Much as we sympathize with the appellant if that is true, we cannot help her as the law ties our hands. Section 90 of the Employment Act 2007 which we have quoted verbatim herein above, is in mandatory terms. A claim based on a contract of employment must be filed within 3 years. ... the limitation period is never extended in matters based on contract. The period can only be extended in claims founded on tort and only when the applicant satisfies the requirements of Sections 27 and 28 of the Limitation of Actions Act.

22. The objections by the respondent being premised on the application of section 90 of the Employment Act, 2007 and the same being mandatory, noting the time running from January, 2011 to 2017 when the petition was filed, the claims made being premised on employment and labour relations, the petitioner cannot benefit from listing the matter herein as a Petition and not a Claim. The matters between the parties are with regard to employment and labour relations. The provisions of section 90 of the Employment Act, 2007 are mandatory. There is no claim that there is a continuing injury.

Accordingly, the objections by the respondent and filed on 16th May, 2017 are hereby found with merit and are allowed. The petition and orders sought being premised on employment and labour relations are time barred. The petition is hereby struck out. Each party to bear own costs.

Dated and delivered in open court at Nairobi this 7th day of August. 2017.

M. MBARU JUDGE

In the presence of:

Court Assistants: Lillian Njenga & David Muturi

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