



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 10 OF 2015

(FORMERLY HIGH COURT AT BUSIA PETITION NO. 3 OF 2014)

(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)

CLEMENT ERNEST MURENGO.....PETITIONER

-VERSUS-

PRINCIPAL SECRETARY TREASURY.....1ST RESPONDENT

COMMISSION OF CUSTOMS -KRA.....2ND RESPONDENT

RULING

The Petitioner Clement Ernest Opiyo Murenga has filed this Petition against the Principal Secretary, Treasury and the Commissioner of Customs, Kenya Revenue Authority seeking the following remedies;

- a) *A declaration to be made that the Petitioner's rights under Articles 47(1) and (2) , 50(1),28,25(a),4(1) and 35(2) of the Constitution have been breached and violated by the Respondents.*
- b) *An Order of compensation for lost salary and other benefits going with the job from February 1981 to the date the Petitioner was to retire from the service.*
- c) *Damages, and*
- d) *(Such other Orders as this Honourable court shall deem just.*

Background

This petition was originally filed by the Petitioner in Busia High Court on 27th March, 2014. Parties appeared before the judge in Busia and were directed to argue the Petition by way of affidavits and written submissions. However, after filing the submissions the judge transferred the Petition to this court by orders of 10th March, 2015 on grounds that it is an Employment and Labour Relations matter.

The parties appeared before me for directions on 2nd July, 2015 when I allowed the 2nd Respondent's application to file a Preliminary Objection on limitation.

The 2nd Respondent subsequently filed a notice of Preliminary Objection as well as a notice of motion both of which raised the issue of limitation. The Petitioner responded to both the Preliminary Objection through grounds of objection and a replying affidavit.

On the date fixed for hearing the Preliminary Objection the 2nd Respondent abandoned the same and instead parties agreed only the motion by consent of the parties. In the motion the 2nd Respondent seeks the following prayers ;

1. That the Petitioner's prayers be dismissed in its entirety.
2. That the costs of this application be provided for.

Petitioner's Case

The Petitioner avers that he was employed by the Department of Customs and Excise under the East African Community in 1975. He was absorbed by Customs Department in the Ministry of Finance in 1977 upon the collapse of the Community. His designation was clerical officer.

In August 1981 the Petitioner was charged with the offence of making a customs entry without authority at Makadara Criminal Case Number 12467 of 1981 but was acquitted of the charges under Section 210 of the Criminal Procedure Code on 21st December 1983 with no case to answer.

Upon being charged in court the Petitioner was interdicted on half salary. After his acquittal the Petitioner took the proceedings to his reporting officer expecting the lifting of the interdiction, reinstatement of salary and resumption of duty. After several visits to his reporting officer the Petitioner went to make inquiries at the Head Office where he was informed that his personal file number 104807 could not be found. He sought help from both the Treasury and Public Service Commission to no avail.

Thereafter the Petitioner reported the matter to the Commissioner of Administrative Justice from whom he learnt that he was dismissed from employment on 2nd January 1985 for deserting duty.

According to the letter of dismissal the Petitioner did not report back from leave commencing on 26th November, 1984 and ending on 31st December, 1984 following which he was dismissed by letter dated 29th May, 1985.

The Petitioner denies taking leave on 26th November, 1984. He further denies receiving the letter of dismissal which he alleges was sent to the Principal Pensions Officer at Treasury which is the wrong address as he did not work there.

The Petitioner contends that the action of the Respondents was in total breach of Article 25(a) of the Constitution which provides for freedom from torture, cruelty, inhuman or degrading treatment or punishment. He further contends that the Respondents breached Article 28 which provides that every person has inherent dignity and for the right to have that dignity respected and further that the actions of the Respondents were unfair and against fair labour relations as entrenched in Article 41(1).

The Petitioner also contends that he was not given a fair hearing in contravention of Article 50(1) and Article 47 which provide for administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. He further contends the information in the letter of dismissal is misleading and injurious to his image and must be corrected in accordance with Article 35(2) of the Constitution.

Respondents case

The 1st Respondent did not respond to the Petition although service was effected on the Principal Secretary Treasury. The 2nd Respondent filed a replying affidavit and written submissions. It contends that the Petitioner was never its employee, but an employee of the Department of Customs and Excise within the Ministry of Finance and Planning and that he was never seconded to the 2nd Respondent as he was not employed by the Customs and Excise Department at the commencement of the Kenya Revenue Authority Act on 1st July 1995.

The 2nd Respondent further contends that the Petitioner never followed up his case with the 2nd

Respondent, that the 2nd Respondent had no mandate to reinstate him as the only body with such mandate is the Public Service Commission through the Permanent Secretary/Treasury in the Ministry of Finance which dismissed him on 29th May, 1985.

Notice of Motion

On 10th August, 2015 the 2nd Respondent filed a notice of motion seeking the dismissal of the Petition on grounds that it is time barred under the Public Authorities Limitations Act Chapter 39 of the Laws of Kenya and Section 90 of the Employment Act and that this court lacks jurisdiction as the claim did not arise in the course of the Petitioner's employment and finally, that the Petitioner seeks remedies under the 2010 Constitution for violations of rights that occurred before the Promulgation of the Constitution.

In the Petitioner's replying affidavit and grounds of opposition he states that the 2nd Respondent filed the Preliminary Objection out of time and without leave of the court having filed the same on 10th August, 2015 instead of 14 days from 2nd July, 2015 when leave was granted.

The Petitioner further stated that there is no limitation of time to institute a suit on violation of human rights under the Constitution, that he never received the letter of dismissal from either defendants and that both limitation and lack of jurisdiction were never pleaded or raised at the first opportunity at the commencement of this suit when the same should have been raised.

Determination

From the pleadings and submissions the issues which arise for determination are the following:-

- (i) Whether the motion filed by the 2nd Respondent is properly in court,
- (ii) Whether the 2nd Respondent is properly joined in this suit,
- (iii) Whether the petition is time barred.

Is the 2nd respondent's motion properly filed?

Mr. J.V Juma submitted that the application by the 2nd Respondent has been brought at the wrong time as pleadings had been closed and parties had already taken directions and filed written submissions as directed by the Judge in Busia so that what was remaining was taking of a date for judgement.

Mr. Twahi for the 2nd Respondent on the other hand argued that he had raised the issue of jurisdiction in his written submissions and the judge supported his submissions but directed parties to come before this court. He submitted that once the matter came to this court it became an Employment and Labour Relations matter and not a Petition and that the 2nd Respondent exercised its right to file the application under rule 16 of the Industrial Court (Procedure) Rules.

I do not agree with Mr. Juma. When this matter was transferred to this court, the suit was fixed for mention for directions on 2nd July, 2015. On that day the Respondent sought and was granted leave to file a Preliminary Objection. The 2nd Respondent filed both the Preliminary Objection and this application, and as I have already stated herein before, the 2nd Respondent abandoned the Preliminary Objection in favour of the application. The Petitioner's counsel's argument that this matter was pending for judgement is therefore not correct as the case came up before this court for directions. There is no restriction in law to the time for filing applications. Having not objected to the 2nd Respondent abandoning the Preliminary Objection in favour of the application, the Petitioner cannot be heard to raise objections to the same.

I find no merit in the objection to the filing of the motion. The application is therefore properly before me for determination.

The second issue for determination is whether the 2nd Respondent is properly joined in these proceedings. In the Petition the Petitioner states that he was first employed by the East African Community then upon its dissolution in 1977, he was absorbed by the Ministry of Finance and was stationed in Customs Department at Jomo Kenyatta International Airport. He was arrested while working under the Department in August, 1981 and was dismissed by letter dated 29th May, 1985, although the letter states the dismissal was effective from 2nd January, 1985.

The Petitioner has not denied the 2nd Respondent's contention that it was created in 1995 after the enactment of the Kenya Revenue Authority Act Cap 469 on 1st July, 1995, long after the Petitioner was dismissed from employment on 29th May, 1985,

Section 22(4) of the Kenya Revenue Act provides that ;

"unless the Board otherwise determines, all persons being public officers, who before the commencement of this Act are employed by the Government for the purposes of the written laws specified in the first schedule shall, on the commencement of this Act, be deemed to be on secondment to the Authority until they are employed in the service of the Authority in accordance with this Act or their secondment with the Authority otherwise ceases in accordance with the terms of the secondment."

I therefore agree with the 2nd Respondent that the Petitioner was never employed by the 2nd Respondent as he left employment before the 2nd Respondent came into being.

It is also not contested by the Petitioner that his letter of dismissal was from the Permanent Secretary/Treasury. The Petitioner has also not denied the contents of a letter dated 18th September, 2008 from the Public Service Commission to the Public Complaints Standing Committee to the effect that;

- *The Former officer was accused of desertion of duty with effect 26th November, 1984 to 31st December, 1984.*
- *A show cause letter was addressed to him on 15th March, 1985 to show cause why he should not be dismissed from the service on account of absence from duty without lawful authority.*
- *He did not respond to the show cause letter within the stipulated time.*
- *The authorized officer dismissed him with effect from 2nd January, 1985.*
- *Mr. Murenga appealed against his dismissal to the commission vide his letter of 3rd November, 1992.*
- *The commission considered the appeal but disallowed it.*
- *He made second appeal vide his letter of 7th April, 2004.*
- *The commission considered the second appeal but disallowed and closed the case on 10th December, 2004.*

In view of the above, it is evident that the complainant has already exhausted the Commission's jurisdiction in the matter. His case was also handled in accordance with the prevailing service regulation.

For these reasons I find that the 2nd Respondent was not in existence at the time the Petitioner's cause of action arose and is therefore not properly joined in these proceedings.

The last issue for determination is whether the claim in the Petition is time barred Section 3 of the Public Authorities Limitation Act Cap 39 Provides as follows

"1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.

(2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.

(3) Where the defence to any proceedings is that the defendant was at the material time acting in the course of his employment by the Government or a local authority and the proceedings were brought after the end of—

(a) twelve months, in the case of proceedings founded on tort; or

(b) three years, in the case of proceedings founded on contract, from the date on which the cause of action accrued, the court, at any stage of the proceedings, if satisfied that such defendant was at the material time so acting, shall enter judgment for that defendant."

Section 90 of the Employment Act also provides as follows:-

"Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or 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 the case of continuing injury or damage within twelve months next after the cessation thereof."

My understanding of the term "proceedings" is that it includes suits for redress of infringement of fundamental rights and freedoms. The Petitioner avers that the issues raised in the Petition are of continuing nature. A termination of employment is not a continuing injury. It is an event that is specific. The act of termination was by letter dated 29th May, 1985 and does not constitute a continuing violation. All the other violations alleged by the Petitioner arise from the termination of his employment. The limitation period is therefore reckoned from 29th May, 1985.

In the case of John Murithi Marire v Attorney General [2014] eKLR the court held that not every action brought by way of a Petition constitutes a continuing violation. The court quoted with approval the case of Kemrajh Harrikissoon v The Attorney General of Trinidad and Tobago [1979]UKPC 3 where the court held 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.

I agree with the court's decision that the elevation of labour rights to the Bill of Rights by the 2010 Constitution does not jettison the applicable substantive and procedural law on employment and labour relations. There is no doubt that the Petitioner's claim herein is founded on an employment contract which was terminated on 29th May, 1985.

A related issue is whether the rights in the Constitution 2010 can be applied retrospectively. The Petitioner has pleaded violation of Articles 47(1) and (2) 50(1), 28, 25(a), 41(1) and 35(2) of the Constitution 2010, yet his employment was terminated in 1985.

In the same case of John Murithi Maririre (supra) the court held that rights under the current Constitution are not applicable to a person for wrongs alleged to have been committed before the Promulgation of the Constitution. This was also the decision in Joseph Thuo Mwaura & 82 others v Attorney General (Petition No. 498 of 2009) in which it was held that the Constitution of Kenya 2010 does not apply retrospectively.

For the foregoing reasons the application filed by the 2nd Respondent succeeds. The claim against the 2nd Respondent is dismissed with no orders for costs.

Dated, signed and delivered this 16th February, 2016.

MAUREEN ONYANGO

JUDGE