



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
PETITION NUMBER 7 OF 2015
BETWEEN
MUNIR ABUBAKAR MASOUD PETITIONER
VERSUS
1. COMMISIONER OF CUSTOMS
2. PRINCIPAL SECRETARY TREASURY
3. KENYA REVENUE AUTHORITY
4. ATTORNEY GENERAL RESPONDENTS

RULING

1. The Petitioner was the Plaintiff in Nairobi High Court Civil Case Number 196 of 2000. That Case was against the 3rd Respondent. The Petitioner sought damages for wrongful retirement; back salaries and benefits; with costs and interest. The Claim was dismissed for non-prosecution. The Petitioner made an Application for reinstatement. When the Application came up for hearing before the High Court, the Case was transferred to the Employment and Labour Relations Court Nairobi on jurisdictional ground, and ultimately, to the same Court in Mombasa.

2. It was argued by the 3rd Respondent, when the transferred Cause came before the Court for directions, that there was no Case capable of transfer, at the time the purported transfer was made, the substantive Case having been dismissed for want of prosecution. The Court agreed with the 3rd Respondent, and gave the following orders on the 28th September 2015:-

- a) H.C.C.C No. 196 of 2000 shall remain dismissed as ordered by the High Court.
- b) The file is returned to the High Court at Nairobi for preservation.
- c) Mr. Masoud is granted leave of this Court to file a fresh Claim within 40 days of this Order.

3. Mr. Masoud consequently presented Petition No. 7 of 2015. He did not file a Claim under the Industrial Court [Procedure] Rules 2010. He filed a Petition, citing certain Articles of the Constitution which he

feels were violated. He brought in the 1st, 2nd and 4th Respondents who were not in the High Court Case. He brought in new issues. The result was that the 1st and 3rd Respondents feel aggrieved and filed a Notice of Preliminary Objection on 19th February 2016, alleging the Petition is in abuse of the process of the Court.

4. The Objection was heard on the 20th July 2016, in the presence of all the Parties.

5. Upon evaluation of the Parties' submissions and the grounds listed in support and in opposition to the Preliminary Objection; upon reading the judicial authorities cited by the Parties; and upon evaluation of the entire Petition and the documents filed in support of the Petition, the Court finds:-

a) The Petition goes beyond the contemplation of the leave granted to Mr. Masoud to file a fresh Claim. The Court did not intend that the Petitioner would file a Petition, but a Claim under the Industrial Court [Procedure] Rules 2010, confined to the issues raised in the High Court Civil Case.

b) These issues revolved around wrongful retirement, and whether the Petitioner should be paid damages, terminal benefits and back salaries. The Petition expands the issues and transforms them into constitutional grievances, leaning back to the era of the East African Community. He brings in issues about his lack of promotion, and his discrimination by the Employer in years gone by. He brings arguments about the Constitution of Kenya 1964, as well as about the Constitution 2010.

c) All the Court did by grant of leave, with the concurrence of the 3rd Respondent, was to allow the Petitioner a window of opportunity to pursue the issues as they were at the High Court, against a specific Respondent. At the High Court was a crystallized employment dispute. There were technicalities around dismissal of the High Court Case and subsequent transfer. The Court, and gracefully the 3rd Respondent, intended to assist the Petitioner in going round these legal hurdles. He has opened the constitutional door. He brings in the Constitution of 1964 and its successor. The opening of that door comes with many fresh challenges which tend to blur the employment dispute. Among these are whether certain claims would not be time barred; and whether indeed the Constitution 2010 is properly invoked.

d) it was not the intention of the Court that the Petitioner brings in other Respondents who were not included in his High Court Case. There is no reason why leave granted should have been interpreted as availing the Claimant the chance to bring in the 1st, 2nd and 4th Respondents. These Respondents were not in Court in the first place when the Petitioner was allowed to revive his Case. They were not privy to the leave of the Court granted in favour of the Petitioner. The Petitioner did not include them in his Case before the High Court, at the time of filing, or through subsequent amendment, from the year 2000. Essentially the Employment and Labour Relations Court intended that the Petitioner would pick the pieces from where his High Court case collapsed. He made the wrong approach by expanding issues, changing the character of his Claim, and by bringing in new Parties.

e) the Petition is full of intemperate language. It includes such terms as 'brutal and corrupt employers,' 'Petitioner was shamelessly robbed,' and 'Customs Mafioso,' among others. Pleadings filed in Court, and proceedings in Court, should be in moderated language, regardless of how passionately the Parties feel about their grievances. Intemperate language tends, like multi-pleading, to blur rather than clarify issues in dispute. The Industrial Relations Charter similarly requires Employers and Employees to resolve their differences by use of temperate language.

6. The Court is persuaded the Petition as presented, exceeds the intention of the Court in granting the Petitioner leave to file a fresh Claim. The nature of the Claim contemplated by the said leave was an employment Claim under the Industrial Court [Procedure] Rules 2010. The Parties and issues were to remain as they were in the High Court. In essence the Court intended the Petitioner would continue with the Claim, though under fresh pleadings, from where it collapsed at the High Court. IT IS ORDERED:-

a) The Petition filed on 6th November 2015 goes beyond the contemplation of the leave granted to the Petitioner on the 28th September 2015, and is hereby struck off.

b) The Petitioner is granted further leave to file a fresh Claim against the 3rd Respondent, confined to the issues in dispute at the High Court, and in conformity with the Industrial Court Procedure Rules.

c) Such Claim shall be filed within 30 days.

d) no order on the costs.

Dated and delivered at Mombasa this 28th day of October 2016.

James Rika

Judge