



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**PETITION CAUSE NO. 8 OF 2015**

**(Before Hon. Lady Justice Maureen Onyango)**

**JULIUS SITUMA .....PETITIONER**

**VRS**

**TEACHERS SERVICE COMMISSION.....RESPONDENT**

**R U L I N G**

On 12th February, 2015 the Petitioner filed a Notice of Motion seeking the following orders:-

1. That this application be certified urgent for hearing interpartes
2. That at interpartes hearing and pending the hearing and determination of the petition the following orders do issue.
  - (a) An order of prohibition to prohibit the Respondent's appellate tribunal from in any way proceeding against the Petitioner.
3. That such further or other orders and directions be issued to facilitate the just, expeditious and fair determination of this application and petition.
4. That the costs of this application be provided for.

The application is grounded on the Petitioner's supporting affidavit and on the following grounds:-

- (a) The Petitioner stands struck out from the register of the Teachers Service Commission as teacher since 10.9.2008 a period of well over 6 years.
- (b) The decision to strike out his name as such was made in violation of the constitution, the Teachers Service Commission Act and Regulations thereunder and established principles of natural justice.
- (c) That further that the said decision was made ultravires the governing law and the disciplinary process employed by the Respondent against the Petitioner was fundamentally flawed, null and void.
- (d) The Petitioner having filed his appeal which appeal was accepted by the Respondent and is still pending, the Petitioner is entitled to remain in the register of teachers pursuant to S. 21 of The Teachers Service Commission Act.
- (e) That the Petitioner should continue enjoying the terms and conditions of his employment as a teacher

until all issues in controversy have been solved.

(f) The petitioner has established a prima facie case and the Petitioner cannot be adequately compensated by way of damages.

The Respondent filed grounds of opposition on 7th April 2015 in which it listed the following grounds of opposition to the application:-

1. The Honourable Court has no jurisdiction to determine the issues raised in the Petition for reasons that the Petition is based on a cause of action which is statute barred pursuant to the provisions of Section 90 of the Employment Act.
2. The Honourable Court has no jurisdiction to grant the prayers and or reliefs set out in the Petition pursuant to the provisions of the Employment Act 2007.
3. The Petitioner's prayers are unreasonable, irrational and if granted, shall amount to usurping the administrative, statutory and constitutional mandate of the Respondent.
4. The Applicant has misconstrued/misinterpreted the applicable law relating to employment and removal from the register of teachers and in doing so has arrived at a wrong and untenable conclusion regarding the difference between the Register and Employment.
5. The Petition herein has no merit, is bad in law, misconceived, fatally defective and ought to be dismissed.
6. The Petition as presently drawn is riddled with factual errors, errors of law and premised on inaccurate information and hearsay;
7. The Petition has been rendered otiose since the Teachers Service Appeals Tribunal does not exist in law after the repeal of the Teachers Service Commission Act, Cap 212.
8. The Claimant herein has failed to adduce sufficient, compelling and reasonable grounds to support his Petition.
9. The Claimant herein is guilty of unreasonable delay and is not entitled to prayers sought.
10. That Respondent is likely to suffer irreparable loss, damage and injustice should the prayers in the Petition be granted.

The brief facts of this case are that the Petitioner was employed by the Respondent as a primary school teacher and was posted to Makhukhuni Primary school. He was interdicted by letter dated 4th April, 2008. At the time of interdiction he was teaching at Muhomo Primary School. The charges against him were the follows -

#### **1. Immoral Behaviour**

*You breached the TSC Act Cap 212 Section 7 (3b) of the Laws of Kenya and Regulation 66 (2) (a) of the Code of Regulations for Teachers in that, on diverse dates including 25.11.2005, you had carnal knowledge of D.J a Std 8 pupil at **Makhukhuni Primary School** which occasioned her pregnancy (**name withheld to protect identity of the pupil who was a minor at the time**).*

*You breached the TSC Act Cap 21 Section 7 (3b) of the Laws of Kenya and Regulation 66(2)(g) of the Code of Regulations for Teachers in that, on 1/8/2006 you prepared a document (letter) and submitted it to the D.E.O. Lugari purporting the same to have been authored by D.J.'s mother, S.N., exonerating you from the blame of having had carnal knowledge of her daughter and the eventual pregnancy. The Petitioner was invited for a disciplinary hearing of his case on 10th September, 2008 at the*

*D.E.O.'s office, Lugari District, Lumakanda. The Petitioner was subsequently dismissed by letter of the same date. By a separate letter also of the same date, he was informed of the decision to remove his name from the register of teachers on the same grounds as the dismissal.*

The letter of removal from the Register of Teachers advised the Petitioner of his right to appeal to the Appeals Tribunal within 28 days.

The Petitioner received the letters on 19th June, 2010 and lodged his appeal on 5th July, 2010. He paid the Appeal Fees of Kshs.1000/= on 17th August 2010. The Petitioner did not receive any response from the Teachers Appeals Tribunal.

The Petitioner argues that having filed an appeal his name should remain in the register of teachers and on the payroll of the Respondent until the appeal is determined. He further argues that the decision to strike out his name from the register of teachers and to dismiss him were made in violation of the Constitution, Teachers Service Commission Regulations and principles of natural justice.

In its response to the application, the Respondent submitted that this petition emanates from employment relationship but is disguised as a constitutional matter to evade the rigors of the Employment Act. The Respondent submitted that the elevation of a simple labour dispute to a constitutional petition cannot jettison the application of the substantive and procedural law on employment. The Respondent relied on the ruling of Nduma Nderi J in **JOHN MIRITI MBARIRE V ATTORNEY GENERAL [2014] eKLR**, and the decision of Radido J. in **SAMSON O. NGONGA V PUBLIC SERVICE COMMISSION & 5 OTHERS [2013] eKLR**.

The Respondent submitted that the claim is statute barred under Section 90 of the Employment Act and this court has no jurisdiction to determine the issues raised in the application.

On prayer 2 of the Notice of Motion the Respondent submitted that the prayer is vague, ambiguous, unclear and uncertain as it does not disclose the exact remedy the Petitioner seeks. The Respondent further submitted that the Petitioner has mistaken the identify of the Respondent and as a result has sued a wrong party who has no legal capacity to implement the orders sought in the application. The Respondent states that Teachers Services Appeals Tribunal and Teachers Service Commission are distinct and separate legal entities each with capacity to sue and be sued in its corporate name.

The Respondent submitted that the application has no merit and should be dismissed.

I have considered the application and agree with the Respondent that the claim emanates from an employment relationship although it has been filed as a petition. In **John Miriti**

**Mbarire v Attorney General [2014] eKLR** Justice Nduma Nderi had this to say in a similar case:-

**The Petitioner argues that because his claim is brought by way of a petition under the Constitution, then he is not bound by the provisions of limitation. In the submissions filed on his behalf, the Court was referred to several authorities on the point that actions for breach of fundamental rights and freedoms are not bound by limitation of time. While I fully agree with these authorities, I do not think that every action that is brought by way of a petition falls under this insulation.**

**In the case of Kemrajh Harrikissoon vs the Attorney General of Trinidad and Tobago [1979] UKPC 3 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 am persuaded that this is the correct interpretation of our jurisprudence even against the backdrop of the current Constitution which elevates labour rights to the Bill of Rights. I do not think that this elevation jettisons the applicable substantive and procedural law on employment and labour relations.**

**In view of the foregoing, the Court finds that the Petitioner's claim is founded on contract and is therefore subject to limitation. According to the pleadings filed in Court, the Petitioner's commission was terminated effective 5th August, 1995 given rise to the cause of action herein. Even taking the six year limitation period provided under the Limitation of Actions Act, the Petitioner's claim is way out of time.**

Justice Radido also stated the following in **Josephat Ndirangu vs Henkel Chemical (EA) Limited [2013] eKLR**

**"Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act, 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 commenced within three years next after the act, neglect or default complaint or in the case of continuing injury or damage within twelve months next after the cessation thereof"**

The provisions of Section 90 of the Employment Act are mandatory. No civil action or proceedings based on or arising out of the Act or a contract of service in general shall lie or be instituted after expiry of three years after the wrong complained of.

The Petitioner's employment with the Respondent having been terminated on 10th September, 2008, became statute barred after 3 years, on 10th September, 2011. As a result this court has no jurisdiction to hear this petition

The contention that the Petitioner's appeal has not been determined to date has been made to the wrong entity. The Teacher's Appeals Tribunal to whom the Petitioner appealed is a separate legal entity from Teachers Service Commission. The Appeals Tribunal is no longer in existence after the repeal of Teachers Service Commission Act Cap 212 (repealed) which created the tribunal under Section 11 thereof.

On the argument by the Petitioner that the Petitioner's named should have remained in the register of teachers and on the Respondent's payroll until his appeal is heard and determined that position would only have been valid if he got orders to stay the decision. Without such stay the Respondent's decision remained valid until overturned, which in this case has not been done.

Thirdly the petition is based on Articles 25(c), 27(1), 41 and 50 of the 2010 Constitution. The claims herein arose on 10th September, 2008 before the promulgation of the Constitution. As stated by Justice Majanja in **Joseph Thuo Mwaura & 82 Others v Attorney General** in Petition No. 498 of 2009, the provisions of the Constitution, 2010 do not apply retrospectively.

The upshot is that I find the application by the Petitioner is without merit and it is dismissed on the grounds that it is statute barred and the Respondent is non-suited.

There shall be no orders for costs.

**Dated and delivered today in the open court this 24th day of JULY, 2015**

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE.**