



**REPUBLIC OF KENYA**  
**IN EMPLOYMENT AND LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**PETITION NO. 44 OF 2014**

**CHALRES MUCHEM KARURU ..... PETITIONER**

***VERSUS***

**NATIONAL WATER CONSERVATION &**

**PIPELINE CORPORATION .....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**MR. Kurauka for the Petitioner...**

**M/S Monyagi for 1<sup>st</sup> Respondent**

**M/S Akuno for 2<sup>nd</sup> Respondent..**

**JUDGMENT**

1. This is a typical claim arising from a termination of employment albeit brought by way of a petition dated 25<sup>th</sup> June 2014 and filed on the same date.
2. The Petitioner seeks a declaration that the purported termination of employment of the Petitioner by the 1<sup>st</sup> Respondent was illegal, null and void and that the same was unjustified and unfair.
3. The Petitioner avers that his right against discrimination, torture and inhuman treatment was violated by the Respondents. That the Petitioner's right to be presumed innocent and to a fair administrative and disciplinary action was infringed.
4. The Petitioner seeks for;
  - a. Payment of arrears salary and other benefits and allowances due to him up to the date of this judgment.
  - b. Payment in lieu of six (6) months' notice.
  - c. Payment of general damages for contravention of his rights under Article 77 of the Constitution of Kenya 1963 (now repealed).
  - d. Payment of maximum compensation of twelve (12) months' salary for unfair and unjust termination;
  - e. An order to return the Petitioner to work or in the alternative payment of the remainder of the term

- of the said contract.  
f. Costs and interest.

### **Facts of the case**

5. The Petitioner was employed under probation by the 1<sup>st</sup> Respondent on 23<sup>rd</sup> November 1999 in the position of Senior Accountant in salary scale 2B. He was confirmed to the position on 4<sup>th</sup> July 2001. On 12<sup>th</sup> March 2003, he was promoted to the position of Chief Accountant.
6. On 26<sup>th</sup> November 2004, the Petitioner was appointed to be part of the change management team to spearhead implementation of the water sector reforms by under the Water Act, 2000.
7. On 21<sup>st</sup> November 2004, the Petitioner was deployed as Acting Chief Finance manager pending restructuring process of the 1<sup>st</sup> Respondent.
8. On 25<sup>th</sup> July 2005, the Petitioner was re-deployed as the Acting incharge of Finance and Administration.
9. On 23<sup>rd</sup> February, 2006, the Petitioner was tasked to make a presentation to the committee on the vision and strategy in his department.
10. On 26<sup>th</sup> March 2006, the Petitioner was appointed by the managing Director of the 1<sup>st</sup> Respondent as the Head Finance and Human Resources Department earning a gross salary of Kshs.290,000.
11. On 24<sup>th</sup> July 2007, the Permanent Secretary Ministry of Water and Irrigation wrote a letter to the Chairman of the 1<sup>st</sup> Respondent raising six issues captioned “*fiscal*” indiscipline in the 1<sup>st</sup> Respondent.
12. On 2<sup>nd</sup> August 2007, the Chairman responded to the letter.
13. By a letter dated 7<sup>th</sup> September 2001, the Permanent Secretary, Ministry of Water and Irrigation wrote a letter to the Managing Director purporting to deploy the Petitioner to the Ministry of Water and Irrigation (Natural Resources Management Project) housed at Maji house.
14. By a letter dated 25<sup>th</sup> September 2007, the Managing Director wrote to the Petitioner confirming the purported deployment and recalling the Petitioner from leave to handover his duties to a Mr. Stanley Mombo a Amuti head hunted from the Water Resources Regulatory Authority Board of Directors by the Permanent Secretary without the knowledge or consent of the Board of Directors of the said Corporation.
15. On 26<sup>th</sup> September 2007, the Petitioner wrote to the Managing Director challenging the deployment and recall in violation of the three (3) years Heads of Department contract which was in force until 23<sup>rd</sup> March 2009.
16. The letter was not responded to. The Petitioner requested for a meeting on the matter in vain. By a letter dated 1<sup>st</sup> August 2007, the 1<sup>st</sup> Respondent approved the Petitioner’s leave for 130 days with effect from 30<sup>th</sup> July 2007 and was to resume duty on 5<sup>th</sup> February 2008.
17. In a meeting held on 7<sup>th</sup> February 2008, the 1<sup>st</sup> Respondent’s Board passed a resolution to terminate the employment of the Petitioner in terms of the Employment Act.
18. On 4<sup>th</sup> February 2008, the Petitioner had been invited to attend a special staff welfare and establishment committee of the Board to deliberate on issues touching on “*your employment contract with Corporation.*” The Petitioner at the meeting maintained that his contract was valid and could only be varied as provided for in the said contract.

19. The Claimant was granted 130 days leave pending investigations on unspecified charges.
20. By a letter dated 8<sup>th</sup> February 2008, the 1<sup>st</sup> Respondent terminated the Petitioner's employment.
21. The Petitioner was to be paid one month salary in lieu of notice and any other benefits due to him subject to and in accordance with the terms and conditions of service of the Corporation. No reason for the termination was given in the letter of termination.
22. The Petitioner avers that he was discriminated upon by the 1<sup>st</sup> Respondent in that he was never given terms of service as a Head of Department as approved by the Board on 4<sup>th</sup> September 2007 unlike the other two heads of Departments namely Eng. M. Saboke & Eng. B. Kioko who were issued with terms of service on 24<sup>th</sup> September 2007.
23. That the 1<sup>st</sup> Respondent did not follow its own code of regulations of its staff dated November 2007, in carrying out its disciplinary procedures against the Petitioner leading to his termination.
24. That the termination from employment was malicious, abrupt, unlawful and without due process and any reasonable or probable cause.
25. That the Petitioner was not paid terminal benefits to date as head of department.
26. That the Petitioner was fifty (50) years at the time and lost prospects of employment to end of contract, and to retirement age.
27. The Petition is supported by a verifying affidavit of the Petitioner to which supporting documents marked CMK 1 are attached.
28. The Petitioner urges the Court to find in his favour.

### **Replying Affidavit**

29. The 1<sup>st</sup> Respondent filed a replying affidavit dated 15<sup>th</sup> September 2014 sworn to by Evans Ngibuini, Acting Managing Director of the 1<sup>st</sup> Respondent.
30. The Respondent dismisses the Petition as a sham, unsupported, grossly incompetent, mischievous and an abuse of the Court process and that it ought to be struck out with costs in that;
  - a. The Petitioner was lawfully and regularly terminated from his employment.
  - b. The Petitioner was paid his full terminal benefits upon being lawfully terminated and no further or other benefits remain accruing.
  - c. That fiscal anomalies were noted while he was the Head of Finance and Human Resource Management and several complaints arose leading to the Petitioner taking leave which was due pending investigations. That the Petitioner was paid leave allowance during the period he was on leave.
31. That the Petitioner acted in terms of the Constitution of Kenya, 1963 (now repealed), and the Employment Act, Cap 226 (now repealed) and the Petitioner's employment was terminated on 8<sup>th</sup> February 2008. The new employment Act, 2007, commenced on 2<sup>nd</sup> June 2008 after the termination took place.
32. The 1<sup>st</sup> Respondent denies the allegations of discrimination made against the 1<sup>st</sup> Respondent by the Petitioner.
33. That the Petitioner was lawfully redeployed to the Ministry of Water and Irrigation (National

Resources Management Project) housed at Maji House on the same terms and conditions of employment as he had always enjoyed as Head of Finance and Human Resources.

34. That the Petition is replete with falsehoods and the 1<sup>st</sup> Respondent traverses these unsupported allegations found in the body of the Petition.

35. In particular, the 1<sup>st</sup> Respondent under paragraph 6 (b) avers that the Petitioner be paid;

1. one month salary in lieu of notice;
2. Kshs.40,000 leave allowance;
3. Kshs.52,493 pension benefits for the month of September to December 2010;
4. Kshs.52,493 for the months of May, August 2010 and was issued with a certificate of service.

36. Annex 'RN5' was attached to evidence the aforesaid payments. A letter dated 18<sup>th</sup> February 2014, was also attached containing explanation why remuneration arrears in the sum of Kshs.2,579,167 and gratuity claim for Kshs.1,472,000 at 31% for 25 months was not paid for the period the Petitioner served as Head of Finance and Human Resource Department under contract since the Petitioner continued to contribute to the NWPC Staff Retirement Benefits Scheme.

37. It was also confirmed that the Petitioner continued to receive monthly pension dues to the date of the communication on 18<sup>th</sup> February 2014.

38. The Respondent prays that the Petition be dismissed with costs.

### **Determination**

39. Before I embark on the merits and demerits of the Petition, the Court has noted that it is not in dispute that the termination of employment that constitutes the course of action in this matter occurred on 8<sup>th</sup> February 2008.

40. It is also not in dispute that the Petition was filed on 25<sup>th</sup> June 2014, more than six (6) years from the date the cause of action arose.

41. It is indisputable that no application for leave to file this Petition out of the limitation period provided under Section 4(1) of the Limitation of Actions Act, Cap 22 of the Laws of Kenya was made.

42. As stated at the opening of this Judgment, this is a typical claim for unlawful and unfair termination of employment disguised as a constitutional petition. The entire suit is premised on a contract of employment and the same is subject of limitation period for suits founded on contract in terms of Section 4(1) of Cap 22 which is six (6) years.

43. In terms of the **Court of Appeal Decision in Civil Appeal No. 142 of 1997** this Court lacks jurisdiction to entertain this suit founded on contract after the limitation period has lapsed.

44. The Court held:

*“it means that no one shall have the right or power to bring after the end of six (6) years from the date on which a cause of action accrued, an action founded in contract. The corollary to this is that no Court may or shall have the right or power to entertain what cannot be done namely, an action that is in contract six (6) years after the cause of action arose or any application to extend such time for the bringing of the action.”*

The Court's hands are therefore tied in this respect on the basis of latches.

45. The Court nonetheless notes that, the Petition itself has no merit since it does not disclose in specific

terms the constitutional provisions and allegations of violation of constitutional rights that necessitated the filing of this Petition.

46. The Petition also lacks bonafides in that payment of terminal benefits made to the Petitioner upon re-deployment and eventual termination of employment are not disclosed in the Petition.

47. For these and other reasons stated herein-before and in particular that the suit is time barred, the Court dismisses the entire Petition with costs to the Respondents.

**Dated and Delivered at Nairobi this 30<sup>th</sup> day of October 2015.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**