



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 54 OF 2014**

**PETER LICHUNGU.....CLAIMANT**

**VERSUS**

**KENYA POWER & LIGHTING COMPANY.....RESPONDENT**

**RULING**

1. The respondent in this suit raised as preliminary, the objection that the claim herein brought by way of Petition is res judicata.
2. According to the respondent, upon being terminated from employment by the petitioner feeling dissatisfied filed a claim before this Court being Cause No. 1169 of 2012. In that claim the respondent raised a preliminary objection to the effect that the claim was statute barred by virtue of section 90 of the Employment Act. This objection was sustained by the Court and the suit dismissed. According to the respondent therefore the present petition is a camouflage to relitigate afresh issues that were dismissed in cause number 1169 of 2012. According to Mr. Otieno for the respondent, the doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely, that litigation must come to an end and that a person should not be harassed twice with the same account of litigation. Counsel relied on the cases of **James Ketabazi & 21 Others v. the AG of Uganda** and **Uhuru Highway Development Ltd v. Central Bank of Kenya**. Mr. Otieno further submitted that the present petition has been brought with the sole aim of avoiding the consequences of section 90 of the Employment Act as well as the ruling of Honourable Justice Rika in cause no. 1169 of 2012. In support of this contention, Counsel relied on the case of **Joseph Ndirangu Vs. Henkel Chemicals**.
3. The petitioner on the other hand submitted through Mr. Amendi that the jurisdiction of the Court to determine disputes relating to breach of fundamental rights and freedoms in labour matters is conferred by statute and the Constitution. It was his contention that the objection was not based on any provision of the Constitution or rules made thereunder. According to Mr. Amendi, the availability of other remedies was no bar to the bringing or instituting a petition under the Constitution for breach of fundamental rights and freedoms. He contended that a constitutional provision cannot be annulled or defeated by a statutory provision and that an action to bring a breach of fundamental right and freedom has no time duration hence limitation does not apply.
4. The arguments in the objection before the Court present very peculiar and almost novel point however the Court must be cautious not to tread the path of interpretation that could amount to judicial licentiousness.
5. Whereas it is undisputed that fair labour practice is recognized as a fundamental right under article

41 of the Constitution, there are those aspects of labour relations which are purely contractual hence governed by the contractual arrangements between the parties and the Employment Act. Article 41 of the Constitution as relevant to this petition provides as follows:-

**41 (1) Every person has the right to fair labour practices**

**(2) Every worker has the right**

**(a) to fair remuneration;**

**(b) to reasonable working condition**

**(c) to form, join or participate in activities and programmes of a trade union; and**

**(d) to go on strike.**

6. The issues of fair remuneration, reasonable working conditions and the right of an employee to form and join or participate in union activities including going on strike are protected under international law and ILO Conventions. The issue of fair remuneration for instance is covered under convention nos. 100 and recommendation no. 111 concerning discrimination in respect of employment and occupation, 1958. It is intended to promote equal pay for work of equal value and encourage fair compensation for labour. Reasonable working conditions govern decent work place environment in order to promote health, sanitation and occupational safety while the right to join a union and participate in its activities is meant to provide a worker with freedom to collectively agitate for better terms and conditions for work.

7. These rights in a sense do not concern themselves with contractual arrangements between an employer and employee they merely provide an environment under which those contracts can be negotiated and executed. If therefore be an allegation that an employer was discriminated against and paid differently from the rest for work of equal value or that his health or life was endangered as a result of poor working conditions or that his services were terminated on account of joining or participating in Union activities then a claim under the constitution can be sustained. In such a case, the issue of whether such a claim can be caught by limitation is arguable and will be decided on its unique circumstances. However an ordinary termination of employment in accordance with the contract of service or Employment Act does not elevate itself to a Constitutional question on which a person may petition the Court.

8. My brother Justice Radido has aptly summarised the position in the case of **Joseph Ndirangu vs. Henkel Chemicals (E.A. Ltd (2013) eKLR** as follows:-

**“In my view a litigant should not avoid the provisions of the Employment Act regarding unfair termination or wrongful dismissal by going behind the statute and relying 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 practice 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 in 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 the bar.”**

9. I cannot agree more.

10. The objection by the respondent is therefore sustained with the consequence that the petition herein is struck out with costs.

11. It is so ordered.

Dated at Nairobi this 23<sup>rd</sup> day of October 2015

Abuodha J. N.

Judge

Delivered this 23<sup>rd</sup> day of October 2015

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge