



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

PETITION NO.14 OF 2015

**POLICE CONSTABLE HENRY NYAKOE
OBUBA.....PETITIONER**

VERSUS

**NATIONAL POLICE SERVICE COMMISSION.....1ST
RESPONDENT**

**INSPECTOR GENERAL OF THE KENYA POLICE SERVICE.....2ND
RESPONDENT**

**DEPUTY INSPECTOR GENERAL OF THE KENYA POLICE SERVICE.....3RD
RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....4TH
RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 20th November, 2015)

RULING

The petitioner filed the petition on 08.09.2014 through M’Njau & Mageto advocates. The petitioner invoked Chapter 4 of the Bill of Rights, Articles 1, 2, 3(1), 10, 19, 20, 21, 22, 23, 25, 27(1) (2) and (3), 28, 35, 41(1) and (2), 48, 49, 50(1) (2) (a) and (o), 159(2) (D), 162, and, 246 (1), (2) and (3) of the Constitution of Kenya. The petitioner prayed for judgment against the respondents for:

- a. A declaration that the act of the respondent in serving the petitioner with a notice to show cause and initiating removal proceedings from the Kenya Police Service (formerly Kenya Police Force) based on the concluded Meru Chief Magistrate’s Court Criminal Case No. 1764 of 2000 and 696 of 2000 was a breach of the petitioner’s constitutional rights under Articles 27(1) (2) and (3), 28, 41, 47, 50, 159 of the Constitution of Kenya, sections 45 as read with section 35(1) (c) of the Employment Act, 2007.
- b. Reinstatement of the petitioner to the position he held prior to the said removal and accumulated salary and allowances from 31.08.2000 amounting to Kshs. 7, 878, 600.00.
- c. Costs and interests be provided for.
- d. Any other relief which the honourable court deems meet and just to grant.

The petitioner filed the petition together with the Notice of Motion dated 8.09.2015 supported with the petitioner’s affidavit.

The respondents filed the notice of preliminary objection on 14.10.2015 through F.O. Makori, Litigation Counsel. The respondents opposed the application and the petition on the following preliminary grounds of objection:

- a. That the honourable court lacks jurisdiction to grant the orders as sought by the petitioner.
- b. That the petitioner's application and the petition as filed contravenes the mandatory provisions of section 89(5) of the National Police Service Act as read together with Article 244(a); 245(1)(b), (4)(c), (8); and Article 247 envisaged under the provisions of Article 10(1) as read with (2) of the Constitution of Kenya, 2010.
- c. That the petitioner's application and the petition as filed contravenes the legal principle of the rule of law envisaged under the provisions of Article 10(1) as read together with (2) of the Constitution of Kenya, 2010.
- d. The conservatory orders as sought and orders as sought in the petition cannot issue since they are hinged on employment claims which are contrary to the mandatory provisions of sections 87 and 90 of the Employment Act, 2007.
- e. That the conservatory orders and orders as sought in the petition cannot issue since they are hinged on employment claims which are contrary to the mandatory provisions of sections 3(1) and (2) of the Public Authorities Limitation Act.
- f. That the conservatory orders in the application and orders sought in the petition cannot issue since they are anchored on employment claims which are contrary to the mandatory provisions of sections 4 (1) and (2) of the Limitation of Actions Act.
- g. That petitioner's application and the petition as filed are incurably bad in law, grossly incompetent, fatally defective and legally untenable.
- h. That the respondents will suffer prejudice if the petitioner's application and petition are heard and determined as filed.

The respondents prayed that the petitioner's application and petition be dismissed with costs.

The **1st issue** for determination is whether the petitioner's case is time barred or if the court lacks jurisdiction to hear and determine the petition.

The respondents have submitted that the suit is time barred because the petitioner has alleged that he was dismissed from employment on 27.05.2004. It is submitted that under section 90 of the Employment Act, 2007 the suit should have been filed 3 years from the date of dismissal. It is further submitted that under section 3 (2) of the Public Authorities Limitation Act, proceedings founded upon contract should be filed against the government within 3 years from the date of the cause of action. Finally it is submitted that the cause of action accrued on 27.05.2004 whereas the petitioner has invoked the Constitution of Kenya, 2010 whose effective date was 27.08.2010, long after the cause of action and the Constitution cannot be applied retrospectively. Thus the court lacks jurisdiction to hear and determine the petition because the petitioner was dismissed on 27.05.2004 and the petition filed on 08.09.2015.

The petitioner submitted that the respondents had failed to establish the constitutional or statutory provisions upon which the court's jurisdiction would be found as lacking to hear and determine the petition. The issues on dates and whether the suit was time barred related to facts which could be resolved by evidence at full hearing and not as a preliminary point. The petitioner submitted that because the suit was about employment relationship, the court enjoyed the relevant jurisdiction under section 12 of the Employment and Labour Relations Court Act, 2012 as read with Article 162 (2) of the Constitution.

The court has considered the submissions. At paragraph 54 of the petition the petitioner has pleaded that on 1.07.2004, the petitioner filed an appeal to the then Commissioner of Police now the Inspector General through Eastern Provincial Police Officer which appeal has never been decided or its decision, if any, communicated to the petitioner 11 years thereafter. At paragraph 55 the petitioner states that he has subsequently written letters dated 04.09.2013, 19.01.2015 and 8.04.2015 as a reminder and pleading with the respondents, particularly the 3rd respondent, to comply with the law by making the final decision on the petitioner's appeal and communicating the same to him but the petitioner has not received any response at the time of filing the petition.

The respondents have not disputed the facts as pleaded by the petitioner and if the same were disputed, then the preliminary objection would fail upon the test in **Mukisa Biscuits Manufacturing Company Limited (1969) EA 696** where it was held that a preliminary objection must consist of only pure point of law which has been pleaded or which arises by clear implications from the pleadings which if argued as a preliminary point may dispose off the suit.

The court has taken into account the petitioner's pleadings in the cited paragraphs of the petition. The court finds that the administrative appeal being allegedly unresolved as at time of filing of the petition, the petitioner's case is alive and is not time barred. The statutory provisions on time barring as cited for the respondents do not therefore, even begin to apply. The court finds that the petitioner's case runs from the former constitutional dispensation into the current constitutional order and the rights and obligations of the parties and the applicable law will have to be canvassed at the full hearing of the petition.

There is no doubt that the dispute is about employment relationship and as submitted for the petitioner, there is no doubt that the court enjoys the jurisdiction to hear the petition under the provisions of the Employment and Labour Relations Act, 2012 as read with Articles 162 (2) (a) and 165(5) of the Constitution.

The court upholds its opinion in **Margaret Lorna Kariuki –Versus- Embu County Government [2015]eKLR** where it was stated, **“There is no dispute that the parties are in an employer-employee relationship and the court finds that it has the constitutional and statutory jurisdiction to hear and determine the dispute. While making this finding, the court is guided by Article 165(5) of the Constitution which expressly bars the High Court from entertaining cases whose jurisdiction is vested in this court under Article 162(2) of the Constitution and under the Employment and Labour Relations Court Act.”**

The 2nd issue for determination is whether the petitioner should have filed an ordinary action and not a constitutional petition. It was submitted for the respondents that the petitioner should have of necessity filed a statement of claim under the rules of this court and not a petition. It is the view of this court that taking such submission would introduce procedural bars to access to justice and this court upholds its opinion in **Peter Muchai Muhura –Versus- Teachers Service Commission [2015]eKLR** thus,

“It is the opinion of this court that the barriers or ridge or valley between judicial review proceedings and the ordinary actions as they were has been collapsed by the Constitution of Kenya, 2010. The Constitution has opened avenues to access to justice and all stipulated remedies in the same proceedings; ordinary action or prescribed application. Thus, litigants need not file separate processes to access the different available remedies. It is true that universal procedural rules have not yet fully evolved in our judicial system to keep pace with the constitutional liberation of litigants; a legitimate and urgent project towards full realization of the constitutional principles in Article 159 that justice shall not be delayed; justice shall be administered without undue regard to procedural technicalities; and the purpose and principles of the Constitution shall be protected and promoted.”

It is the further finding of the court that the opinion applies to judicial review applications, ordinary actions as much as to petitions like in the instant case.

The court, on the procedural manner litigants should invoke and approach the court's jurisdiction, further upholds its opinion in **Professor Elijah Biama –Versus- University of Eldoret and 2 Others [2014]eKLR** thus,

“...The court holds that a venture to distinguish the manner a litigant approaches or ought to approach the court merely on the basis of the remedy or the situ (prescription of the right or fundamental freedom as embedded in the Constitution or legislation or other formal source) of the right or fundamental freedom in issue is long dead under the former constitutional dispensation as the new constitutional order prescribes and favours universal approach towards the realization of the rights and fundamental rights irrespective their primary

formal situ. In the opinion of the court, future measures of aligning court procedures to the new constitutional order will entail universal procedure for realization and enforcement of the rights and freedoms irrespective the formal source or residence of the right or fundamental freedom because the Constitution incorporates all as part of the Bill of Rights. If every dispute that comes to court entails enforcement of some legitimate right or fundamental freedom which the Constitution has incorporated in the constitutional Bill of Rights, then, in the court's opinion, time for a universal procedure by which parties should move the court has come and it would be pursuit in vanity to look for and attempt to sieve rights and fundamental freedoms that are expressly provided for in the Bill of Rights as was the case in the days of Harrikson –Versus- Attorney General of Trinidad and Tobacco (1980) AC 265. For the time being that the universal procedure is not in place, it is the opinion of the court that litigants will not be faulted for the option they shall adopt of the myriad procedural options that continue to peep their souls from the former constitutional dispensation to the new constitutional order.”

In conclusion, the notice of preliminary objection filed on 14.10.2015 is dismissed with costs and parties are invited to take directions on further steps in the petition.

Signed, dated and delivered in court at Nyeri this **Friday, 20th November, 2015**.

BYRAM ONGAYA

JUDGE