



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 979 OF 2011

CHRIS NGAIRA ISABWACLAIMANT

VERSUS

POSTAL CORPORATION OF KENYARESPONDENT

RULING

The Applicant herein Chris Ngaira Isabwa commenced this suit by way of a Memorandum of Claim dated 17th June 2011 and filed in court on 20th June 2011. He alleges that his former employer Postal Corporation of Kenya wrongfully dismissed him from employment. He seeks a declaration that the dismissal was wrongful and unlawful, an order for payment of his terminal benefits, compensation, costs and interest.

The Respondent filed a Memorandum of Response to the Claim on 11th July 2011. In the Response the Respondent raises a preliminary objection to the effect that the claim is not maintainable as it offends Section 24 of the Postal Corporations Act which requires written notice to the Post-Master General of at least one month prior to commencing action against the Respondent and further that the claim must be commenced within 12 months. In the present case the Claimant was dismissed from employment on 22nd July 2009 while the Claim was filed on 20th June 2011 some 24 months after the dismissal.

In reaction to the preliminary objection the Claimant filed the present application on 2nd July 2012 by way of a petition in Nairobi High Court Petition No. 276 of 2012. The Petition was however referred to this court by the High Court for hearing and determination.

I note that the parties have filed their petitions in the original Industrial Court case file and not in the Petition file which was transferred from the High Court to this court. The Petitioner's submissions are titled Petition No. 40 of 2012 while the Respondents' submissions are filed under cause No. 979 of 2011.

Since this file is for Cause No. 979 of 2011 and the two have been placed in one file, I will treat the Petition as a response to the Respondents preliminary objection which they were reacting to when they filed the Petition in the High Court.

The Petitioner has submitted as follows:-

That in its response to the Claim in this cause No. 979 of 2011 the Respondent raised a point of law to the effect that the Petitioner's Claim having been commenced more than twelve months after the act complained of is caught by Section 24 (b) of the Postal Corporation of Kenya Act which provides for cases against the Corporation to be commenced within twelve months. The Petitioner explains that he

was dismissed on 22nd July 2009 and appealed against the decision. His appeal was determined a year later by which time twelve months had lapsed.

The Petitioner submits that Section 24 of the Postal Corporation Act

contravenes Article 3, 20 22), 27, 48 and 159 (2) of the Constitution. That the Act creates a barrier for person in the position of the petitioner to access justice by restricting suits against it to be brought within twelve months which is contrary to Article 48.

The Petitioner relied on the case of **KENYA BUS SERVICES LTD & ANOTHER V MINISTER FOR TRANSPORT & 2 OTHERS [2012] eKLR** which considered Sections 13(A) and 3(1) and (2) of the Government Proceedings Act and the Public Authorities Limitation Act respectively which are similar to Section 24 of the Postal Corporation of Kenya Act.

Majanja J in the matter cited with approval the judgment in *Leach Mokeli Mohlomi v Minister of defence [1996] ZACC 20, 1997 (1) SA 124, 129*, in regard to section 22 of the Interim South African Constitution which in substance is in tandem with Article 48 of our constitution. The Court held:

“the provisions of the Defence Act, 2957 which required that action be brought within six months when the cause of action arose.... Contravened Section 22 of the Interim Constitution which provided that, “Every person shall have a right to have justifiable disputes settled by a court of law or where appropriate another independent forum.” The provision read as a whole must be construed, “against the background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound.... Where such conditions isolate the people whom they handicap from the

mainstream of the law, where most persons who have been injured are either unaware or poorly informed about their rights and what they should do in order to enforce those, and where access to professional advice and assistance that they need so solely is often difficult for financial... reasons.”..... the severity of the provisions resulted in a situation where claimants were not afforded an adequate and fair opportunity to seek judicial redress for wrongs and therefore section 22 violated.”

The Petitioner submitted that in this case he required certain documents for his defence from the Respondent which the Respondent has never supplied to date.

The Petitioner further referred me to the following quotation from Justice Majanja’s decision:

“strict provisions of the applicable statute which in effect provided for a window of five months in which to give notice and file a suit. The general worldwide consensus is that a shorter period for the state cannot be justified. State must abide by the same standards required of mere mortals. Mandatory... short limitation periods would tend to undermine social justice and in a country like ours where illiteracy is rife, communication systems and links are few and far between and

access to legal services wanting, their effect would be to provide a cover for impunity and create de-facto state immunity.”

The Petitioner submitted that the restriction of twelve months undermines social justice and creates a de-facto immunity for the Respondent to the detriment of ordinary people. That although Justice Majanja declined to pronounce the provisions as unconstitutional, he stated that section 3(1) of the Public Authorities Limitation Act are somewhat ameliorated by the provisions of Section 6 in so far as it allows extension of time for certain reasons and that Section 13A of Government Proceedings Act violates the provisions of Article 48. That unlike the Government Proceedings Act, the Postal Corporations Act provides no room for extension of Limitation period and therefore contravenes the right to access justice.

The Petitioner further submitted that the Section contravenes Article 27 (1), (2) and (4) as it is discriminatory and therefore does not extend equal protection to the Claimant as he would have under the Limitation of Actions Act. That for this reason the Section is unconstitutional.

The Petitioner also relied on the case of **MOHAMED BALALA & 11 OTHERS V ATTORNEY GENERAL & 7 OTHERS [2012]eKLR** in which it was held that a law that puts a certain set of land owners to extra burden of procuring consents from the government, a burden that other land owners did not have, was in contravention of Article 27 (1) of the

Constitution. In that case Justice Kasango held that:-

“the requirement for such consent is discriminatory because there is no such similar requirement for the rest of the country.”

The Petitioner further submitted that the Section denies the employees of Postal Corporation the right to file suit within 3 years as provided in Section 90 of the Employment Act and creates inequality between the employees of the Respondent and those of other Corporations and employers.

The Petitioner also submitted that Section 24 of the Postal Corporation Act created a procedural technicality by requiring suits to be brought within 12 months contrary to Article 159 of the Constitution.

The Petitioner also submits that Section 24 of the Postal Corporation Act does not provide a window for enlargement of time unlike the Limitation of Actions Act which gives the courts power to enlarge time. He relied on the case of **APEX FINANCE INTERNATIONAL LIMITED V THE KENYA ANTI-CORRUPTION COMMISSION JUDICIAL REVIEW NO. 64 OF 2011** where the jurisdiction of the court to enlarge time for filing judicial review proceedings after six months was considered. The judge held that “it was within the court’s jurisdiction to both enlarge the period and grant leave especially due to the illegalities involved in the case” The Claimant submitted that this court has jurisdiction under Section 3A of the Civil Procedure Act and Article 21 and 23 of the Constitution to enlarge time in the present case.

The Petitioner further submitted that Section 24 of Postal Corporation Act breaches the Respondents duty under Article 21 (1) to observe, respect, protect, promote and fulfill the rights and fundamental owns in the Bill of Rights.

The Petitioner urged the court to find that he has locus standi under Article 22 (1) of the Constitution to institute court proceedings where a right or fundamental freedom has been denied, violated or infringed or is threatened. He urged the court to declare Section 24 of the Postal Corporations Act unconstitutional, illegal, null and void and further that it is contrary to Section 90 of the Employment Act and Section 4 of the Limitation of Actions Act. He further prayed that the court orders the Section repealed with immediate effect and award costs to the Petitioner.

The Respondent opposed the Petition. The Respondent submits that the enactment of the Postal Corporations Act was a deliberate and intentional action to align the Respondents operations with mainstream central government and create uniformity in actions against the Government. That this was because the Respondent is funded by public funds. The Respondent cited legislation in respect of other state corporations with provisions similar to Section 24 of the Postal Corporation Act being Kenya

Railways Corporation Act (Section 87), Kenya Roads Board Act (Section 67), Kenya Broadcasting Corporation Act (Section 46), and Kenya Airports Authority Act (Section 34). The Respondent further submitted that the intention of enacting the Section was to ensure that claims against the Government and its agencies were dealt with expeditiously when facts and evidence are still fresh and the witnesses and documents are easily traceable. The Respondent cited Civil Appeal No. 3 of 1964: **DHANESVAR MEHTA V Minalal M. SHAH (1965) E.A 321** where Justice Crabbe with approval of the entire bench held:

“The overriding purpose of all limitation statutes is based on the maxim interest *reipublicae ut sit finis litium*, and it has been the policy of the court to lean against stale claims....In my view such a construction as canvassed by the counsel for the respondent would not only make article 175A nugatory... but would also operate to the prejudice of defendant who has been lulled into a false sense of security and who would have lost all evidence for his defence.”

The object of the laws on limitation were again stated by Justice Bosire (as he then was) in Mombasa Civil Case No. 128 of 1962: **RAWAL V RAWAL [1990] KLR 275** when he held that:

“The effect of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand

protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims.”

The Respondent further submitted that the Postal Corporation Act conforms with Articles 50 of the Constitution which provides that “Every person has a right to have the trial begin and conclude without unreasonable delay.”

The Respondent referred the court to Justice Majanjas decision in Nairobi Civil Suit No. 504 of 2008; **Kenya Bus Service Limited & Another V Minister for Transport & 2 others** where he declined to declare a similar provision, Section 3 (1) and (2) of the Public Authorities and Limitations Act unconstitutional when he stated:

“The provisions for demanding prior notice before suing Government is justified on the basis that the Government is a large organization with extensive activities and fluid staff and it is necessary for it to be given opportunity to investigate claims laid against it and decide whether to settle or contest liability taking into account the public expense..”

He proceeded to remark:

“The law of limitation therefore attempts to strike a balance between two contending parties, one to enforce an action and the other not to be vexed by an action that is stale. The balance is struck by the

legislature which provides specific limitation period depending on the subject matter taking into account various policy considerations..”

The learned judge finally held as follows:-

- a. *That Section 13A of the Government Proceedings Act and Section 3 of the Public Authorities Act do not violate Article 27 of the constitution;*
- b.
- c. *That Section 3 of the Public Authorities Limitation Act does not violate the provisions of Article 48 of the constitution.*

On whether Section 24 of the Postal Corporations Act is discriminatory, the Respondent submitted that Articles 27 and 48 of the Constitution have been misapplied and misconstrued by the Petitioner. That Article 27(4) sets out specific grounds for a claim of discrimination being race, sex, marital status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. The Respondent pointed out that the Petitioner has failed to specify the precise ground on which he bases his claim of discrimination. The Respondent submitted that a similar request was rejected in High Court Civil Case No. 1351 of 2002 **Rose Moraa & Another v Attorney General [2006] eKLR**. The Respondent further referred the court to the case of **ANARITA KARIMI NJERU V REPUBLIC (1979) No. 1 KLR 154** and **MEME V REPUBLIC** in which

the court upheld the principle that a litigant seeking redress in a constitutional reference must set out the provisions alleged to have been infringed.

The Respondent further submitted that only a natural person can discriminate against another as Article 27(5) does not envisage an artificial person. That for this reason the Respondent is incapable of infringing Article 27(5). The Respondent relied on **KENYA BUS SERVICE LIMITED & ANOTHER V MINISTER FOR TRANSPORT & 2 OTHERS [2012]eKLR**.

The Respondent also submitted that Section 24 of Postal Corporation of Kenya applied to all claims including claims by employees and relied on the **KENYA BUS SERVICE LTD & ANOTHER case**.

The Respondent submitted that the protection under Article 27 is not absolute relying on the decision in **JAMES NYASORA NYARANGI & 3 OTHERS V ATTORNEY GENERAL [2008] eKLR** and further that not all destinations resulting in differential treatment amount to violation of Article 27 as was stated in **JOHN KABUI MWAI V KENYA NATIONAL EXAMINATIONS COUNCIL & 2 OTHERS [2011]eKLR** and **R V TURPPIN (1989) I S.G.R** as well as in the **ROSE MORARA case (Supra)**.

The Respondent also submitted that the Petitioner has overstretched the meaning of Article 48 in alleging infringement of his right to access justice by Section 24 of the Postal Corporation Act. The Respondent submitted that the object and effect of limitation is not to limit access to justice but to bar stale claims by limiting the time within which certain claims must be filed in court. The Respondent relied on Justice Odunga's decision in **FRANCIS MUGO NDEGWA V AMBOSELI COURT LIMITED [2012] eKLR**, **IGA V MAKERERE UNIVERSITY [1972]EA 65** and **RAWAL V RAWAL (Supra)** in which the court held that the effect of limitation is not to extinguish claims but operates to bar the claim or, remedy sought when it is time barred. The Respondent argued that the 12 months period of limitation in Section 24 of Postal Corporation Act does not foreclose the Claimant's rights to approach the court but only limits the period within which this should be done.

On the hierarchy of statutes the Respondent relied on Section 3 of the Judicature Act and Article 24 of the Constitution and submitted that Section 24 of the Postal Corporation Act should not be declared unconstitutional for being in conflict with the Employment Act and Limitation of Actions Act and that it is a settled principle that where there is a specific enactment governing an institution the provisions of other statutes of general application may not be relevant for purposes of litigation and that courts must apply the specific statute. The Respondent relied on the case of **J. WAMBUGU & 8 OTHERS V RAILWAYS CORPORATION OF KENYA[2005] eKLR** where justice Ojwang' upon being asked to consider which statute was applicable between the state Corporations Act and the Employment Act in a suit involving Railways Corporation held that:- "*I am unable to appreciate that such a statute has very much to do with the logistics of the conduct of litigation in public corporations; and I must conclude that the relevant enactment for purposes of the suit herein is the Kenya Railways Corporations Act (Cap 397). It follows that it would not be right as a matter of law to overlook the requirements of Section 87 of the Act. I am, in this regard, in agreement with the learned Counsel of the Respondent that the applicable law is the Kenya Railways Corporation Act.*"

On whether Section 24 of Postal Corporation Act violates Article 159 of the Constitution the Respondent submitted that the constitution was not enacted to oust substantive provisions of law and litigants who have failed to abide by clear provisions of law should not take refuge under Article 159. The Respondent relied on the decision of Musinga J in **WLLIS EVANS OTIENO V LAW SOCIETY OF KENYA & 2 OTHERS [2011]eKLR** when he stated as follows in respect of article 159;

"What should the court do in light of submissions made by the petitioner that the court is obliged to disregard procedural technicalities in dispensation of justice? I do not agree with the petitioner that the

issue of competence of pleadings, and particularly where such incompetence arises from circumstance as in this case, can be termed as procedural technicality. This is a substantive

question of law, which goes to the root of the matter. The provisions of Article 159 (2) (d) of the constitution cannot be relied upon as a panacea for incompetent pleadings filed by an unqualified person.”

And by Havelock J in **SIETCO V KIGWE COMPLEX LIMITED [2013]eKLR** when he stated:-

“I do not think that the provisions of Article 159(2) (d) of the constitution 2010 helps the defendant herein in any way. I concur with the finding of my learned brother Musinga J in the Willis Evans Otieno case that Article 159 (2) (d) of the constitution cannot be relied upon in the face of the specific provision of section 6 (1) of the Arbitration Act expressed in mandatory terms.”

The Respondent urged the court to disregard the Petitioners Claim as devoid of merit.

I have considered the grounds in support and opposition of the petition and the submissions by the parties.

The applicant prays for a declaration that Section 24(b) of the Postal

Corporation Act is unconstitutional. This is because it limits the rights of parties suing it to file suits against the corporation to twelve months.

As pointed out by the Respondent, this Section is not unique to the Postal Corporations Act. There are similar provisions in the public authorities Limitations Act, Kenya Railways Corporation Act, Kenya Roads Board Act, Kenya Broadcasting Corporation Act and Kenya Airports Authority Act among others. The basis for such provisions have also been considered in several cases as pointed out by the Respondent among them **DHANES VAR MEHTA V. MANILAL M. Shah (1965) E.A 321, Rawal V Rawal** and recently in **KENYA BUS SERVICES LTD & ANOTHER V MINISTER FOR TRANSPORT & 2 OTHERS [2012] eKLR** when he stated that :-

“the GPA and PALA apply to all equally with Claims against the Government” and further that “the Plaintiff did not demonstrate how these provisions violate the provisions of Article 27(4).”

I would say the same of the Petition herein. Section 24 (a) and (b) of the Postal Corporation Act is not discriminative as it applies to all equally. It is therefore not unconstitutional.

Having stated that, I still have to determine if the claim by the Petitioner in respect of the termination of his employment is subject to Section 24 of the Postal Corporations Act and therefore time barred.

In the Memorandum of Claim the Claimant alleges that the termination of his employment did not comply with Section 43, and 45 of the Employment Act. The Respondent on the other hand states that the summary dismissal of the Claimant was in accordance with Section 44(4)(c) of the Employment Act.

Section 26 of the Employment Act provides that the terms in the Act are minimum basic terms of Employment and that where the terms and conditions of a contract of service are regulated by any regulations, agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment, award or order of this court, such terms can only be substituted with the minimum terms in the Employment Act if they are more favourable.

Section 92(3) of the Employment Act provides that contracts of employment shall be enforced in accordance with the Employment Act. Section 93 provides that every contract of service shall be construed as if it were a contract made in accordance with and subject to the provisions of the Act, and the parties thereto shall be subject to those provisions accordingly.

For these reasons I find that all employment contracts, including contracts

made by the Respondent herein, are subject to the Employment Act and

enforceable in terms of the provisions of the Employment Act.

In the case of **Kenya Revenue Authority V Menginya Salim** (Supra) the Court of appeal held that disciplinary action against an employee of a public body is exercised by the public body in its power under a contract of employment and not its statutory power under an act of parliament.

For the foregoing reasons I find that Section 24 of the Postal Corporation Act does not apply to this case. The proper legal regime for resolution of all employment matters is the Employment Act. Holding otherwise would mean that employees of the government and public corporations which are established by Acts of parliament with provisions similar to Section 24 of the Postal Corporation Act would be subjected to less favourable terms in contravention of the provision of the Employment Act and Article 27 of the Constitution. This would also not be a purposive interpretation of the law and would introduce parallel legal regimes for resolution of employment disputes.

I therefore declare that the claim filed by the Claimant in Industrial Court Cause No. 979 of 2011 is not statute barred as it was filed before the lapse

of the limitation period of 3 years provided for under Section 90 of the Employment Act.

Orders accordingly.

Dated and delivered at Nairobi this 17th day of July 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

No appearance for Petitioner

No appearance for Respondent