



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

PETITION NO. 4 OF 2013

SAMSON O. NGONGAPETITIONER

-VERSUS-

PUBLIC SERVICE COMMISSION

AND 5 OTHERSRESPONDENT/APPLICANT

Mr. Silo for the Respondent/Applicant

Mr. Ombwayo for the Petitioner.

RULING

The Petition dated 7th March, 2011 was filed at the High Court on 15th September, 2011.

The cause of action arose from the dismissal of the Petitioner from the Police Force with effect from 25th September, 1988 by a letter dated 9th October, 1998.

The Petitioner had prior to the disciplinary hearing been charged with two (2) other police officers with the offence of robbery with violence contrary to **Section 296 (2)** of the Penal Code Cap 63 on 31st August, 1998.

The charges were later withdrawn under **Section 87 (a)** of the **Criminal Procedure Code Cap 75**.

From the date of arrest on 12th August, 1998, to the date of discharge on 5th February, 1999, he was kept in police custody as this was a non-bailable offence.

Though the petition is said to have been brought in terms of the Constitution of Kenya 2010, no violation of any specific provision of the constitution is cited therein.

The matter was subsequently transferred to the Industrial Court, it being a case of alleged dismissal of an employee by his employer.

A preliminary objection was filed on 15th July, 2013 by the Respondents to wit;
“That the matter herein is time barred as it is contrary to Section 3 (2) of the Public authorities

Limitation Act”

Section 3 titled limitation of proceedings provides;

“(3) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.”

This action is based on a contract of employment between the Claimant and the 1st and 2nd Respondents.

The action was filed about thirteen (13) years from the date of dismissal. No application for leave to extent time to file the matter was sought precisely because the matter was framed as a constitutional petition.

The specific prayers sought by the Petitioner are as follows;

“1. An order that the decision dated 9th October, 1998 and or anyother by which the petitioner was dismissed from the Police Force is unlawful, unconstitutional, null and void and is set aside and the petitioner be and is deemed as still an officer in the Police Force with the attendant responsibilities, duties, powers and privileges.

2. An order of mandamus compelling the respondents to re-enlist the petitioner to the Police Force with no loss of seniority, and to pay him all his dues to date.

3. An order that the petitioner be and is entitled to all his accrued benefits from the date of employment to date with no loss of seniority.”

As was stated by the East African Court of Appeal considering an appeal from the High Court of Uganda in the matter of **Iga v Makerere University (1972) E.A;**

“The limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time-barred, the court cannot grant the remedy or relief.”

The Court went on to elaborate;

“The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint, and no grounds of exemption are shown in the plaint, the plaint must be rejected.”

Upon considering this preliminary objection, the court accepts the submission’s by the counsel for the Respondent that no specific allegations of violation of human rights and fundamental freedom are pleaded in this matter and the claim is purely based on breach of contract of employment and must be treated as such for purposes of the law of limitation.

No attempt has been made whatsoever to show that this matter falls within any of the exemptions to the limitation of actions.

In particular no attempt is made to explain the delay in filing this matter within the three year period at the High Court which is the court that had jurisdiction to deal with the matter then.

The dismissal was in 1998 and the Petitioner was freed from custody in 1999 but instead of filing a suit, he persisted in futile appeals to the Respondent which were not responded to at all. It was at that time when a suit should have been filed well within the limitation period.

Section 3 (3) of the Public Authorities Limitation Act reads;

“Where the defence to any proceedings is that the defendant was at the material time acting in the course of his employment by the Government or a local authority and the proceedings were brought after the end of-

- a. twelve months, in the case of proceedings founded on tort;**
- or**
- b. three years in the case of proceedings founded on contract, from the date on which the cause of action accrued, the courts at any stage of proceedings, if satisfied that such defendant was at the material time so acting, shall enter judgment for that defendant.”**

Upon considering the papers filed of record and the submissions by counsel, the court is satisfied that the cause of action herein arose in 1998, and the respondent was acting in its capacity as the employer of the Petitioner.

This being the case, the suit before this court cannot be sustained as the claim or remedy sought for is time barred and the court cannot grant the remedy or relief sought.

The preliminary objection is therefore upheld, with the result that the petition is dismissed with no order as to costs.

Dated and delivered at Nairobi this 10th day of December, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE