



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

PETITION NO 7 OF 2021

**IN THE MATTER OF THE ALLEGED CONTRAVENTION RIGHTS AND FUNDAMENTAL FREEDOMS UNDER
ARTICLE 19, 20, 25, 27, 28, 41, 47, AND 50 OF THE CONSTITUTION**

BETWEEN

SAMSON LETEIPA OLE KIMONGO.....PETITIONER/APPLICANT

- VERSUS -

THE INSPECTOR GENERAL, NATIONAL POLICE SERVICE.....1ST RESPONDENT

THE NATIONAL POLICE SERVICE COMMISSION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. This ruling relates to the 2nd respondent's Preliminary Objection dated 2.11.2021 which objects to the Petition on the following grounds:-

- (a) The petition is scandalous, frivolous and vexatious.
- (b) The petition herein offends section 4(1) (a) of the Limitation of Actions Act Cap 22.
- (c) The petition herein goes against the principles of section 12 (3) (vii) of the Employment and Labour Relations Court Act.
- (d) The petition is therefore incompetent and should be dismissed.
- (e) The petition herein is an abuse of the court process, lacks merit and is ill advised.

2. On 3.11.2021, the parties agreed to dispose of the objection by written Submissions.

Objector's case

3. The gist of the objection is that the petition herein is incompetent because it is time barred. According to the 2nd respondent, the petition involves an employment dispute disguised as a constitutional violation issue in order to circumvent the Limitation of Actions Act. It is submitted that by dint of Section 3(2) of the Employment Act, the Act does not apply to officers in the Police Service and therefore the Limitation of Actions Act applies to this case.

4. It observed that the petition was filed after the lapse of 19 years from the date when the cause of action arose, and 13 years after the lapse of the 6 years limitation period provided for suits founded on contract. It is therefore submitted that the suit herein being brought out of time is time barred and consequently, incompetent.

5. For emphasis, the 2nd respondent cited several precedents including **Benjamin Wachira Ndiithi v Public Service Commission & another [2014] eKLR**, **Johnstone Ogechi Mose v National Police Service Commission [2017] e KLR** and **Daniel Kago Gachanja v Inspector General & 2 others [2020] e KLR** where the courts upheld objections similar to the instant one on ground that the petitions involved employment dispute and were filed out of time contrary to section 4 of the Limitation of Actions Act and section 3(2) of the Public Authorities Limitation of Actions (PALA) Act.

6. As regards the reliefs sought, the 2nd respondent contends that the court lacks jurisdiction to grant relief in the suit since it is time barred. Further it contends that under section 12(3)(vii) of the ELRC Act, the court barred from ordering reinstatement after the lapse of 3 years from the date of separation.

7. For emphasis, it relied on **Bosire Ongero v Royal Media Services [2015] e KLR**, **The Owners of the “MV Lillian S” v Caltex Oil Kenya Limited [1989] e KLR**, **Ann Waceke Makori & 2 others v Faulu Microfinance Bank Limited [2021] e KLR** and **Yusto Opiyo Onyango v National Police Service Commission & 2 Others [2018] e KLR** where the courts held that without jurisdiction the court should not grant any relief but just down its tools.

8. The petitioner did file any submissions to oppose the preliminary objection.

Issues for determination

9. I have considered the pleadings, objection and the submissions by the parties. The issues for determination are:-

a) *Whether the objection raises pure points of law*

b) *Whether suit is time barred*

c) *Whether the sit offends section 12(3)(vii) of the ELRC Act*

Pure point of law

10. In the case of **Mukisa Biscuits v Westend Distributor Ltd [1969] EA 696**, the court observed that: -

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

11. In this case, I am satisfied that the objection raises some pure points of law which do not need evidence to establish. The points raised can be summed up to say that, the petition is time barred. The said point is capable of ending the suit if they are established.

Time barred suit

12. There is no dispute that the suit herein is founded on contract of service between the parties herein. It is also a fact that the cause of action herein accrued on 25.2.2002 according paragraph 12 of the petition. Further, it is not disputed that the suit was filed on 4.6.2021, 19 years from the date when the cause of action arose.

13. The petitioner accuses the employer of failure to hear his appeal which he made on 12.3.2003 after his acquittal from criminal case which involved the allegations that led to his dismissal. However, considering the dismissal letter, the petitioner had only seven days to appeal but he delayed for over a year. The said appeal in my view, was time barred and cannot be said that it is pending determination. It is therefore not a ground to validate the instant late petition.

14. The relevant law to this matter is Section 3(2) of the PALA Act which provides that:-

“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 course of action accrued”

15. The suit herein is against officers and an organ of the government of Kenya and therefore the petitioner ought to have commenced his suit within three years from 25.2.2002 when he was dismissed. The said period lapsed on 24.2.2005, but he filed the suit on 4.6.2021, more than 19 years from the date of the impugned dismissal. In the circumstances, I find and hold that the suit is time barred by dint of section 3(2) of the PALA Act and it is therefore incompetent.

16. I gather support from the Court of Appeal decision in **Anaclet Kalia Musau –vs Attorney General & 2 others [2020] eKLR** that:-

“...the overriding purpose of all limitation statutes is based on the maxim interest reipublicae ut finis litium, that it is in the public interest that there be an end to litigation. A party will not be permitted to prosecute stale claims.”

17. Having found that the suit is time barred it is also obvious the court lacks jurisdiction to entertain the same. In my view it is common sense that the lapse of limitation period means that the mandate of the court to receive and entertain proceedings in a particular cause of action is extinguished by effluxion of time.

18. I gather support from the case of **Bakery Confectionery food Manufacturing and allied workers union –vs Razo Limited [2021] eKLR** where Onyango J held that:

“The claimant did not file the matter in court until 25th February 2016 which is 5 years after the last course of action arose. As such the suit is statute barred and the court does not have jurisdiction to hear and determine the claim.”

19. I am further guided by the case of **The Owners of the “Motor Vessel Lilian S” v Caltex Oil (Kenya) Ltd [1989] eKLR**, where the Court of Appeal held that:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

20. In view of the foregoing findings and observations I uphold the preliminary objection by the 2nd respondent and strike out the suit with direction that each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 20TH DAY OF JANUARY, 2022.

ONESMUS N MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE



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