



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

PETITION NO. E004 OF 2021

IN THE MATTER OF ARTICLES 22, 23, 35, 59 & 249 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS

UNDER ARTICLE 47 OF THE CONSTITUTION KENYA

AND

IN THE MATTER OF SECTION 6 & 12 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF NATIONAL POLICE ACT & NATIONAL POLICE SERVICE COMMISSION ACT

BETWEEN

MOSES NYANDUSI OSORO.....PETITIONER

VERSUS

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

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. The Petitioner was an employee of the 1st Respondent until 5th February 2014 when he requested to be released from the force on account of ill health. After some time, it does appear that the Petitioner changed his mind about leaving employment. As he says, he requested that he be allowed to resume duty.

2. Despite this request on 14th October 2019 by the Petitioner, it is alleged that the 1st Respondent did not give him a favourable response. As a result, the Petitioner filed the current Petition.

3. In the Petition, the Petitioner seeks for orders that he is still an employee of the 1st Respondent and is thus entitled to resume duty and as well to be paid all his salary and other emoluments from March 2014 to the date he resumes duty. In addition, the Petitioner prays for the following other orders: that the 1st Respondent's action in failing to clarify the Petitioner's employment status is a violation of the Petitioner's constitutional rights; that the Respondents do pay the Petitioner general and special damages; and that the Respondents do pay interest and costs.

4. According to the Petitioner, although he tendered his resignation in February 2014, the 1st Respondent never communicated its acceptance of the request. Consequently, the resignation never took effect and the Petitioner remains an employee of the 1st Respondent to date.

5. In its response to the claim, the 1st Respondent has averred that the Petitioner's resignation letter was received and processed. And that the Petitioner even paid the 1st Respondent salary in lieu of notice since it was his desire that the resignation takes effect immediately. According to the 1st Respondent, the Petitioner therefore resigned voluntarily and his employment contract was effectively closed upon his resignation in February 2014.

6. Even though the Petition is yet to be fully ventilated, my preliminary assessment of the documents filed suggests that the parties interacted over the issue of the Petitioner's resignation between February 2014 and June 2014. It does appear that the Petitioner did tender the letter dated 4th February 2014 resigning from the force. It does appear that through the same letter, the Petitioner paid the 1st Respondent some Ksh. 31,770/= being one month's salary in lieu of notice to terminate. It does also appear that the amount paid by cheque was accepted by the 1st Respondent and a receipt issued to the Petitioner on 26th June 2014.

7. The law on resignation is that it takes effect immediately it is tendered unless it is expressed to take effect at a later date. In other words, acceptance of such resignation is not a prerequisite for its efficacy (see *Kennedy Obala Oaga v Kenya Ports Authority [2018] eKLR*).

8. The Respondents have filed a preliminary objection to the Petition. The objection is basically that the action is time barred and is therefore an abuse of the court process. Although filed as a constitutional Petition, the Respondent's position is that this was just a guise to avoid the consequences of section 90 of the Employment Act. That the action is nevertheless time barred by reason of section 3(2) of the Public Authorities Act.

9. I do not think that by filing this matter as a constitutional petition instead of an ordinary employment dispute that the Petitioner was attempting to go round section 90 of the Employment Act. Section 3 of the Act clearly excludes the parties to this action from the application of the Employment Act. Therefore, the only way these parties can litigate employment disputes between them is by approaching the court through a constitutional petition that sits outside the Employment Act.

10. In my view, proceedings commenced as constitutional petitions do not fall in the realm of ordinary civil actions. They are actions sui generis. Therefore, the limitation period set under the Public Authorities Act in so far as it applies to ordinary civil actions does not have application to proceedings commenced through constitutional petitions.

11. That said, although proceedings to enforce constitutional rights may not be defeated by reference to provisions of statutes raising time bars, they are nevertheless affected by the common law concept of laches. The Petitioner must invoke the court's jurisdiction to protect his rights in a manner that exhibits diligence on his part.

12. If there is undue delay in instituting a claim to protect one's rights, there is the obvious risk of the defendant being led to think that the Claimant has abandoned his right. The defendant may also have lost the evidence he requires for his defense due to passage of time.

13. Fairness therefore dictates that all claims for enforcement of rights ought to be prosecuted with some measure of promptness and diligence. Indeed, it is for this reason that the court may find that although a constitutional petition is not time barred, the delay in presenting it nevertheless amounts to abuse of the court process.

14. This principle is reiterated in the case of *Peter M. Kariuki v Attorney General [2014] eKLR* when the court observed as follows: -

“.....the Constitution did not set a time limit within which applications for enforcement of fundamental rights should be brought. Nevertheless the court added that, like all other processes of the court, it is in public interest that such applications be brought promptly or within a reasonable time, otherwise they may be considered an abuse of the process of the court.”

15. I have considered the Respondents' preliminary objection in the context of the foregoing exposition of the law. The Petitioner tendered his resignation in 2014 when he argues that it was not accepted and therefore did not take effect. As demonstrated above, this ground may nevertheless be shaky as resignations take effect on the date they are tendered unless the contrary is expressed irrespective of the employer's view on them.

16. After he recovered as he asserts, the Petitioner asked to resume duty. This was sometime in 2019. However, there is no indication of the date the Petitioner recovered if at all.

17. The Petition for readmission into the force is then filed in June 2021, several years down the line. Between 2014 when the Petitioner resigned and 2021 when he moves the court to seek reinstatement is a period of approximately eight (8) years. Over this time, has the 1st Respondent not changed its position in respect of the previous employer-employee relation between the parties and even recruited new personnel to take up the vacancy left by the Petitioner" Would permitting the prayers in the Petition coming this late in the day not prejudice the 1st Respondent" And if the answer to the second question is in the affirmative, will this Petition not be an abuse of the court process"

18. I find that the Petition, though not affected by the various statutes of limitation referred to is nevertheless barred by the common law doctrine of laches. It is therefore filed in abuse of the court process. I therefore strike it out with costs to the Respondents.

DATED, SIGNED AND DELIVERED ON THE 28TH DAY OF APRIL, 2022

B.O. M. MANANI

JUDGE

In the presence of:

No appearance for the Petitioner

No appearance for the 1st and 2nd Respondents

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.

B. O. M. MANANI

JUDGE



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