



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 825 of 2003

LAWRENCE ADIYO PLAINTIFF

VERSUS

KENYA REVENUE AUTHORITY.....: DEFENDANT

RULING

The Plaintiff moved to this Court and filed this suit against the Defendant vide his plaint dated 7th August, 2003 and filed on 11th August, 2003. The averments relevant to this ruling are that the Plaintiff was seconded to the Defendant by the Ministry of Finance as a Chief Inspector seconded to the value Added Tax Department. In pursuance of the said secondment, the Defendant offered the Plaintiff employment as a Chief Inspector on Permanent and Pensionable terms of service with effect from July 1996, the Plaintiff worked diligently and the Defendant promoted him to a Senior Assistant Commissioner of V..A.T under Kenya Revenue Authority job group KRA Grade 5 at a salary scale of Kshs 70,767.00, and about 1st December 2000 the plaintiff opted for early retirement having worked for 31 years and was paid Kshs 2,556,078 which was based on his gross salary of Kshs 70,767/=.

The cause of action arises because the plaintiff has learned since leaving employment that the Defendant during the duration of his contract of employment maintained and applied a two-tier salary structure to its employees wherein the Defendant maintained a lower scale and a higher executive scale under a similar job group, the effect of the said two tier structure was that persons of a similar job group and grade earned different packages with glaring variations with the minimum basic salary in the lower scale being 68% of the minimum higher executive salary scale being an average 49% of the maximum basic salary under the higher executive scale. The Plaintiff contends that during the entire service with the Defendant he was relegated to the lower scale by being paid a gross salary of Kshs 70,767 per month instead of Kshs 138,276 per month which put him at par with officers 5 grades his junior, it is further his contention that the application of the higher executive scale to employees was based on extraneous factors and political connection and not on any policy or job qualification and or competence. It was selective, discriminatory unconstitutional and contrary to public policy.

In consequence thereof the Plaintiff seeks a declaration that the maintenance of the two-tier salary structure was, discriminatory un constitutional and contrary to public policy, Kshs 3,689,412.00, costs and any other or further relief this Honourable Court may deem, fit to grant.

The Defendant filed a defence to that claim dated 15.9.2003 and filed on 16.9.2003. The key averments relevant to this ruling are paragraphs 4,5,6,13,14,15,16,17,20 and 21. The salient features of the same are that the Plaintiff agreed to enter the employment of the Defendant on the terms and conditions stipulated in the letter of appointment, he received payment for his rightful dues and as such nothing is owing, that it

enters into individual employment contracts with each of its employees and as such variance in terms, conditions and remuneration would be expected based on market value, skill, competence, resources and performance among other factors. That the Plaintiff was not privy to other employment contracts between it and other individual employees and the issue of how much they (other employees) earned and what work they did is irrelevant.

Further that allegations that the higher salary was discriminatory and unconstitutional is in the nature of an allegation of contravention of fundamental rights and freedoms under Section 84 of the Constitution, that the suit is un-maintainable under contract law, that the blatant breach of statutory provisions is incurable as the Plaintiff is not rightly before this Honourable Court, that the suit as instituted is bad in law, incompetent and fatally defective and the Defendant shall in due course apply to have the same struck out.

On the basis of the averments in the defence the Defendant has filed the chamber summons subject of this ruling under order VI rule 13(1) (d) and 16 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking orders that the court be pleased to strike out the plaint, that the suit against the defendant be dismissed with costs and that costs be provided for.

The major grounds in support are firstly that the suit stems from a contract of employment between the disputants brought to an end by the Plaintiff who was duly paid his dues and upon receipt of those terminal dues the plaintiff lawfully freed and discharged the Defendants from any obligation, under the contract and so he cannot turn round and sue upon it because it is dead and there is nothing to enforce. He plaintiff is precluded from relying on contracts between Defendant and other employees to enforce his contract.

The second ground is that since the plaint seeks to enforce Constitutional rights the matter should have been brought to Court by way of a constitutional reference under rule 11 of legal notice No.133/01 and not by way of Plaint.

Thirdly, that these proceedings are governed by the government proceedings Act Cap.40 Laws of Kenya and Public Authority Limitation of Actions Act Cap.39 Laws of Kenya which require the plaintiff to have issued a notice of intention to sue KRA which notice should have been issued to the Attorney General. They contend that the letter of demand dated 8.3.2002 does not satisfy the requirements of the law more so when it was addressed to Kenya Revenue Authority and not the Attorney General.

Fourthly, that the action being based on contract it has a life span of three years. The alleged discrimination is alleged to have occurred from 1.1.1999 where as the suit was filed on 11.8.2003 more than three years later. It is their contention that as at the time the plaintiff came to court his cause of action had become statutorily barred.

Counsel for the defendant applicant also relied on legal authorities and provisions of law to fortify his argument. Reliance was placed on the provisions of legal notice No.133/01 with special reference to rules 9,10 and 11 which the Court will revert to at a later stage in the ruling. Chitty on contracts, 27th Edition volume II Pr.788 at paragraph 37-115 on termination of agreement where it stated "*in accordance with general contractual principles, it is open to an employer and employee at any time during the currency of a contract of employment to terminate the contract by agreement. The agreement will be effective by virtue of the mutual release by parties of the obligation under the contract of employment. The agreement may be subject, to terms, provided these do not for instance constitute any unlawful restraint of trade. The agreement will be effective to override formal or substantive restrictions placed on the termination of the contract by the original contract itself*"

Reliance was also placed on the principles of the English law of contract and of Agency in its relation to contract by the Right Honourable Sir William R. Anson 21st Edition 1959 chapter XII Pr.2 where it is stated "*Rescission of an executory contract. A contract may be discharged by agreement between the rescission parties that it shall no longer bind them. This effects the rescission of the contract, and it releases the parties from their obligation under it. Such an agreement is formed of mutual promise, and*

the consideration for each promise of each party is the abandonment by the other of his rights under the contract. The rule as often stated, that a simple contract may before breach be waived or discharged without a deed and without consideration...”

At common law, the right to performance of a contract can be abandoned only by release under seal or for consideration”

Reliance was also placed in the ruling on the NAIROBI HCCC NO. 2106 OF 1996 JAMES K. MWAME AND 2 OTHERS –VS- THE COMMISSION OF LANDS AND TWO OTHERS where the court upheld objection on the non compliance with Section 13A of the Government Proceedings Act Cap. 40 Laws of Kenya and Section 3(2) of the public Authorities Limitation Act Cap.39 Laws of Kenya.

The Applicant defendants counsel further asked the court to ignore the Respondents replying affidavit as the document relied upon by him cannot pass the test of admissibility.

In reply the plaintiff respondent reiterated the averments in the plaint and added that he came to court after discovering that there were dues which were due to him which had not been paid to him during the subsistence of the employment because the defendant was applying a two tier salary scheme which was unknown to him, he maintains that they had issued the requisite notice to the Attorney General and his former advocate on record should have exhibited that notice, as far as he is concerned his former lawyer whose services he hired filed the proceedings in the proper court which can also deal with the constitutional issues and if he is not before the correct forum then this Court has power to refer the matter to the correct forum instead of striking it out or dismissing it. He asked the court to deal with the issues of law since he could not tackle them.

In reply Counsel for the applicant maintained that all the annexures to the replying affidavit are of no use because they are not properly executed. Secondly they do not apply to the Applicant because he had already retired from their employment, that the Plaintiff should have taken up that issue before retirement as he had that information as at the time of retirement, allowing the matter to go to trial will amount to rewriting the contract between the parties and lastly wrongs of his former advocate on record cannot be ventilated in this forum.

On the courts assessment of the facts herein it is clear that the defendant has moved this court to fault the plaintiffs claim on a number of grounds. Firstly that the case being based on a contract of employment which was voluntarily brought to an end by the Plaintiff, the Defendant was wholly discharged from any further obligations under the said contract and no useful purpose will be served by reopening that issue for trial.

Secondly, that the complaint being based on contract, the matters complained of having been known to the plaintiff the same have become statutorily barred as the plaintiff did not move to court to ventilate them before the expiry of three years and lastly that since the plaint raises constitutional issues it is in the wrong forum. It should be in a constitutional court instituted using the procedure laid down in LN NO.133 OF 2001.

This court will tackle each issue one at a time. Starting with the issue of a discharge of a contract, it is not disputed that indeed there was a contract of employment between the disputants which was voluntarily brought to an end by the plaintiff. What the plaintiff is seeking to enforce is the shortfall of what he had been paid in terms of monthly salary and terminal dues and what he ought to have been paid in terms of salary and terminal dues had the defendant not maintained a two-tier salary structure. The defendant maintains no claim lies as a result of that contract and the matter is fore closed on the plaintiff and the defendant discharged. The applicant has not exhibited the contract signed upon termination to show that the Respondent undertook there in not to pursue any further claim that may arise whatsoever and howsoever. In the absence of such proof this court cannot shut out the Plaintiff from claiming what he believes was due to him but was not paid to him. This court can only shut him out from revisiting what has already been paid to him which he is not pursuing as shown by his pleadings and submissions. It therefore follows that the applicant/defendant has not brought himself within the ambit of principles of

law relied upon by them that the Obligations under the contract have been discharged by mutual consent in so far as claims over and above what was paid are concerned.

As regards statutory limitation to the contract it is correctly submitted by the defendants' Counsel that a contract has a legally recognized life span which is the yard stick for determining the existence or non existence of a cause of action based on contract. Section 4(1) (a) of the Limitation of actions Act cap.22 Laws of Kenya states:- *“ the following actions may not be brought after the end of six years from the date on which the cause of action accrued-*

(a) *actions founded on contract*

This provision applies to any contract. However the plaintiffs' contract falls under a special class of contracts in that firstly, it is a contract of employment and secondly it is a contract of employment involving a government entity governed by a special set of provisions of law namely the Public Authority Limitations of Actions Act Cap.39 Laws of Kenya.

It is not disputed that Kenya Revenue Authority is a public Authority within the meaning of the public Authority Limitation of Actions Act Cap.39 Laws of Kenya. This being the case it means that in order to succeed to have his suit stand trial the Plaintiff must have brought it within the time stipulated by that Act.

Section 3(2) of the said Act states:-

“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 provision applies to the proceedings herein because Kenya Revenue Authority is a government body but with donated power to sue and being sued.

To determine the date when the cause of action accrued to the Plaintiff this court has to go back to the plaint and the replying affidavit. Paragraph 8 of the plaint does not state when the Plaintiff came to know of the two-tier salary scheme. However paragraph 7 of the replying affidavit is explicit on this. It states *“that on or about October 2000 before my retirement I came to learn that the defendant/applicant had during the duration of my contract of employment maintained and applied a two tier salary structure where in the defendant/applicant maintained a higher and lower scale for its employees under a similar job group. Annexed here to and marked “LOA1” is a copy of a document titled brief on the two tier salary structure at KRA dated September, 1998.*

The cause of action for the Plaintiff started running from on or about October 2000. The time of limitation ran from October 2000 to October 2003. The demand letter was issued on 8.3.2002 before the expiry of that period. That letter interrupted the period from running and started running afresh from that date. By 8.3.2002 three (3) years had not lapsed from October, 2000. The suit is dated 7th August 2003 and filed 11.8.2003 two months to the expiry time in October 2003 for the period running from October 2000 and 6-7 months from the interrupted period which started running from 8.3.2003.

It is on record as submitted earlier on that paragraph 13 and 14 of the plaint raise constitutional issues. The defence also acknowledges this fact in paragraph 13 and 14 of the defence and it is also one of the grounds for seeking to strike out the plaint for having been improperly filed in a wrong forum. The question that this court has to answer is whether the period of limitation runs against these constitutional claims.

The defence in their submissions have relied on the statute of Limitation Act Cap.22 Laws of Kenya and the public Authority Limitation Act Cap.39 Laws of Kenya. The Constitutional claims are governed by the provisions of the constitution. Nowhere in the constitution does one find a provision for Limitation. Meaning that grievances that fall under the Constitution can be ventilated at any time. In fact section 3 of the Kenya Constitution stipulates specifically that it is the supreme law of Kenya and if any other law is

inconsistent with it, then the constitution prevails. That being the case then the provisions of Cap.22 Laws of Kenya and 39 Laws of Kenya cannot be invoked to affect the constitutional claims of the plaintiff. It means that even if the other reliefs were to fail on account of limitation the constitution claim can be severed and be proceeded with to full trial. It is therefore the finding of this Court that the Plaintiffs suit cannot be faulted on the ground of being statutorily barred.

Having passed the test under the public Authorities Limitation Act Cap.39 Laws of Kenya the plaintiffs clearly needs to pass another test under the government proceedings Act Cap.40 Laws of Kenya Section 13 A (1) of the said Act states:-

“No proceedings against the government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the government in relation to those proceedings”

It is the contention of the Defendant applicant that, that provision has not been complied with by the Plaintiff and so his claim falls on that ground. The court notes that this was not one of the points relied on by the applicant in his supporting affidavit. However, in his submissions Counsel for the applicant submitted that the demand letter does not amount to such a notice. Although the Plaintiff maintained that notice was issued none has been exhibited. However his explanation that his former lawyer on the record ought to have exhibited it since he is sure one was issued is not remote in view of the fact that it was not raised by the applicant at the earliest opportune time both in the defence and in the supporting affidavit. The assumption should be that if it exists then it would have been exhibited had the defendant queried its existence. The Plaintiff may have proceeded on the assumption that the point is not in issue. However, now that it has been raised in submissions and since it has not been exhibited and since there is no way this court can access it at this juncture, the duty of this court is to decide whether on the facts and the law before it the Plaintiffs claim has been faulted for

non-compliant with Section 13 A(1) Cap.40 Laws of Kenya.

Section 13A (3) seems to be giving a reprieve to the plaintiff’s claim. It states *“The provisions of this Section shall not apply for such part of any proceedings as relates to a claim for relief in respect of which the court may by virtue of proviso (i) to Section 16 (i) make an order declaratory of the right of the parties in lieu of an injunction. Section 16(1) provides” “ in any civil proceedings by or against the government, the court may subject to the provisions of this Act make any order that it may in proceedings between subjects and otherwise give such appropriate relief as the case may require provided that –*

(i) where in any proceedings against the government any relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance the court shall not grant an injunction or make an order for specific performance but may in lieu thereof make an order declaratory of the rights of the parties:”

Although an injunction and specific performance are specifically mentioned in this section, the operative words here are *“in any proceedings”* These words go to cover proceedings such as these commenced by the Plaintiff herein are covered by Section 13A (3) as read with Section 16(1) (i) in so far as they relate to seeking of declaratory orders. Section 19(a) of the Plaintiffs plaint is a declaration and it states *“A declaration that the maintenance of the two-tier salary structure was discriminatory, un constitutional and contrary to public policy”*

By virtue of what I have stated above this relief is exempted from the operation of section 13A (1) of the GPA Cap.40 Laws of Kenya. The other reliefs in prayers 19(b) (c) and (d) flow directly from prayer 19 (a) and so they cannot be severed. The same immunity protects them. On the basis of the foregoing the plaintiffs claim cannot be faulted on this ground firstly because the issue was not raised in the defence or the defendants supporting affidavit and the belated mention of it in the submissions is prejudicial to the Plaintiff and is likely to cause him injustice should it turn out at the trial that the notice was actually issued. Secondly, the claim falls within the exemption in section 13A (3) as read with Section 16 (1) (1) of the same Act.

The last test to be passed is the one dealing with fundamental freedoms under the constitution. These are pleaded by the Defendant in their paragraph 13 and 14 of the defence and paragraph 5 and 6 of the supporting affidavit. Reliance was placed on the provisions of legal notice no 133 of 21.9.2001. Particularly rule 9 and 11 thereof. Rule 9 states “*where contravention of fundamental rights and freedoms is alleged otherwise than is the course of proceedings in a subordinate court or the High Court, an application shall be made directly to the High Court*” Rule 11(a) states:

“Applications under rules 5 and 9 of the rules shall be made by originating summons and the procedure laid down under order XXXVI of the Civil Procedure Rules shall as far as practicable apply.”

There is no doubt that the discrimination complained of falls under section 82 of the Kenyan Constitution. LN 133 of 2001 were made under the authority of section 84(6) of the said constitution.

A reading of Section 84 of the Constitution gives jurisdiction to the High court to deal with constitutional issues where they have been referred to it by litigants during the pendency of other proceedings in the same High Court or by way of reference to it in its original jurisdiction or from the subordinate court. Herein the issues have just been pleaded but not referred. The applicant seeks to fault them since they have not been originated by way of originating summons as required by the rules.

The biggest challenge to this Court is to decide whether the rules which are subsidiary to the substantive provisions of the Constitution can operate to oust the unlimited jurisdiction of the High court. This court has taken it upon itself to explore this on its own because the plaintiff left matters of the law to be handled by the court. Section 60 (1) of the Constitution states “*There shall be a high court, which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred to it by this constitution or any other law*”. By virtue of this section the High Court has power to try any suit filed in it. Section 60 (1) of the constitution is a substantive provision, which cannot be ousted by a subsidiary provision like legal notice No.133 of 2001. It would therefore appear that the claim is in the proper forum.

The court on its own has had to refer to the case of MARETE –V- ATTORNEY GENERAL {1987} KLR 690 where at pg.692 paragraph 15 the learned trial judge made findings that “*the constitution of this republic is not a toothless bulldog, or is it a collection of platitudes. It has teeth and in particular these are found in Section 84.*” In the same decision it was held *inter alia* that the contravention by the state of any of the protective provisions of the constitution is prohibited and the High court is empowered to award redress to any person who has suffered because of such contravention and such redress can include compensation for loss of earnings consequent on the contravention and recompense for the inconvenience and distress suffered.

Although the reliefs in the cited case were directed against the state, I have no doubt the principles apply to any person or body of persons against whom such reliefs may be sought like the Defendant in this case.

In NAIROBI HCCC MISC. APP.494/2003 DOMINIC AKANY AMOLO –V- THE HON. ATTORNEY GENERAL at page 67 of the judgment the second paragraph the learned trial judges had this to say :-

“From the plain reading of the aforesaid provisions (Sections 84(1) and (2) it is abundantly clear that the makers of the constitution intended that the powers of this court in the matter of Preservation, Protection and Enforcement of Fundamental rights are unfettered and unconditional. These provisions of the Constitution were meant to ensure the people of this country to come before this court unhesitatingly and without any constraint when there has been, there is or there is likelihood of a breach of their rights enshrined in sections 70 to 83 (inclusive) of the Constitution”

The Powers of the High Court under the Constitution being unfettered means that even rules made there under which rules are meant to facilitate the exercise of those powers cannot oust the said jurisdiction. It therefore follows that failure to follow the procedure laid down by rule 9 and 11 of LN 133 of 2001 does not disentitle a litigant of any relief, under the constitution howsoever presented to the High court so long as it is presented through one of the legally recognized modes of presentation of claims to the High

Court. A plaint is one of the legally recognized modes of presentation of claims to the High Court.

Section 60 (5) which states “*The High Court shall sit at such places as the chief justice may appoint*” gives power to the Chief justice to take administrative measures for the smooth running of the High Court. That section empowers the Chief Justice to establish special Divisions and christen them with whatever name or title he deems fit. This court has no doubt a constitutional court is one of such creations under Section 60(5) of the Constitution. This is not an institution legally recognized by the constitution and so failure to seek relief from it in pursuance to administrative rules made to facilitate its function does not disentitle the plaintiff the right of audience before a legally and constitutionally recognized high court like in this case. This objection too fails as the Plaintiff has lodged his constitutional complaint in the right forum. All that he needs to do is to move the office of the Chief Justice at an appropriate time for directions so that the Chief Justice can appoint a bench of whatever number of judges to hear the matter.

There was also complaint about the plaintiffs reliance on annexure LAO 1 to the Plaintiffs replying affidavit which is not dated and further that some of the documents relied upon by the plaintiff relate to events which took place after the Plaintiff had left the Defendant’s employment. Even if this were to be taken into consideration, the defendants’ own averments in paragraphs 6 and 10 of the defence amount to an admission of there having existed a two-tier salary scheme in their establishment. All that the Plaintiff will be required to prove is that such a scheme existed during the pendency of his employment with the defendant which was prejudicial to him as a result caused him financial or pecuniary loss of sums of money he was rightly entitled to during the subsistence of the employment and which should have been taken into consideration during the calculation of his terminal benefits for which he is entitled to claim over and above what he was paid. The admissibility and relevance of that document to the proceedings will arise at the trial stage. In conclusion this Court is inclined to dismiss the defendants application to strike out and dismiss the Plaintiff claim against the Defendant dated 10.8.2005 and filed on 16.8.2005 for the following reasons.

- 1)The Defendant applicant has not exhibited the discharge document executed by him and the Plaintiff to show that what the Plaintiff was paid upon voluntarily termination of his contract of employment was final and in full and final settlement of any other additional claims that may arise in respect of the same terminated contract but not catered for.
- 2) The claim based on contract has not been affected by the plea of statutory limitation as the cause of action started running from the date the Plaintiff learned of the existence of a two tier salary scheme that is in October 2000 and three years had not expired as at the time the suit was filed in Court.
- 3) Failure to comply with Section 13A (1) of the government proceedings Act Cap.40 Laws of Kenya was neither pleaded in the defence nor raised in the supporting affidavit to the application. It was taken up, as an afterthought and the existence of such a notice as asserted by the Plaintiff cannot be ruled out. In any case this is a matter of evidence, which can be taken up at the time of trial.
- 4) Even assuming that Section 13A (1) of the Government Proceedings Act Cap.40 Laws of Kenya was not complied with, the Plaintiffs claim is not faulted as it falls within the exemption in Section 13 A(3) as read with. Section 16(1) (i) of the same Act.
- 5) Failure to comply with rule 9 and 11 of LN 133/01 of 03 does not oust the High Courts’ jurisdiction over the claim in terms of Section 60 of the constitution as the substantive provision overrides any subsidiary provision made there under and so the constitutional claim is properly before court.
- 6)The period of limitation does not run against the constitutional claims.

The application dated 10.8.2005 and filed on 16.8.2005 be and is hereby dismissed with costs to the Plaintiff/Respondent.

DATED READ AND DELIVERED AT NAIROBI THIS 16TH DAY OF MARCH 2007.

R. NAMBUYE

JUDGE