IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KIAGE & MURGOR, JJ.A)

CIVIL APPEAL NO. 59 OF 2012

BETWEEN

PETER WANGAI KIAMA.....APPELLANT

AND

LAWRENCE GELMON.....1ST RESPONDENT

JOSHUA KIMANI.....2ND RESPONDENT

UNIVERSITY OF MANITOBA.....3RD RESPONDENT

(An appeal from the Ruling and Order of the Industrial Court of Kenya at Nairobi (E.K. Mukunya, J.) dated 9th December 2011

in

Industrial Cause No. 1170 of 2010)

****

JUDGMENT OF THE COURT

The appellant **Prof. Peter Wangai Kiama** wears at least two professional hats. Other than being an advocate of the High Court of Kenya, in which capacity he appeared before us self-represented, he is also a medical doctor, a consultant pathologist and forensic specialist no less, and a professor of medicine. His appeal to this Court challenges the decision of the then Industrial Court of Kenya (Mukunya, J.) rendered on 9th December 2011. By that decision the learned Judge dismissed the appellant's claim filed before that Court seeking the sum of **Kshs. 98,021.700** being the composite of accrued annual leave, salary arrears and increments, annual gratuity, house allowance, terminal dues and benefits arising from the termination of his employment with the University of Manitoba which he maintained was unlawful. That termination was conveyed by a letter dated 27th November 2002 under the hand of Lawrence Gelmon the 1st respondent which we set out in full;

> ***"November 27, 2002***
>
> ***Dr. Peter W. Kiama***
>
> ***Nairobi, Kenya***
>
> ***Dear Peter:***
>
> ***I trust that you had a good vacation, but it sounds as if you weren't exactly on holiday. I heard a rumour yesterday that you were running for Parliament, and I met with Joshua Kimani this morning, who confirmed it.***
>
> ***We wish you success in your political career, but unfortunately this creates a major problem for us. I have been in contact with my colleagues in Canada and here, and they have confirmed that Univ. Manitoba regulations as well as the nature of the agreements between Univ.Manitoba/Govt of Canada and Univ.Nairobi/Govt of Kenya, oblige us to remain scrupulously non-political in our work in Kenya.***

Thus your political ambitions create a major of interest in our operations.

Regretfully, we have no option but to terminate your association with the Univ. Manitoba projects in Kenya and your employment at the Majengo clinic, effective immediately. This does not affect your current six-month contract with the Univ. Nairobi, which runs until April 2003. Therefore, you will have to discuss your future options with Dr. Jaoko and the Dept of Medical Microbiology. But any obligations and salary from Univ. Manitoba will cease henceforth. We will offer you two months salary in lieu of any gratuity that you may have been eligible for had you been employed on a longer-term contract.

Again, we do regret this turn of events, but you will understand that our continued presence in Kenya requires us to maintain a non-political position as assiduously as possible, and has necessitated this move. We do wish you well, and best wishes in your future endeavours, both political and otherwise.

Yours sincerely

L. Gelmon MD MPH

Ass. Professor, Univ. Manitoba Visiting Lecturer, Univ.Nairobi."

It was the appellant's contention as gleaned from his statement of claim that the termination of his employment was unlawful, unjustified and unfair. It was his case that he was not given a hearing and that the termination unleashed a stream of prejudicial consequences including but not limited to denying him 80% of his net salary for post-graduate studies, Kshs. 340,000 the University was obligated to pay him while so studying, 15 years payments on a tenant purchase scheme guaranteed by the respondents and 15 years pay as terminal benefits on his 5 year renewable contract.

In opposition to the appellant's claim the respondents filed a reply in which they denied the allegations leveled against them. They also raised the defence of the claim having been statute time barred under the **Limitations of Actions Act**. They asserted that the appellant's employment was terminated because he elected to run for a political post as a contestant for the Juja Parliamentary Seat in the 2002 General Elections. They maintained that the appellant's claim against them were misconceived and outlandish, and did not lie.

The case proceeded to hearing before the learned Judge with the appellant testifying for himself while two witnesses testified on behalf of the respondents.

In the ensuing judgment impugned herein, the learned Judge found that the dispute was filed on 24th September 2010 yet the termination giving rise to it occurred on 27th November 2002, almost eight years previously. He also found that an earlier dispute arising from the same dispute, namely **Industrial Case No. 751(N)** of **2009** had previously been struck out for being time barred. Moreover, whereas the Trade Disputes Act required that a dispute be commenced by reporting it to the Minister who would appoint a Conciliator, no such report was made. Additionally, under **section 90** of the **Employmen**t **Act** no suit could be filed after the expiry of 3 years from the occurrence of the events leading to the dispute. On the merits, the learned Judge found that the appellant had failed to prove that his employment was to run up to 2017 and that he was entitled to a refund of any of the monies he spent to fund his post-graduate studies and to service his mortgage. He dismissed the claim with costs.

That provoked the present appeal with the appellant faulting the learned Judge for erring by ignoring the transitional provisions of the **Labour Institutions Act**, 2007; holding that the Employment Act, 2007, was applicable and that the claim was statute barred under **section 90;** misinterpreting the provisions of the Trade Dispute Act, 234; holding on the duration of the contract that the appellants employment was for a five year term faster of "*a five year renewable*" one; holding that the termination of the employment was lawful and for holding that the appellant was adequately compensated.

Arguing the appeal before us the appellant expounded on those grounds. He submitted that the learned Judge as well as Rika, J in the struck out case referred to by the Judge correctly held that the dispute was governed by the Trade Disputes Act (repealed) but faulted him for holding that failure to report the dispute to the Minister was fatal to the suit. According to him, the omission was merely procedural one which should not have led to his being sent away from the seat of justice. He criticized the learned judge for failing to have regard to **section 7** of the **Trade Disputes Act** which allowed a party to directly approach the courts. He contended in the alternative that the learned Judge ought to have referred the dispute to the Minister instead of dismissing the suit.

The appellant next urged that the suit was not statute-barred and for this he referred to the Judge's own dismissal of an application by the respondents that had sought to strike the suit out for being time-barred and *res judicata*. He conceded, however, that the said dismissal was a terse single-sentence order and not a ruling containing any reasons or findings.

Finally, on the foundation of his multi-million shilling claim, the appellant argued that it was based on the length of the contract that was cut short by the termination and this, according to his reckoning, was to be up to the year 2017. His reasoning for this, which we must confess to having great difficulty following was that "*a five year renewable contract means ten years*." He contended that he had an assured ten-year contract and placed further reliance on the fact that the respondents had "*guaranteed*" the 15 year tenant-purchase loan he had obtained from the National Social Security Fund for a house in Nyayo Estate, Embakasi.

Opposing the appeal Ms. Sian Rapeu learned counsel for the respondents defended the learned Judge's finding that the suit was time-barred both under the **Employment Act** and under **section 4** of the Limitation of Actions Act. She also termed as correct the learned Judge's finding that the appellant ought to have but failed to report the dispute to the Minister. She contended that the appellant's contract was under **section 16** of the **Employment Act** terminable by notice or payment of salary in lieu of notice and he was in fact paid double what he was entitled in lieu of notice. She termed the contract as being a fixed one for 5 years and it was not permanent. The respondents were under no obligation to finance any of the appellant's loans and his employment having been lawfully terminated, the appeal ought to be dismissed.

This being a first appeal, our task is to approach all of the evidence in a fresh and exhaustive way with a view to drawing our own inferences of fact and making our own conclusions thereon. We do so alive to the fact that unlike the trial judge we have not had the advantage of hearing and observing the witnesses as they testified. Our reliance is on the cold letter of the record and we make due allowance for that by being slow to interfere with the Judge's conclusions unless they are based on no evidence; proceed from a misapprehension of the evidence or are, on a consideration of the case as a whole, plainly wrong and unsustainable. See Rule 29 of the Court of Appeal Rules, ***PETERS vs. SUNDAY TIMES [1958] EA 424***; ***SELLE vs. ASSOCIATED MOTOR BOAT CO. [1968] EA 123.***

In this appeal not all issues are dependent on the credibility of witnesses. Indeed, two of them, to wit the competency of the suit and the duration of the contract that the appellant had with the respondents, turn on construction of statutory provisions and the employment contract and it is these we shall first address. Was the learned judge wrong to hold that the appellant's suit was statute-time barred? We respectfully think not. Whether under the general law of contract or under the Employment Act, the suit, having been filed nearly 8 years after the termination of the employment, was hopelessly out of time. Under **section 90** of the **Employment Act**, no such suit could be brought after 3 years had lapsed. The appellant had been out of time when he filed **Industrial Cause No. 751(N)** of **2009** which Rika, J., struck out on that basis. The learned Judge was therefore right to hold that the question of time bar was *res judicata*. But even were the more favourable approach to be taken, that of not applying the shorter stricter time line set by the Employment Act in favour of the general law of contract, the statutory period would be 6 years under section 16 of the **Limitation of Actions Act** and these had elapsed by the time the suit was filed. The suit was therefore incompetent and ought to have been struck out.

That being the case, there really is no necessity for consideration of the other issues but, since we allowed the parties to address us on them, our considered findings are that under the **Trade Disputes Act** under which the appellant took umbrage, no suit ought to have been filed before the appellant first made a report to the Minister who would appoint a conciliator to try to resolve the dispute. It being common ground that the appellant did not make such report, the suit was premature and equally incompetent. We are unpersuaded that this was a merely minor procedural omission. It is a cardinal principle of law that where statutory mechanisms and procedures are in place for settling of disputes prior to action, those mechanisms must first be exhausted. Any suit filed before such exhaustion must flounder and fall for unripeness.

Finally, we are unable to accept the appellant's claim that his contract assured him of employment for 10 or 15 years as he seemed to variously argue on the basis only that it was indicated to be *renewable*. Our understanding of the term "*5 years renewable*" is simply that it was open to the parties to the contract to agree to enter into another contract for a similar term of years after the expiry of the current term. In other words and simply put, it was not a contract which could not be extended for another term to be agreed as happens under "*non-renewable*" or "single term contracts." Before any renewal happens however, the contract is and remains a 5 year contract. There is no warranty or guarantee that it would be extended or renewed and the appellant's claim for the Ksh. 98 million based on that unrealistic interpretation of the contract is fanciful and for dismissal as it was rightly dismissed by the learned Judge.

We think that the appellant willfully placed himself at a place where the respondents had no choice but to terminate his contract with them. The appellant gave in to the seducing spirits of elective politics and on learning of it the respondents addressed him in the terms we already set out earlier in this judgment.

There was evidence that he was paid two months salary in lieu of notice and that is all that, indeed more than he was entitled to. We do not see what was unlawful about the action the respondents took as they had to seeing as politics and most other professional undertakings do not mix.

The upshot of our consideration of this appeal is that it is wholly devoid of merit and it is accordingly dismissed with costs.

Dated and delivered at Nairobi this 8th day of February, 2019.

W. OUKO, (P)

…….....……

JUDGE OF APPEAL

P. O. KIAGE

…….....……

JUDGE OF APPEAL

A. K. MURGOR

…….....……

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR