



**Menjo v Teachers Service Commission (Miscellaneous Application
E016 of 2023) [2024] KEELRC 726 (KLR) (5 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 726 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
MISCELLANEOUS APPLICATION E016 OF 2023
ON MAKAU, J
APRIL 5, 2024**

BETWEEN

KIMARU PHILIP MENJO CLAIMANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

RULING

1. This Ruling relates to the Originating Summons dated 27th July 2023 by which the applicant seeks the following orders: -
 - a. That the Honourable Court be pleased to grant leave for the purpose of section 27 of the *Limitation of Actions Act* to enable the intended claimant file an action out of time in the nature of Judicial Review orders for wrongful termination from his employment service by his employer Teachers Service Commission.
 - b. That the Claimant/Applicant was not given a fair hearing during hearing proceedings by the Teachers Service Commission Disciplinary Committee which led to unfair and wrong dismissal from his employment.
 - c. That the cost of this Application be cost in the cause.
2. The summons is supported by the Applicant's Affidavit sworn on 27th July 2023. In brief the applicant deposed that he was subjected to disciplinary process which ended with a verdict of dismissal on 16th December 2015 but the said verdict was not communicated to him until 20th November 2022. As a result, he could not exercise his right of appeal within the required 28 days since the verdict was communicated to him after seven (7) years.
3. He further deposed that the respondent had his postal as well as email addresses but it never communicated the verdict with him. He contended that he could not file a normal suit to challenge



the decision because that right lapsed three years after the verdict. He contended further that his right to file judicial review lapsed six months after the said verdict. Hence the instant summons for leave to file the intended proceedings.

4. The Respondent has opposed the application vide a Replying Affidavit sworn by its Director in Charge of Teacher Discipline Management Ms Evaleen Mitei. In brief she contended that after the respondent reached a verdict of dismissal the same was communicated to the applicant through his permanent contract address, P.O Box 117 Rumuruti. The said address was the one he provided in his employment application at the time of appointment and also in the Attendance form during the disciplinary hearing for communicating the decision.
5. The affiant further produced copy of mailing list including a letter to the applicant plus a certificate of posting Registered Postal Article for 8th January 2016. In that regard she maintained that the verdict was dispatched to the claimant through the correct postal address which he indicated to his employer as his permanent contract address. Consequently, she prayed for the application to be dismissed for being an abuse of the process of the court because the court lacks jurisdiction by dint of section 90 of the *Employment Act*.
6. The application was canvassed by written submissions which basically echoed the averments in the supporting affidavit and the Replying affidavit. The applicant reiterated that the delay in filing the intended suit was caused by the delay by the employer to communicate its verdict. On the other hand, the respondent maintained that it posted its verdict through the address supplied by the applicant during the disciplinary hearing, hence the application before the court is an attempt by the applicant to circumvent the limitation period set by the law.

Issues for determination

7. Having considered the Application, the affidavits and the submissions filed, the following issues fall for determination: -
 - a. Whether the court lacks jurisdiction.
 - b. Whether the application has merits.

Jurisdiction

8. The respondent contended that the intended suit is time barred and therefore the court lacks jurisdiction. However, my curiosity is drawn to the novelty of the application. I have never seen or heard about such proceedings in our jurisprudence.
9. From the onset, I have to firmly state that it is now settled law that limitation period for claims founded on contracts including employment contracts cannot be extended. It follows that even the thought of leave to file suit out of time in the circumstances of this case is a pipe dream.
10. Besides, the court finds a lot of difficulties in swallowing the bitter truth that Judicial Review under order 53 of the *Civil Procedure Rules* is a province of litigation that is sui generis. It stands on a class of its own and therefore a party cannot move the court under any other adjectival law outside Order 53 unless the relief is sought under Article 23 of the *Constitution*.



11. Having perused the draft Judicial Review pleadings, I find that the applicant intends to move the court under order 53 of the Civil Procedure Rules. Rule 7 (2) of the *ELRC Procedure Rules* provides that:

“ A person who wishes to institute Judicial Review proceedings shall do so in accordance with section 8 and 9 of the *Law Reform Act* and Order 53 of the *Civil Procedure Rules*.”
12. In view of the foregoing, I must hold that the court lacks jurisdiction to enlarge time for filing suits founded on employment contracts. I further hold that the procedure followed to move the court for leave outside order 53 of the *Civil Procedure Rules* is not only novel but also an abuse of the process of the court.
13. Consequently, I will not go to the merits of the summons, but rather strike it out with no costs since the nature of the summons is supposed to be *ex parte* application.

DATED, SIGNED AND DELIVERED AT NYERI THIS 5TH DAY OF APRIL, 2024.

ONESMUS N MAKAU

JUDGE

Order

This ruling has been delivered to the parties via Teams video conferencing with their consent, 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

