REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION NO. 154 OF 2019

BETWEEN

CHRISTOPHER JOHN NYAMOHANGA .....APPLICANT

VERSUS

REGIONAL CENTRE FOR MAPPING OF

RESOURCES FOR DEVELOPMENT ..... RESPONDENT

RULING

1. Mr. Nyamohanga worked for the Respondent, formerly known as Regional Centre for Services in Surveying and Mapping, as an Electronic Engineer.

2. He was employed on 5th February 1980.

3. The Respondent terminated his contract, in February 1991.

4. He was Acting Head of Engineering Department, when his contract was terminated.

5. He states he was not paid terminal benefits, which he wishes to pursue, quantified at USD 344,212.42.

6. He filed an Originating Summons at the High Court, registered as Miscellaneous Application Number 1622 of 2005, seeking leave to institute a Claim at the High Court, for recovery of the terminal benefits.

7. The Application was dismissed by the High Court for want of prosecution, 10 years after its filing, on 26th July 2015.

8. In a Ruling dated 12th July 2018, the High Court reversed dismissal orders, reinstated the Application, and transferred the same to the Employment and Labour Relations Court, citing lack of jurisdiction.

9. On 23rd September 2021, it was agreed that the Application is considered and determined on the strength of Written Submissions.

10. The Applicant filed Submissions dated 25th October 2021. The Court has not seen any Submissions filed by the Respondent.

Explanation for Delay

11. The Applicant explains delay in moving the Court, through his Supporting Affidavit sworn on 11th November 2005.

12. He states that he spent considerable time, actively pursuing payment of his terminal benefits. He even petitioned the late President Daniel Toroitich arap Moi [peace be upon his soul], to intervene and have the Respondent pay his terminal dues. He engaged the Law Firm of Hamilton, Harrison & Mathews, who made demand for payment. The Respondent wrote back, stating it was in financial constraints, but would pay the Applicant his terminal benefits, once its financial position improved.

13. The Respondent led the Applicant to believe he would be paid his benefits, and as a result, the Applicant continued to engage the

Respondent without instituting legal proceedings.

14. It was only in 2003, that Respondent informed the Applicant, that it would not pay his terminal dues. The Applicant submits that his cause of action therefore arose in 2003. He explains however, that the issue of terminal benefits *''arose in 1991 and it is a matter of abundant caution that I seek the leave of this Honourable Court, to institute this suit by way of this Application.''*

***The Court Finds*: -**

15. The reasons given by the Applicant explaining the considerable delay from the date of termination, to the date he filed his Application at the High Court, are not persuasive.

16. Termination was in 1991. He moved the Court in 2005, 14 years after termination. Even after filing the Application in 2005, he only prosecuted it in 2021, 16 years down the line.

17. Pursuit of his terminal benefits out of Court, ought not to have distracted the Applicant from the timeframes imposed by the law, on filing of employment claims. At the time the cause of action arose, which the Court holds to be 1991, and not 2003, the Limitation of Actions Act required the Applicant files his Claim within 6 years. This lapsed in 1997. Was a period of 6 years not sufficient for the Applicant to exhaustively, pursue out of Court settlement? Ought it not to have been clear to the Applicant, that there was no likelihood of payment out of Court, during those 6 years? Why not file a Claim even as he negotiated?

18. Delay in prosecuting the Application once filed was likewise, inordinate. The Applicant explains that this was occasioned by a preliminary objection filed by the Respondent, alleging diplomatic immunity. He also attributes delay to the orders issued dismissing his Application for want of prosecution. This is absurd, because the orders of dismissal issued for the very reason- delay in prosecuting the Application. Even after the generous reinstatement of the Application by the High Court, the Applicant did not demonstrate urgency in prosecuting his Application. Lastly, he attributes delay to the transfer of the Application from the High Court. This again is without merit. Transfer was in 2018. Why wait until 2021 to prosecute an Application which had a history of dismissal for want of prosecution?

19. The demand letter by the Applicant's then Advocates, issued on 18th November 1991. The letter to President Moi, is dated 28th February 1992. These letters issued close on the heels of the accrual of the cause of action. They issued at the beginning of the dispute. They cannot have the effect of delaying filing of the Claim. There is no reason why the Applicant would continue to engage the Respondent rather than the Court, after these efforts at settlement out of Court, bore no fruit.

20. In **Rift Valley Railways [Kenya] Limited v. Hawkins Wagunza Musonye & Another [2016] e-KLR,** the Court of Appeal found this Court to be in grave error, stating that the Court had by craft and innovation, extended time for Employees to file Claims against their Employer. This Court had concluded that time taken in negotiations out of Court by the Parties, should have been excluded from computation of time in determining when the cause of action arose. The Court of Appeal emphasized that time is never frozen, in determining when the cause of action arises. Whereas the law encourages alternative dispute resolution, it must be conducted within the law, and time does not stop running, merely because Parties are engaged in out of Court negotiations, the Court of Appeal held. This must apply to the Applicant here. Time did not stop running because of the Claimant's engagement out of Court with the Respondent; with President Moi; and, with Hamilton Harrison and Mathews.

21. In dismissing the Application herein, the Court observes, that in the undated letter from the Respondent to the Applicant, [Applicant's exhibit 'CJN 7'], it is stated that the Applicant was paid terminal benefits amounting to Kshs. 745,522. The letter states payment was made on 30th September 1992. A payment schedule is attached. He does not seem to deny this payment, in his Affidavit and Submissions. He ought to have explained these exhibits on payment. These are his exhibits. In the end, it would not be correct, to endorse his position that he left employment without terminal benefits. He did not leave empty-handed, after years of toil.

IT IS ORDERED: -

a. ***The Application is declined.***

b. ***No order on the costs.***

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 27TH DAY OF JANUARY 2022.

JAMES RIKA

JUDGE