



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. E411 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

ELKANA MAGU KIRUNDI..... CLAIMANT

VERSUS

NATIONAL INDUSTRIAL

TRAINING AUTHORITY..... RESPONDENT

RULING

1. Vide a notice of preliminary objection dated 8th July 2021 the Respondent prays that the suit herein be dismissed/struck out on the following grounds –

a.. THAT this Court lacks jurisdiction to entertain these proceedings by dint of the provisions of Section 90 of the Employment Act of 2007.

b.. THAT the suit is an abuse of the Court process.

c.. THAT the suit is incompetent and ought to be struck out with costs.

2. The background to the suit is that following a disciplinary hearing by the Respondent, the Claimant was compelled to resign from employment. His letter of resignation is dated 5th March 2018 and the resignation was to be effective from 5th April 2018.

3. The Claimant successfully appealed against the forced resignation and on 26th August 2020, the Public Service Commission ordered his reinstatement to the position of Centre Manager.

4. It is the Respondent's position that the cause of action arose on 5th April 2018 being the effective date of resignation, and that the claim is therefore statute barred by virtue of Section 90 of the Employment Act.

5. The Respondent refers the Court to the case of **Mukisa Biscuits Manufacturing Ltd (1969) EA 696** on the definition of a preliminary objection. The Respondent further relies on the decision in **Industrial Court Cause No. 1201 of 2012, Banking Insurance and Finance Union (K) v Bank of India** where the Court stated:

“The fact of the matter is that employment contracts like other commercial contracts were subject to the provisions of the limitations of Actions Act Cap 22 of the Laws of Kenya at the time with regard to limitations but presently the limitation period is governed by Section 90 of the Employment Act 2007 which has reduced the limitation period in employment matters to three (3) years.”

6. The Respondent submits that no leave has been sought to extend the limitation period prior to fling of this claim. Further that the Claimant has not given an explanation or justification for moving Court after the lapse of the 3 year limitation period.

7. The Respondent further relies on the decision in **Attorney General & Another v Andrew Maina Githinji & Another, [2016] eKLR**, while setting aside the decision of this Court stated in majority decision (one Judge dissented):

“I have considerable sympathy for the reasoning in all the above cases which leads me to the conclusion that the cause of action in this case did not arise after the conclusion of the criminal case against the respondents. The respondents had a clear cause of action

against the employer when they received their letters of dismissal on 2nd October 2010. They had all the facts which had been placed before them in the disciplinary proceedings and they could have filed legal proceedings if they felt aggrieved by that dismissal, but they did not”.

“Having found that the cause of action arose on 2nd February 2010 and that the claim was filed on 16th June 2014, it follows by simple arithmetic that the limitation period of three years was surpassed by a long margin. This claim was time barred as at 1st February 2013, and I so hold”.

8. The Respondent further relies on the decision of Radido J. in **Ndirangu v Henkel Chemicals (EA) Ltd [2013] eKLR (Industrial Court at Mombasa)**, where the Judge stated:

“...Section 90 of the Act now regulates limitation time in employment contracts to three years. Section 4(1) of the Limitation of Actions Act is not applicable and therefore the Claimant cannot be heard to argue that the limitation was 6 years.”

9. It is the Respondent’s position that the appeal to the Public Service Commission did not stop time from running, citing the decision of the Court of Appeal in **Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye & another [2016] eKLR**, where the Court stated: -

“For us it is clear from our reading of section 90 aforesaid that there are no exceptions to the three year limitation period, save for cases of continuing injury or damage where action or proceedings must be brought within twelve months after the cessation thereof. This was not a case of a continuing injury or damage but one of a single act of termination. In any case the respondents have not specified when the injury or damage ceased for time to have began to run. Secondly the learned Judge did not rely on the continuing injury or damage but on the fact that the parties engaged in negotiations. Those negotiations began when time had begun to run following the termination of the respondents' services”.

“While there is no doubt that section 15 of the Employment and Industrial Relations Act encourages alternative dispute resolution, it must be court-based and conducted within the law. Time does not stop running merely because parties are engaged in an out of court negotiations. It was incumbent upon the respondents to bear in mind the provisions of section 90 of the Employment Act even as they engaged in the negotiations. The claim went stale three years from the date of the termination of the respondents' contracts of service”.

“By craft and innovation the learned Judge, in grave error extended time by relying on negotiations by the parties and suspending time for this period. Where a statute limits time for bringing an action, no court has the power to extend that time, unless the statute itself allows extension of time. That is what the court stated in **Divecon v Samani (1995**

- **1998) I EA 48 at p. 54**

“No one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract”.

10. The Respondent prays that the claim is time barred and offends the provisions of Section 90 of the Employment Act. That the same therefore amounts to an abuse of Court process and is incompetent.

11. The Respondent prays that the suit be struck out.

Claimant’s Case

12. The Claimant opposes the preliminary objection. It is the Claimant’s submission that the averments of the Respondent with respect to Section 90 of the Employment Act require evidence and therefore does not fit within the definition of a preliminary objection as exposed in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (supra)** where it was held as follows:-

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

13. The Claimant further relies on the decision in the case of **Nakuru Civil Case No. 489 of 2013, Samuel Waweru v Geoffrey Muhoro Wangi** where a preliminary objection of a similar nature to the instant Preliminary Objection was raised, the Court stated as follows: -

“This court must now consider whether the issues raised in this Preliminary Objection are matters of fact or law. I have perused the reasons by the applicant in his Preliminary Objection. I have not seen a single point of law that has been raised. What has been raised are purely matters of fact which the defendant's counsel ought to have a chance to respond to. I hold the view that by filing such an objection, the plaintiff has denied the defendant the opportunity to respond factually to the Preliminary Objection. As a matter of Law, a party upon whom a Preliminary Objection is served, does not have a right to respond factually and can only place before the court the law applicable. What the plaintiff should have done was to raise matters in relation to conflict by filing a formal application.”

14. The Claimant also relies on the decision in the case of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR** the Supreme Court stated as follows: -

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

15. The Claimant submits that the case before the Court is for enforcement of the decision of the Public Service Commission made on 26th August 2020.

16. It is the Claimant’s case is that he appeared for oral submission during the disciplinary hearing on 6th October 2017 before the disciplinary committee of the Respondent.

17. The Claimant submits that in the Respondent’s Board meeting

held on 31st January 2018 whose agenda was the Claimant’s suspension, the Board considered the recommendations of the Disciplinary Committee resolved that the Claimant ought to exit the Respondent’s service and management was tasked to pursue the option of early retirement or resignation.

18. It is the Claimant’s case that the Decision to force the Claimant’s resignation, (which is the subject matter of this Claim) was made by the Respondent’s Board on 31st January, 2018 and the Claimant appealed to the Board on 28th April 2018 which never bothered to act on the appeal forcing the Claimant to file an Appeal against forced resignation to the Chairman, Public Service Commission on 11th June 2018. The decision of Public Service Commission allowing the appeal was made on 26th August 2020. The Claim herein was filed on 18th May 2021 which was less than one and half years.

19. It is the Claimant’s case that the cause of action arose on 29th September 2020 when the Respondent acknowledged receipt the decision of Public Service Commission and the requirement for its implementation. That this is evidenced by the further correspondences of 22nd September 2020, 9th December 2020 and the letter dated 21st January, 2021

thereby pushing the date when the cause action arose.

20. The Claimant submits that the Appeal to Public Service Commission is duly provided for under Section 74 of Public Service Commission Act permits appeals from the decisions of the statutory bodies including the Respondent herein.

21. Section 89 of Public Service Commission Act permits filing of Public Service Commission decisions in the employment and Labour Relations Court for enforcement under Article 162(1)(a) of the Constitution.

22. It is the Claimant’s position that Section 90 of the Employment Act is not applicable in the instant case as the cause of action did not arise on the date of forced resignation as there were subsequent actions undertaken forming part of the disciplinary including the Appeal to Public Service Commission which was decided on 26th August 2021.

23. It is further the Claimant’s position that even if the Court were to find that his claim was filed outside the three years as provided for under Section 90 of Employment Act, which is not the case here, the provision in the Section 90 of Employment Act extends the limitation period for an extra 12 months for continuing injury.

24. The Claimant submits that non-payment of salary and allowances during the hearing and determination of appeals before the board and the Public Service Commission is a continuing injury against the Claimant for the purposes of limitation.

25. It is therefore the Claimant’s case that the preliminary objection is incompetent and lacks merit and urges the Court to dismiss the Respondent’s preliminary objection dated 8th June, 2021 with costs.

Analysis and Determination

26. I have considered the pleadings and submissions on record. The issue for determination is whether the claim as filed by the Claimant is statute barred and therefore incompetent.

27. The prayers in the memorandum of claim filed by the Claimant are the following –

a. A declaration that the Respondent’s action of refusing/neglecting and or failing to implement the Public Service Commission’s decision dated 26th August 2020 by re-instating the claimant into employment with full pay is illegal, unlawful, unprocedural, unfair, unconstitutional, and null and void.

b. A mandatory injunction to compel the Respondent and

or its agents and or servants and or Employees and or Representatives to fully implement the decision of Public Service Commission's decision dated 26th August 2020 by re-instating the Claimant into employment as a Center Manager with full pay and without any loss of benefits.

c. Costs and interest of this cause at Court rates.

d. Any other relief which the court deems fit, just and expedient to grant

28. The cause of action in the claim is therefore not the resignation of the Claimant but the enforcement of the Public Service Commission decision to reinstate the Claimant. This is a cause of action that arose after the Claimant received the letter from the Public Service Commission dated 26th August 2020. The letter is reproduced below –

“Ref. No. PSC/PAP/KI/1/07)

26th August, 2020

The Director General

National Industrial Training Authority

NAIROBI

APPEAL AGAINST FORCEFUL RESIGNATION: MR. ELKANA MAGU KIRUNDI:P/NO.NIT.0237: FORMER CENTRE MANAGER/MANAGER INDUSTRIAL TRAINING: JOB GROUP ‘NITA 12‘

Ref. Your No. NITA/DG/GEN/111/206 of 28.1.2020 and Officer's letter dated 9.3.2020

This is to inform you that the Public Service Commission has considered an Appeal against forceful resignation from the Service submitted by Mr. Elkana Magu Kirundi, former Centre Manager/Manager Industrial Training, National Industrial Training; and

(a) And noted with concern the procedural flaws in handling of discipline cases by the Authority; and

(b) Decided that:

(i) The appeal be allowed;

(ii) The resignation decision be set aside; and

(iii) He be reinstated with full pay as per the provisions of Sec. 74(6) of the PSC Act, 2017.

Take necessary action accordingly.

SIGNED

Simon K. Rotich, EBS

SECRETARY/CEO

PUBLIC SERVICE COMMISSION”

29. The cause of action in the suit is therefore as set out in the claim, the refusal of the Respondent to reinstate the Claimant back to work following the decision of the Public Service Commission in the letter dated 26th August 2020. The cause of action therefore arose on the date when the Respondent refused to reinstate the Claimant which is on the date that the Respondent was required to reinstate the Claimant. The same is not statute barred under Section 90 of the Employment Act.

30. It is for this reason that I find no merit in the preliminary objection raised by the Respondent and dismiss the same with costs to the Claimant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH DAY OF JANUARY 2022

MAUREEN ONYANGO

JUDGE

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE