



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 284 OF 2014

DEDAN N. WANJOHI.....CLAIMANT

VERSUS

1. KENYA REVENUE AUTHORITY

2. DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENTS

R U L I N G

1. Before me is the Applicant's Originating Summons dated 3rd September 2013. The Applicant, DEDAN NDERITU WANJOHI, seeks the following orders:-

a. that this Honourable court do grant leave to the Applicant to file suit against the Respondent out of time.

b. that the costs of the application be provided for.

2. The Applicant set out, in the body of the application, the grounds on which the application is premised. The said grounds are replicated in the supporting affidavit sworn by the Applicant on 3rd September 2013. It is deponed in the said supporting affidavit:-

a. that the applicant was employed by the 1st Respondent as an Accounts Assistant in Customs and Excise Department in 1984-1997 and then Kenya Revenue Authority from 1997-2001.

b. that the Respondent caused the Applicant's arrest, detention, and prosecution on charges of stealing contrary to Section 275 of the penal code and fraudulent false accounting contrary to Section 13 of the penal code in Mombasa Chief Magistrate's Court Criminal Case No. 291 of 2001, 2246 of 2002 and 1309 of 2002.

c. that the Applicant was, on 9th June 2007, acquitted of all charges under Section 210 of the penal code.

d. that the Applicant was summarily dismissed by Kenya Revenue Authority and denied his terminal benefits and that both the prosecution and dismissal were highly malicious, unfounded and had caused the Applicant great mental and financial suffering.

e. that one of the reasons for delay in filing the suit after dismissal was that the Applicant's wife fell ill and had been receiving various treatments in hospital, which had been costly and emotionally torturing on the part of the applicant.

f. that the Appellant intends to claim his terminal benefits and general damages for malicious prosecution in the intended suit.

3. Pursuant to the Court's leave, the Applicant filed a further supporting affidavit on 16th July 2021 whereby he deponed, *inter-alia*:-

a. that sometimes in or about 12th January 2010, the Applicant instructed his then Advocates Khaminwa & Khaminwa Advocates, to commence work on the claim, but for some reason the instructions were not acted on.

b. that as at January 2010, the Applicant was well within the time frame provided by the Limitation of Actions Act as far as employment claims are concerned.

c. that the barrage of criminal cases which the Applicant fought before the Chief Magistrate's Court at Mombasa and the many days and night that the Applicant spent at the Shimo la Tewa Prison ate into his financial, emotional and psychological resources so much such that he faced a tough challenge in sustaining his legal representation.

d. that even after the Court delivered its ruling acquitting the Applicant in all the criminal matters, the 1st Respondent still withheld the Applicant's dues.

e. that an appeal by the Applicant to the Commissioner General on the strength of his acquittal fell on deaf ears.

f. that the Applicant has suffered prejudice since 25th July 2001 when the Respondent abruptly suspended the Applicant without pay or benefit for 10 years based on suspicion of malpractice absent any proof to support the allegations.

4. Among the documents annexed to the Applicant's supporting affidavit is a dismissal letter dated 18th June 2003, which reads in part:-

"...In view of the above, the committee recommended that you be dismissed on misconduct grounds. Consequently you are hereby dismissed from the service of the Authority with effect from 25th July 2001.

Upon this dismissal, you will lose all your terminal benefits but refunded all your pension contributions as per the KRA Pension Scheme Rules on production of the attached clearance certificate duly completed and signed..."

5. The Applicant further annexed and exhibited the 1st Respondent's letter to the Applicant dated 28th November 2008, which states in part:-

"Reference is made to your letter dated 13th June 2008 and the copy of Court judgment delivered on 1st March 2007 attached thereon.

The Authority has carefully considered your appeal vis-a-vis the court ruling. Your acquittal notwithstanding, the investigations conducted by the Internal Audit revealed that you received cheque no. 004958 on 2nd May 2001 against which you issued receipt no. 344949. You did not reflect this transaction in the daily cash abstract and the same cheque was diverted and used on 16th May 2001 at the Customs Warehouse to clear sugar and rice.

Consequently, the Authority has not found any new grounds or material facts to warrant a review of the decision made earlier.

We therefore regret to inform you that your appeal has been disallowed..."

6. The application was opposed by the 1st Respondent, which on 17th December 2021 filed grounds of opposition dated 9th December 2021 stating, *inter-alia*:-

a. that the Applicant is seeking leave to file suit against his unfair dismissal from employment out of time.

b. that the Applicant is guilty of inordinate delay in filing suit, which delay is unexplainable.

c. that the orders sought in the application are in violation of section 90 of the Employment Act, 2007 which is couched in mandatory terms.

d. that the Applicant's contract of employment was terminated on 18th June 2003 whilst the application was filed in 2013 and left unprosecuted until the same was dismissed for want of prosecution *suo moto*.

e. that Section 90 of the Employment Act 2007 provides that no civil actions or proceedings shall lie unless commenced within three years next after the act.

f. that the Applicant slept on his rights and is guilty of laches, and that equity aids the vigilant, not the indolent.

g. that this Court neither has statutory jurisdiction nor discretion to grant leave or extend time in causes of action based on breach of contract of service or actions arising out of the Employment Act, 2007.

7. The 2nd Respondent is not shown to have opposed the application herein, and the Court was not shown and/or referred to any proof of service of the application on the 2nd Respondent.

8. The applicant and the 1st Respondent filed written submissions on the application pursuant to the Court's directions in that regard, which I have considered.

9. Termination of the Applicant's contract of service was communicated to the Applicant by the 1st Respondent vide a letter dated 18th June 2003, part of which I have quoted and/or reproduced at paragraph 4 of this Ruling. The Applicant's cause of action arose on the date of that letter, and time started running on that date.

10. The Applicant did not file any Court proceedings against his dismissal until 18th September 2013 when the present application was filed in the High Court before being transferred to this Court for determination vide the High Court's Ruling dated 15th May 2014. As rightly submitted by the 1st Respondent, the single issue falling for determination by this Court is:-

a. whether this Court is clothed with jurisdiction to issue the orders sought

11. In the case of SAMUEL KAMAU MACHARIA –VS- KCB & 2 OTHERS, CIVIL APPLICATION NO. 2 OF 2011, the Supreme Court of Kenya stated:-

“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus a Court of law can only exercise jurisdiction conferred by the Constitution of other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

12. Section 90 of the Employment Act, 2007 provides:-

“Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

13. The foregoing statutory provision is couched in mandatory terms and does not provide for extension of time by the Court in matters arising out of the Employment Act or a contract of service in general. Neither does it leave room for exercise of the Court's discretion regarding limitation of time in matters employment. This Court cannot exercise jurisdiction that it does not have; regardless of how much the delay involved appears mitigated by facts presented by the Applicant. In the case of BEATRICE KAHAI ADAGALA –VS- POSTAL CORPORATION OF KENYA [2015] eKLR (cited in Peter Katithi Kithome –vs- Laboratory & Allied [2021] eKLR) the Court of Appeal stated:-

“Much as we sympathize with the appellant if that is true, we cannot help her as the law ties our hands. Section 90 of the Employment Act 2007 which we have quoted verbatim herein above, is in mandatory terms. A claim based on a contract of employment must be filed within three years. As this Court stated in the case of DIVECON LIMITED –VS- SAMANI [1995- 1998] 1EAP.48,...in Josephat Ndirangu –vs- Henkel chemicals limited [2013] eKLR, the limitation period is never extended in matters based on contract. The period can only be extended in claims founded on tort and only when the applicant satisfied the requirements of Sections 27 and 28 of the limitation of Actions Act.”

14. Before enactment of the Employment Act 2007 and therefore Section 90 thereof, statutory limitation period for causes of action founded on employment contracts was that applicable to matters based on contracts generally, and was provided for in Section 4(1) of the Limitation of Actions Act. The limitation period was six years, and could not be extended as the said Act does not provide for extension of time in matters based on contract. Section 90 of the Employment Act specifically excludes application of Section 4(1) of the Limitation of Actions Act to matters based or arising out of the Act or a contract of service in general, and mandatorily pegs the limitation period at three years, without provision for extension of such period. The Court of Appeal in the BEATRICE KAHAI ADAGALA CASE (supra) summed up this position.

15. The fact that the Applicant also intends to sue the Director of Public Prosecutions for recovery of damages arising from alleged malicious prosecution does not make the situation any better. Section 3(1) of the Public Authorities Limitation Act (Cap 39 Laws of Kenya) provides as follows:-

“No proceedings founded on tort shall be brought against the government or local authority after the end of twelve months from the date on which the cause of action arose.”

16. The Limitation period of twelve months provided for in Section 3(1) of the Public Authorities Limitation Act cannot be extended under Section 6 of the said Act, as read together with Section 27 of the Limitation of Actions Act, as the intended claim against the Director of Public Prosecutions is not intended to be based on negligence, nuisance or breach of duty.

17. In sum, the Applicant's application cannot stand the test of law. It is without merit, and is hereby dismissed with no orders as to costs

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MARCH, 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

No Appearance for Applicant

Mr. Said for Respondent