



**Ndiege v Judicial Service Commission (Cause 793 of 2019)
[2021] KEELRC 1454 (KLR) (23 February 2021) (Ruling)**

James Otieno Ndiege v Judicial Service Commission [2021] eKLR

Neutral citation: [2021] KEELRC 1454 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

CAUSE 793 OF 2019

M MBARŪ, J

FEBRUARY 23, 2021

BETWEEN

JAMES OTIENO NDIEGE CLAIMANT

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

RULING

1. The ruling herein relates to the respondent Notice of Preliminary Objection dated 27th February, 2020 and on the grounds that;
 1. In so far as the suit relates to a cause of action that allegedly accrued on 16th August, 2016 upon the suspension of the claimant. The claim is time barred under the provisions of section 90 of the Employment Act of 2007. The court therefore lacks jurisdiction to entertain this claim and the same ought to be struck out with costs to the respondent.
 2. The claimant's rights to sue having lapsed, the claimant lack capacity to agitate any cause of action against the respondent in relation to his entitlement to an 'alimentary allowance'. The claim is therefore an abuse of the court process.
2. Parties addressed these objections by way of written submissions.
3. The respondent submitted that the claimant's cause of action is wholly based on the alleged failure by the respondent to pay his alimentary allowance after his suspension on 16th August, 2016 and which became due following his suspension. The claimant has not sued for unlawful or unfair termination save for his alimentary allowance which allegedly accrued in August, 2016. The claim was filed on 28th November, 2019, a period of over 3 years since the cause of action arose. The suit is time barred and the court lacks jurisdiction.



4. Based on the facts as pleaded, the cause of action being contrary to the provisions of section 90 of the Employment Act, the court is without jurisdiction and should be dismissed with costs as held in *Kericho County v Kenya Forest Service & 8 others* [2014] eKLR. In the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR the court held that jurisdiction is everything and without it the court should stop.
5. Section 90 of the *Employment Act* requires a party to move the court with regard to rights under the Employment Act within 3 years since the cause of action arose. The claim for alimentary allowance arises from the claimant's contract of service with the respondent. this benefit could be pursued independently during the subsistence of his employment but from 16th August, 2016 when the claimant was suspended he opted not to claim this allowance and which is now overtaken in time and barred as held in *Justine S Sunyai v Judicial Service Commission & another* [2017] eKLR and in *Francis Atonya Ayeka v Kenya Police Service & another* [2017] eKLR in employment and labour relations claim, section 90 of the *Employment Act* is clear to the extent that all such claims ought to be filed with the court within 3 years from the time the cause of action complained of arose.
6. The claimant submitted that the objectives made are not purely on a points of law as required in the case of *Mukbisa Biscuits manufacturing Co. Ltd v West End Distributors* [1969] E.A. the objections made are based on facts and not the law and the application of section 90 of the Employment Act should not apply. The alimentary allowance is due under section H.14 of the Judiciary Human Resurge Manual, September 2014 and which requires for the payment of alimentary allowance to an officer suspended from duty.
7. The claimant was suspended on 16th August, 2016 and was entitled to alimentary allowance and which has not been paid. This is a continuous payment made on monthly basis and unlike in termination of employment which is a one-off event, the cause of action started in August, 2016 and continued pending the disciplinary process ending on 27th March, 2019. These are facts which can only be determined in a trial.

Determination

8. The single issue for determination is whether the suit is time barred.
9. Section 90 of the *Employment Act*, 2007 (the Act) requires all claims with regard to rights under the Act be filed within 3 years from the date the cause of action arose.
10. Under clause 5 of the Memorandum of Claim the claimant avers that on 16th August, 2016 he was suspended from duty on various allegations. That during such suspension, he was entitled to an alimentary allowance as required under Section H of the Judiciary Human Resource manual, 2014. The due allowance was not paid.
11. Under clause 11 the claimant avers that on 27th March, 2019 the disciplinary committee heard his case and resolved to dismiss him from his employment. His claim is for the payment of the due alimentary from August, 2016 to March, 2019.

Are these claims time barred?

12. Suspension from employment is an administrative prerogative. An employer is allowed to suspend an employee from duty for stated reasons. Such is to remove the employee from the shop floor to allow for investigations or as a sanction for a stated reason(s).



13. In the case of *Donald C. Avude v Kenya Forest Service* [2015] eKLR, the court held that;
- “... the court in this case distinguished between “disciplinary” suspension and “administrative” suspension. For the purposes of the case, disciplinary suspension was defined as “a punitive measure for a reproachable act made during work” while administrative suspension is “a preventive measure which can be taken when the interest of the employer’s business require it, even in the absence of an act made by the employee while working.”
- ... the court set the criteria for administrative suspension as follows; sufficient link between the reproached act and the type of employment; the nature of the accusations; the existence of reasonable grounds to believe that maintaining, even temporarily, the employment relationship would be prejudicial to the employer or to his reputation; the existence of immediate, important inconveniences that cannot be practically countered by alternate measures (for example: assigning the employee to another post); and, the necessity of protecting the public.”
14. In this case, the claimant was suspended on 16th August, 2016 on the grounds that;
- Your habitual behaviour of absenting yourself from duty without permission ... following these actions, you are hereby suspended from performance and functions of your duties with effect from the date of this letter since proceedings which may lead to your dismissal are about to be taken. ...”
15. The essence of the suspension was therefore to remove the claimant from duty to allow for disciplinary proceedings over his misconduct. during the period of suspension, he claims that he was entitled to the payment of an alimentary allowance.
16. On the pleadings, the claimant was dismissed from his employment by notice dated 27th March, 2019. Such concluded his employment with the respondent.
17. The essence of his suspension was thus addressed. The administrative action envisaged in the letter dated 16th August, 2016 resulted in termination of employment on 27th March, 2019. Such administrative action had the possibility of recall back to work where the claimant would have been found innocent.
18. In *Samson Ole Kisirkoi v Maasai Mara University & 3 others* [2018] eKLR and in *Joshua Rodney Marimba v Kenya Revenue Authority* [2019] eKLR the court held that it is the duty of the employer to ensure that the disciplinary process against an employee is held within a reasonable period and where found culpable a sanction to issue and where none, the employee to be recalled back to work and paid his dues.
19. In addressing the question of suspension from employment and its implications with regard to the employee’s employment, the court in *Elizabeth Cheronu Kurgat v Kenya Literature Bureau* [2014] eKLR held that;
- “the Claimant was suspended on being suspected to have committed the employment offence. It is not a material departure, that the Respondent termed this action as compulsory leave, instead of suspension or interdiction under the Terms and Conditions of Employment. All are terms that may be used by an Employer on sending an Employee on administrative leave. She understood she was being placed on administrative leave to allow for investigations and the disciplinary process to take place. She was given the opportunity



to show reasons why disciplinary action should not issue against her. She did this. She was called to a disciplinary hearing, and was accompanied by a Trade Union Representative at the shop floor level. She was heard, her representations considered, and a decision made to terminate her contract of employment in this case, the claimant was suspended to allow the respondent address his work place misconduct. The delay in addressing the claimant's case from 16th August, 2016 to 27th March, 2019 cannot be visited against him. He remained in the employment of the respondent until 27th March, 2019. His rights within and during such employment were secured. Such cannot be negated by application of section 90 of the Act. To do so would be a serious misreading of the law on a matter the respondent had absolute control yet opted to delay the hearing until a period of over 3 years. such is not the essence of section 90 of the Act the cause of action accrued from the date the employment relationship terminated and not before. That is on 27th March, 2019."

20. The claims made shall be heard on the merits.

21. Accordingly, objections made are found without merit and are hereby dismissed. costs to the claimant.

DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2021.

M. MBAR?

JUDGE

In the presence of:

Court Assistant:

..... and

