



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 379 OF 2015**

**MOSES ENONDA MALEYA.....CLAIMANT**

**v**

**TEACHERS SERVICE COMMISSION.....RESPONDENT**

**RULING**

1. Moses Enonda Maleya (the Claimant) was offered employment as a teacher by the Teachers Service Commission (the Commission) in February 1994.
2. Through a letter dated 24 April 2012, the Commission informed the Claimant of dismissal from service on the ground of immoral behaviour.
3. The Claimant appealed against the dismissal on 28 April 2012 but the appeal was dismissed. The Claimant was informed through a letter dated 3 July 2012.
4. On 16 October 2015, the Claimant instituted these proceedings against the Commission alleging unfair termination of employment and breach of contract.
5. The Commission filed Reply to the Memorandum of Claim on 24 November 2015 and a Notice of Preliminary Objection on 9 November 2020.
6. In the Objection, the Commission contended

TAKE NOTICE that the Respondent herein shall at the hearing hereof raise and argue a Preliminary Objection on the grounds that the Claimant's Claim herein is time barred and grossly offends the mandatory provisions of section 4(1)(a) of the Limitation of Actions Act and section 3(2) of the Public Authorities Limitation Act and shall pray that the Statement of Claim be struck out with costs to the Respondent.

7. Pursuant to Court orders, the Commission filed its submissions on 23 November 2020 while the Claimant filed his submissions on 11 December 2020.
8. The Court has considered the pleadings, Objection and submissions.
9. In support of the Objection, the Commission asserted that the cause of action arose on 16 April 2012 and that by virtue of section 90 of the Employment Act, 2007 and section 3(2) of the Public Authorities Limitations Act, the Claimant should have moved the Court within 3 years that is before 16 April 2015.
10. The Commission urged the Court to adopt and apply the law as set out in *Attorney General & Ar v Andrew Maina Githinji & Ar* (2016) eKLR and *Thuranira Karauri v Agnes Ncheche* (1997) eKLR.
11. In challenging the objection, the Claimant contended that the cause of action was not for breach of contract but rather on the manner of his dismissal, which was a violation of his constitutional rights.
12. In the view of the Claimant, and drawing from *David Gitau Njau & 10 Ors v the Attorney General* (2012) eKLR, limitation law did not apply to actions seeking redress of violation of fundamental rights and freedoms.

13. According to the Claimant, his dismissal was in violation of the rights assured him by Articles 27, 28, 29(d) & (f), 30 and 41 of the Constitution. In this respect he found umbrage in Cause No. 849 of 2011, *Justus Atulo Ashioya v Akshar Team Security Ltd.*
14. Section 4(1)(a) of the Limitation of Actions Act does not apply any more to actions arising out of *contracts of service* by dint of section 90 of the Employment Act, 2007. The Commission was therefore prudent to abandon reliance on it in the submissions.
15. That notwithstanding, the Claimant's cause of action arose on notification of dismissal through the letter dated 26 April 2012.
16. In terms of section 90 of the Employment Act, 2007, the Claimant should have commenced action on or before 26 April 2015. He moved the Court outside that prescribed window as he instituted the proceedings on 16 October 2015.
17. Giving the litigation the flavour of fundamental rights and freedoms would not be of any assistance to the Claimant as the direct anchor of the action was a dismissal from a *contract of service*, which is within the purview of the law of contract as underpinned by the Employment Act, 2007 and the statutory framework governing the operations of the Commission.
18. The Court also notes that it is bound by the legal position set out by the Court of Appeal in the *Githinji* case.
19. The Court will in effect uphold the Notice of Preliminary Objection and dismiss the Cause. No order on costs.

**Delivered through Microsoft teams, dated and signed in Kisumu on this 3<sup>rd</sup> day of February 2021.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

For Claimant	Abisai & Co. Advocates
For Respondent	Stella Rutto, Advocates, Teachers Service Commission
Court Assistant	Chrispo Aura