



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC CAUSE NO. 9 OF 2020

JAMES KURIA MBUGUA..... CLAIMANT

VERSUS

THE GOVERNOR,COUNTY GOVERNMENT OF NAKURU.....1ST RESPONDENT

COUNTY GOVERNMENT OF NAKURU..... 2ND RESPONDENT

RULING

1. This ruling is in respect of the Respondents/applicants' application dated 25th June, 2020 filed under certificate of urgency on 26th June, 2020 via the firm of Mirugi Kariuki & company advocates seeking the following orders;

- 1) THAT this Honourable Court be pleased to certify this matter as urgent and service be dispensed with in the first instance.**
- 2) THAT, the Honourable court be pleased to strike out all the pleadings of the Claimant/ Respondent dated 31st January, 2020 for being frivolous,vexatious, raising no reasonable cause of action, an abuse of court process and for misjoinder of causes of action.**
- 3) That, the Honourable Court be pleased in the alternative to order that all the prayers sought in the Memorandum of claim dated 31st January, 2020 be marked as spent, the causes of action eroded and/or time barred and that no further proceedings be taken in relation to this suit and the file be closed.**
- 4) That, the costs of this application as well as the costs of the suit be borne by the Claimant/ Respondent.**

2. The application is supported by the grounds on the face of the application and the affidavit sworn by the county secretary and head of public service of the 2nd Respondent, **Mr. Benjamin Njoroge**, on 25th June, 2020 and on the following grounds:

- a) That this suit as instituted by the claimant on 19th February, 2020 raise no cause of action as against the respondents but is vexatious, frivolous and a mere abuse of Court process.
- b) The term of office of the claimant who was the secretary and the head of the public service for the 2nd respondent came to an end by operation of law on 28th May, 2019 having served his 6 years' non- renewable term from 28th May, 2013.
- c) That at the time of filing this suit, there existed no employer-employee relationship between the claimant and the 2nd respondent therefore this Court lack jurisdiction to hear and determine this dispute.
- d) That, the claimant was send on compulsory leave on 17th January, 2019 before the end of his contract and instead filed Judicial review before this Court being ELRC J.R No. 1 of 2019 seeking to quash the said leave and that the said J.R is pending for hearing of the substantive motion and ought not be an issue for determination in this claim.
- e) That, the prayer for payment of damages for defamation sought is time barred since the alleged defamatory statement were made on 20th January, 2019 more than the statutory one year required in institution of defamatory suits and that this court lack the requisite jurisdiction to deal with the tort of defamation.
- f) That, there is a misjoinder of causes of action by the claimant which renders the memorandum of claim incurably defective,

incompetent and bad in law.

g) That around 5th April, 2016, the special ad-hoc committee of the county assembly of Nakuru made a finding that the claimant herein was guilty of gross misconduct for illegally and irregularly hiring staff, which decision the claimant has not appealed to date, therefore, the said decision remain to be enforced any time by the 1st respondent.

h) Nonetheless, it was stated that, the claimant herein was not terminated as purported but that his contract of employment came to an end by operation of law on expiry of his contract on 28th May, 2019.

i) That the prayers in the memorandum of claim are either time barred, overtaken by events and or the cause of action eroded thus can be disposed of in line with section 3 of the Employment and Labour relations Court Act

3. In opposing the application, the claimant, **James Kuria Mbugua**, swore a replying affidavit filed in this Court on 14th July, 2020 on the following grounds;

a) The claimant avers that it has a legitimate case necessitated by what he called brutal and unfair termination by the respondents. That, his claim disclosed reasonable cause of action that is well grounded on solid evidence and is in no way vexatious or frivolous.

b) The claimant avers that the respondents have contradicted themselves when on one hand it alleges that his contract came to an end by operation of law and on the other hand allege that the termination occurred as a result of the claimant being sent on compulsory leave to pave way for investigation.

c) The claimant avers that his employment contract was not on contractual basis as alleged since he is not a member of the public service board as contemplated under the County Government Act rather that he is employed under permanent and pensionable terms that can only come to an end upon retirement.

d) That, the claimant was the secretary to the County Public Board of Nyeri and was only taken up at Nakuru on transfer which he had requested in his letter of 7th June, 2013.

e) That the suit herein was filed when the claimant was still in proper employment of the respondent albeit on leave as conceded by the respondent at paragraph 7 of the affidavit.

f) That, the period of one year for purposes of limitation of actions in defamation cases run from the date of publication of the said defamatory statements to the date when a demand for admission of liability was made. Consequently, it was averred that, the demand for liability was made about six months after the said statement or words were made therefore the prayer is within the law.

g) That the claimant is not aware of any decision by the ad-hoc committee of the county assembly that resolved that the claimant was guilty of gross misconduct as alleged by the applicant herein. Further that it is suspect that the respondent could have kept such a serious finding in abeyance from 2016 to 2020 and only raise it in response to this claim.

h) That, even if the respondent relied on the finding of the ad-hoc committee to render its decision to terminate the claimant, they ought to have informed him and at the very least subject him to due process as required in law.

i) He therefore stated that his claim is legitimate and urged this court to decline the application herein and proceed to hear his claim on merit.

4. The parties herein agreed to canvass this application by way of written submission with the Applicants filing on 24th August, 2020 and the Claimant/Respondent filed on 5th February, 2021.

Applicants' submissions.

5. The applicant submitted that section 20 of the Defamation Act, cap 36 provides the timeline for institution of slander and libel suits as 1 year which timelines have been equally provided for under section 4 of the Limitation of Actions Act cap 22 laws of Kenya.

6. Accordingly, he submitted that the alleged defamatory words and statement as captured in the claimant's memorandum of claim were made on 18th January, 2019 and on 20th January, 2019. That this suit herein was filed on 3rd February, 2020 after a whole 12 months (1 year) therefore is statute barred. With regard to the averment by the claimant that time stop running when demand on liability is issued, the applicants argues that the said reasoning is not anchored in any known law. On when time starts to run in filing cases of defamation, they cited the case of **Wycliffe A swanya –vs- Toyota East Africa & another [2009]eklr** which court held that;

“...Unfortunately the limitation of actions Act cap 22 Laws of Kenya, does not say so , it says in case of libel or slander no action may be filed after the end of 12 months from the date the cause of action accrued and we understand this to mean from the date the slanderous remarks are made.... In the instant case the slanderous remarks were made on 12th November, 2005 and the latest this suit should have been filed would have been 11th or 12th November, 2006.”

7. The applicant further submitted that the internal remedies /actions cannot stop the time from running in case of action of defamation, so

that the argument by the applicant that time stopped running when it made a demand letter does not amount to an 'action' contemplated under section 4(2) of the Limitation of Actions Act. To reinforce this they cited the case of **James Muruthi Kihara- versus- Jackline Chepkemoi Kimeto [2018] eKLR**.

8. The applicant further argues that even if the said defamation claim was made on time, that is within 12 months, then the same were made against the wrong parties because the three newspapers being Daily Nation, The Peoples Daily and the Standard Newspaper published the said statement thus ought to have been sued for defamation instead of the applicants herein. The respondent argues therefore that the suit is not proper as it has raised no cause of action against them.

9. On the employment term of the claimant, the applicant herein submitted that the claimant was appointed by the governor as the secretary to the County Public Service Board on 28th May, 2013 vide a letter of Appointment dated 31st May, 2013 in line with section 58(1)(c) & 4 of the County Government Act No. 17 of 2012, which give the composition of the County Public service board to include inter alia '**a certified public secretary of good professional standing nominated and appointed by the Governor, with the approval of the county assembly, who shall be the secretary to the board**'

10. Further that section 4 of the said Act provides that a member of the board- **shall hold office for a non-renewable term of six years** and may serve on a part time basis. He then submitted that the claimant's term of services has lapsed by operation of law and was duly paid his terminal dues as confirmed in paragraph 19 of his memorandum of claim. Further that the claimant had misapprehended the law when he alleged that his employment was permanent and pensionable that can only lapse on retirement.

11. The Applicants' argues thus that, when the claimant's employment came to an end by operation of law, his claim for unfair termination is no longer viable and ought to be struck out at this stage and cited the case of **County Council of Nandi –vs- Ezekiel Kibet Rutto & 6 others [2013] eKLR** which court extensively define what is meant by suits that are scandalous, frivolous, vexatious and abuse of court process.

12. The Applicants argue that the claimant's suit as it is raises no cause of action as defined in the case of **Fredlack insurance brokers limited –vs- Thomas Ruhii Kariuki & another [2018] eKLR**. In addition, that the suit is incurably defective for misjoinder of causes of action by the claimant who is seeking for unfair termination and damages for defamation which cause of action did not arise on the same day neither did they arise from the same transaction. Further that the alleged defamatory statements were made by known newspapers who have been deliberately left out in this suit which defamation this court lack jurisdiction to determine as the same is reserved for the High Court of Kenya as provided for under Article 165 of the Constitution of Kenya.

13. It was their submissions that the application herein is meritorious one that should be allowed to save them from unnecessary costs that will accrue if the suit is heard and eventually dismissed on the grounds raised and reinforced this by citing the case of **Fredlack Insurance Brokers Limited –vs- Thomas Ruhii Kariuki & another [2018] eKLR (Supra)**.

Claimant/ Respondent's submissions.

14. The claimant/ Respondent submitted that it has a reasonable cause of action backed by the evidence filed in his list of documents in support of his claim against the unfair termination of his employment that this court ought to consider during hearing of the main suit.

15. The claimant argues that a summary dismissal of this suit as sought by the applicant would only occasion gross miscarriage of justice, breach rules of justice and condemn the claimant unheard when the applicants have contradicted their statement when they claimed that the claimant's employment lapsed by operation of law and on the other hand alleged that the claimant was sent on compulsory leave to pave way for investigation which resulted to the termination.

16. On the substance of **Judicial Review No. 1 of 2019** challenging the placement of the claimant on compulsory leave, the Claimant argues that the same has been overtaken by events since the respondent has already filled the position of secretary to the county public service board which he argues is tantamount to him being constructively dismissed.

17. The claimant in conclusion submitted that it has not violated any law to warrant the applicants' application in any case if he had violated any law then the Applicants would have filed a proper preliminary objection to challenge the same.

18. On payment of cost, the claimant submitted that, payment of costs follows event and urged this court to dismiss the application and award him costs.

19. I have examined the averments of the parties herein. The claimant filed his claim on 3/2/2020.

20. The contention by the claimant in his claim is that he was unfairly terminated. The applicants on their part indicate that his employment came to an end by affliction of time.

21. The issue of whether the claimant was terminated fairly or not or whether his employment contract ended by affliction of time is a triable issue.

22. The term of his contract from the PSC, secondment if any to Nyeri County Public Service Board and later to Nakuru County Public Service Board are all triable matters which I cannot ignore.

23. For the above reasons and without delving into the merit of the case, the application by the applicant respondent if allowed will occasion an injustice to the claimant by condemning him unheard.

24. I decline to grant prayers sought and direct this claim to proceed on merit.

RULING DELIVERED VIRTUALLY THIS 27TH DAY OF MAY, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

No appearance for parties

Court Assistant - Fred