



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 373 OF 2016

JAMES KENYAGA.....CLAIMANT

VERSUS

POSTAL CORPORATION OF KENYA.....RESPONDENT

RULING

Introduction

1. This ruling relates to a Notice of Preliminary Objection dated 10th March, 2017, brought by the Respondent herein.
2. The Respondent's Preliminary Objection is that the Claimant's cause of action is founded on an employment contract between the Claimant and the Respondent, which contract terminated on 26th November, 2013. It is the Respondent position that the suit is time barred by virtue of *Section 90 of the Employment Act, 2007*, having arisen on 26th November, 2013 and the complaint having been filed on 15th December, 2016.
3. The Respondent avers that the suit is incompetent, frivolous and *mala fides* and should be struck out with costs.
4. Both parties filed their submissions.

The Respondent's Submission

5. The Respondent states that the Claimant filed a Memorandum of Claim dated 15th December, 2016 and filed in court on the same day. The Respondent avers that the Claimant admitted vide his Memorandum of claim, that he was served a letter dated 26th November, 2013, informing him of his dismissal from the service of the Respondent, and which letter was to take effect immediately.
6. The Respondent avers that *Section 90 of the Employment Act, 2007* militates that a cause of action founded on the Employment Act, must be filed within three years from the date the cause of action arose.
7. The Respondent submits that the Claimant was aware of the cause of action that had accrued as from 26th November, 2013 and lapsed on 26th November, 2016. The Respondent further states that the Claimant filed this suit on 15th December, 2016 after the expiry of the three-year limitation period.
8. The Respondent submitted that termination occurs once and immediately it does, time starts running. They sought to rely on the case of *Elinathan Kitiro Mwamburi v Telkom Kenya Limited (2014) eKLR* where the court cited with approval the holding in the case of *Hilarion Mwabolo v Kenya Commercial Bank (2013) eKLR*.
9. It is further submitted for the Respondent, that the effective date of termination of the Claimant was 26th November, 2013 and that it is on this date that the cause of action accrued. The Respondent relied on the holding in the case of *Hilarion Mwabolo v Kenya Commercial Bank (2013) eKLR*, where the court stated that:

“... termination kicks in from the date stated in the termination letter...” to buttress their assertion on the date of accrual of the cause of action.

10. It is submitted for the Respondent that the fact that the Claimant lodged appeals against his dismissal, did not stop the running of time.

The Respondent sought to rely on the court decision in the case of *Peris Maina v Nairobi City Water & Sewerage Company Limited (2018) eKLR* where Byram Ongaya J stated:

“As submitted for the Respondent, the administrative appeal proceedings did not postpone or adjourn the running of the time of limitation after the dismissal...”

11. The Respondent submitted that the Claimant acknowledged having stopped receiving salary from the Respondent on 26th November, 2013, which goes to confirm the date of accrual of the cause of action as 26th November, 2013. It is the Respondent’s assertion that the Claimant sat on his rights and acquiesced in the actions of the Respondent.

12. The Respondent avers that this court lacks jurisdiction to entertain this suit as the same is statute barred and should be dismissed with costs.

The Claimant’s Submissions.

13. The Claimant submitted that he was in the service of the Respondent until 26th November, 2013, when he was terminated unfairly. It is his submission that the termination did not adhere to *Sections 41, 43 and 45 of the Employment Act*.

14. It is submitted that the Claimant’s termination letter was issued on 26th November, 2013, but was served upon the Claimant on 16th December, 2013.

15. The Claimant submitted that he appealed against the decision of the Respondent to terminate him and the decision of the appeal was communicated to him on 12th May, 2014. It is submitted that the Claimant, yet again filed a second appeal and that for these reasons, the Claimant cannot be said to have sat on his rights as alleged by the Respondent.

16. The Claimant submitted that the Preliminary Objection herein does not deserve to see the light of day and should be dismissed for being an abuse of the process of this court,

Determination

17. The legal position regarding Preliminary Objections was well laid down in the famous case of *Mukisa Biscuit Manufacturing Co. Ltd – vs West End Distributors Ltd (1969) EA 696*, where the court held as follows:

“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. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

18. The Preliminary Objection in this suit, is a plea of limitation premised on *Section 90 of the Employment Act, 2007*. The Court returns that this is a pure point of law and which if proved, has the potential to dispose of the suit without the need for further hearing.

19. Section 90 of the Employment Act 2007, provides as follows in regard to filing of employment related claims;

“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.”

20. The Claimant filed his Memorandum of Claim on 15th December, 2016. His letter of Dismissal is dated 26th November, 2013. In his submissions, the Claimant states that he was served with the letter of termination from the service of the Respondent on 16th December, 2013. The Respondent’s letter dismissing the Claimant, states ***“... the dismissal is effective from the date of this letter.”***

21. The Claimant at paragraph 8 of his memorandum of claim, states that he stopped receiving his salary from the Respondent from 26th November, 2013. This being a claim arising out of a contract of employed, the same should have been filed within 3 years from the date the cause of action accrued. The question for this court is when the cause of action herein accrued. According to *Black’s Law Dictionary (10th Edition)* the word “accrue” means ***“to come into existence as an enforceable claim or right.”***

22. The letter of dismissal is dated 26th November, 2013 and the same states that the dismissal takes effect on the date of that letter. The Claimant has by his claim told this court, that he did not earn a salary from 26th November, 2013 from the Respondent. Notwithstanding the date when the Claimant received the letter of dismissal, the dismissal took effect from the date it was said to take effect in the dismissal letter, which is 26th November, 2013.

23. It then follows that the cause of action accrued on the 26th November, 2013. The date when time begins running, was settled by the holding of the Court of Appeal in the case of *David Ngugi Waweru v Attorney General & Another (2017) eKLR*, where the court stated that

the time of dismissal or termination is the time contained in the letter of termination/dismissal and not the time of conclusion of internal disciplinary mechanisms.

24. As correctly submitted by the Respondent, the cause of action in cases arising out employment contracts, accrue on the date of termination/dismissal. The court extensively dealt with this issue in the case of *Hilarion Mwabolo v Kenya Commercial Bank (2013) eKLR* where the court held:

“ .. the cause of action under Section 90 of the Employment Act, 2007 accrues from the date of termination as stated in the termination letter....”. In a further case of *Anne Waithira Kimani v Stephen Ndungu Njenga (2013) eKLR*, the court held that the cause of action arose when the resignation took effect.

25. There is no doubt in my mind that the cause of action in this suit accrued on the 26th November, 2013, being the date when the termination letter was written and expressly stated as the date when the termination would take effect.

26. The upshot is:

i. The Respondent's Notice of Preliminary Objection is upheld

ii. The Court further finds and holds that the Claimant's Memorandum of Claim dated 15th December, 2016, statute barred and is struck out with costs.

27. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 25TH DAY OF NOVEMBER, 2021.

CHRISTINE N. BAARI

JUDGE

Appearance:

N/A for the Claimant

Mr. Wachira present for the Respondent

Ms. Christine Omollo-C/A