



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS NO. 12 OF 2020**

**PHILIP MUTUNGA MAUTA.....APPLICANT**

**VERSUS**

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

**RULING**

1. The application before me is the Applicant's Notice of Motion dated 3<sup>rd</sup> February 2021. Through it, the Applicant seeks the following orders: -

a. *Spent*

b. THAT the Applicant be granted leave to lodge a claim out of time contesting termination of employment which occurred on 4<sup>th</sup> March, 2004.

c. THAT costs of the application be in the cause.

The Application is supported by the Applicant's affidavit sworn in support.

2. The Respondent was opposed and filed a Replying Affidavit sworn on 15<sup>th</sup> March 2021. In which the deponent Mary Rotich Director in Charge of Field Services (Discipline of Teachers) states that the Applicant was employed by the Commission on 6<sup>th</sup> May 1988 and posted over time to different schools and the Commission interdicted the Applicant for absconding duty and was dismissed from the employ of the Respondent effective 4<sup>th</sup> March 2004.

3. The application was to be disposed of by way of written submissions and both the Applicant and the Respondent filed their respective submissions. The Applicant submitted that the Applicant was issued with a letter indicating the dismissal of 4<sup>th</sup> March 2004 stands. After the dismissal he appealed and did not know of the outcome of the appeal which he submits was curiously concealed from him during the past 14 years. He submitted that the final decision on his appeal made on 7<sup>th</sup> March 2006 was not communicated until 27<sup>th</sup> August 2018. He submitted that it is evidently clear that the applicant has suffered immensely under the hands of his employer and nothing would have been easier that to ensure the communication on the outcome of his appeal reached him once the decision was made on 7<sup>th</sup> March 2006. He submitted that it is a pure case of impunity to make a decision and sit on it and communicate it 12 years late. He submits that whereas in between the conduct of the employer is wanting, they had already reinstated the applicant. The Applicant urged the court to actually find that he had a legitimate expectation for communication on outcome of his appeal which was not done until the letter dated 27<sup>th</sup> August 2018. For purposes of computation of time he urged the court to find that time should run as from the date of the communication of the outcome of appeal and the Court should therefore find that the Applicant is perfectly within time to file a claim through the dismissal was made on 4<sup>th</sup> March 2004. The Applicant submitted that he has not been indolent but vigilant on his rights as all this time he was pursuing the appeal which was long decided in his absence and the Respondent never bothered to communicate the same. He submitted that in the interests of justice that the Applicant be granted leave to file his claim outside time and/or in the alternative time be computed as from 27<sup>th</sup> August 2018.

4.

5. The Respondent asserts by way of background that the Applicant was a teacher in its service and was terminated for absconding work. The Applicant was dissatisfied with the outcome of the case and he appealed against the decision on 3<sup>rd</sup> June 2004. After considering the Applicant's Appeal, the Commission found that there were no new grounds to merit a review of the Applicant's case which decision was sent to the Applicant via a letter dated 7<sup>th</sup> March 2006. The Applicant thereafter resorted to writing various letters to the Commission seeking for re-instatement and asking for apology. When the requests for re-employment failed, on 25<sup>th</sup> January 2013, the Applicant forged a letter

purporting that he had been re-employed by the Commission and was therefore to be posted to Masinga District. When the Applicant sought to be included in the payroll, it was noted that he had been dismissed and was never reinstated hence the TSC County Director Machakos recalled the Teacher. The Respondent submits that the issues for determination are

- a) Whether the Honourable Court has jurisdiction to extend time
- b) Whether the Applicant has offered proper, reasonable and/or justifiable reason for the delay in filing the instant Application.
- c) Whether the Applicant has failed to candidly disclose all material facts to the Court.
- d) Whether allowing the instant application will cause irreparable loss and prejudice to the Respondent.

6. On the question as to whether the Honourable Court has jurisdiction to extend time, it is the Respondent's submission that this Court is devoid of jurisdiction to grant extension of time for lodging of the claim as the same contravenes Section 90 of the Employment Act as read with Section 4 (1) of the Limitation of Actions Act. The Respondent submits that it is trite law that the Court does not have jurisdiction to extend the time to filing the suit as the reading of the law states clearly that once time has lapsed, jurisdiction is ousted hence the court must dismiss the suit for lacking the necessary power to entertain it. From the foregoing, the Respondent submits that the claimant lodged the claim out of time and this court therefore is deprived of any jurisdiction to extend the limitation period. The Respondent relied on the case of **Peter Katithi Kithome v Laboratory & Allied Limited [2021] eKLR** where the Court cited with approval the decision of the Court of Appeal in the case of **Beatrice Kahai Adagala v Postal Corporation of Kenya [2015] eKLR** which stated that;

*"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 3 years. As this Court stated in the case of **Divecon Limited -vs- Samani (1995-1998) 1 EA P.48, ... in Josephat Ndirangu -vs- Henkel Chemicals (EA) 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 satisfies the requirements of Sections 27 and 28 of the Limitation of Actions Act,"*

7. The Respondent submits that this Honourable court should find that it has no discretion to do what the Applicant seeks. As to whether proper, reasonable and/or justifiable reason has been offered for the delay in filing the instant Application. It is the Respondent's submission that the Applicant has not demonstrated to the satisfaction of this court, any valid or justifiable reason or impediment which made him not file the instant Application in this matter. It submits that the Applicant via their Supporting Affidavit sworn on 3<sup>rd</sup> February 2020, has expressly confirmed receipt of both the dismissal letter on 4<sup>th</sup> March 2004 and a copy of the Letter confirming the decision on appeal delivered on 7<sup>th</sup> March 2006. The choice of the Applicant therefore, to challenge the decision 14 (Fourteen) years after the matters were settled is inexcusable and should not be tolerated by this Honourable court. The Respondent relied on the case of **George Ochieng Onyango v Chemilil Sugar Company [2021] eKLR** where the Court cited the guiding principles available to courts in exercise of discretion to extend time as set by the Supreme Court in the case of **Nicholas Kiptoo Korir Arap Salat v Independent Electoral and Boundaries Commission [2014] eKLR** as follows;

*"Extension of time is not a right to a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court. ii. A party who seeks extension of time has the burden of laying basis to the satisfaction of the court. Whether the court should exercise its discretion to extend time is a consideration to be made on a case by-case basis. iv. Where there is reasonable reason for the delay, the delay should be explained to the satisfaction of the court. v. Whether there will be any prejudice suffered by the Respondent if extension is granted. vi. Whether the application has been brought without undue delay. vii. Whether in certain cases public interest should be a consideration for extension of time."*

The Respondent submits that the only logical deduction that the Applicant relied on to explain the failure to challenge the decision of the Commission from the facts of the case is that he put his hopes in the success of his numerous unmerited pleas for forgiveness and reinstatement. It submits that such an alternative process should not disregard the law and cannot excuse statutory limitations. The Respondent further relied on the case of **G4S Security Services (K) Limited v Joseph Kamau & 468 Others [2018] eKLR** where the court held that:

*"Time does not stop running on the commencement of reconciliation or other alternative dispute resolution mechanisms provided for under the Constitution or any other law. And in the case of **Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye and another [2016] eKLR** the court held that; While there is no doubt that section 15 of the Employment and Industrial Relations Act encourages alternative dispute resolution, it must be court-based and conducted within the law. Time does not stop running merely because parties are engaged in an out of court negotiations. It was incumbent upon the respondents to bear in mind the provisions of Section 90 of the Employment Act even as they engaged in the negotiations. The claim went stale three years from the date of the termination of the respondents' contracts of service."*

8. The Applicant seeks the extension of time. This is impossible in light of Section 90 of the Employment Act. For the benefit of the Applicant I produce the entire Section 90 Employment Act which states:

*"Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based on 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."*

Clearly, the Courts have no jurisdiction to extend time and given the long precedent in the matter of limitation of employment cases, I cannot find for the Applicant. In **G4S Security Services (K) Limited v Joseph Kamau & 468 Others (supra)** the Court of Appeal held

*Time does not stop running on the commencement of reconciliation or other alternative dispute resolution mechanisms provided for under the Constitution or any other law.*

9. The long and short of the above is clear proof that the Applicants application is devoid of any merit and is accordingly dismissed with costs to the Respondent.

**It is so ordered.**

**DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER 2021**

**NZIOKI WA MAKAU**

**JUDGE**