



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.231 OF 2018

ISAAC NEWTON KINITY.....CLAIMANT

VERSUS

ATTORNEY GENERAL.....RESPONDENT

RULING

On 9th August, 2018 the claimant filed the Memorandum of Claim and in reply, the respondent filed Notice of Preliminary Objections on the grounds that the claims contravenes the provisions of section 90 of the Employment Act, 2007 (the Act).

Both parties made oral submissions.

The respondent submitted that the claimant's claim is premised on the facts that the cause of action arose between 1972 to 1997 and the claim having been filed on 9th August, 2018 with regard to alleged salaries not paid; arrears thereof, notice pay, unpaid leave from 1972 to 1997 and compensation in damages is time barred under the Act. the claimant ought to have filed his claim on or before the year 2002 but this is now over 18 years and outside the 3 years period within which claims before the court can be lodged.

The respondent also submitted that even where the claims for unpaid leave constitute continuing injury, this ought to have been addressed within 12 months since the cause of action arose or stopped.

Due to the time lapse, the respondent has been unable to trace the claimant's file to be able to file a defence. The objections should be allowed the suit dismissed with costs. There is no constitutional question set out for determination and the terminal dues outlined ought to have been made in compliance with section 90 of the Act.

The claimant submitted in opposition to the objections made and on the grounds that the provisions of section 90 of the Act depend on circumstances of each case. The claimants case relates to the violation of fundamental rights as he was forced to go into exile and has now filed his claim which should be addressed on the merits after a full hearing.

Section 90 of the Act cannot restrict constitutional rights as held in **Ambassador Samson Chemai Kipkech versus AG & others [2017] eKLR** where the claimant came to court far much later and the court held there were violation of constitutional rights and awarded damages.

Determination

In the Memorandum of Claim dated and filed on 9th August, 2018 the claimant sets out the issues in dispute as;

1. *Unfair/unlawful termination of employment;*
2. *Entitlement to compensation between the years 1972 – 1997;*
3. *Entitlement to benefits for the years until 2014;*
4. *Entitlement to pension following his retirement;*
5. *Claims for damages.*

In the prayers made the claimant is seeking for an order that his dismissal from employment be found to have been unlawful, unfair and contravenes the principles established under the Employment Act, removal from employment was unconstitutional and contrary to Article 80 of the repealed constitution and 36 of the Constitution, 2010 and section 44 of the Employment Act, the claimant is thus seeking an award of damages and compensation for violation of his rights, payment of full retirement benefits, terminal benefits, compensatory damages, full pension and allowances, compensation for persecution, harassment and mental torture and compensation for displacement from his home into exile.

The claim is also based on the facts that the claimant was employed by the Ministry of Land Reclamation Regional and Water Development now Nakuru Water and Sewerage Company and due to his union activities for the revival of the Kenya Civil Servants Union in 1992 he was trailed, persecuted, harassed and underwent mental torture by the police and which forced him to flee the country into exile on 25th December, 1998.

Section 90 of the Act is couched in mandatory terms. All claims with regard to employment and labour relations and for connected purposes must be lodged with the court within 3 years from the date the cause of action arose and where there is a continuing injury within 12 months from the time the date of cessation of the injury.

The claim herein comprises claims relating to employment and labour relations and the terminal dues therefrom and the violation of fundamental rights and freedoms of the claimant.

With regard to the claim for terminal dues, section 90 being mandatory claims going back to the year 1998 are time barred.

With regard to claims for the breach and violation of constitutional rights, The question of limitations of time in regard to allegations of breach of fundamental rights have in many cases been raised by the State and that is why in **Joan Akinyi Kabasellah and 2 Others versus Attorney General, Petition No 41 of 2014** the court held that;

Nonetheless, I take into account the views of the court with regard to limitation in respect of claims for enforcement of fundamental rights. In a line of cases such as Dominic Arony Amolo vs Attorney General, Nairobi High Court Misc. Civil Case No 1184 of 2003 (OS) [2010] eKLR, Otieno Mak'Onyango vs Attorney General and Another, Nairobi HCCC NO 845 of 2003 (unreported), Courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.

I note also the sentiments of the court in James Kanyiita vs Attorney General and Another, Nairobi Petition No. 180 of 2011 that: 'Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under Section 84 of the Constitution, is entitled to consider whether there has been inordinate delay in lodging the claim. The court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State, in any of its manifestations, should be vexed by an otherwise stale claim.

The claimant has given a chronology of events towards his going into exile on 25th December, 1998 and nothing more. He has not clarified the date of return and why he failed to file his current claims seeking damages for the violation of his constitutional rights and freedoms and particularly within the new constitutional dispensation under Constitution, 2010.

Even where the court is to assess the alleged breaches and violation of constitutional rights the court must be moved without undue delay. **In High Court Petition No. 306 of 2012 Ochieng' Kenneth K'Ogotu versus Kenyatta University and 2 others**, the court held that;

As I conclude this matter, I will address the issue of delay in filing this petition. The respondent has argued that the petitioner is guilty of inordinate delay, and I am inclined to agree with it. The events complained of took place more than 12 years ago. There is nothing before the court that explains or justifies the delay in coming to court to vindicate his rights. The petitioner's counsel submitted that he was so traumatised that he could not come to court before, but I can see no basis for this submission. While the petitioner alleges that he was arrested and charged, and that he served for 15 days before his fine was paid, I cannot see any basis for alleging that he was so traumatised that it has taken him 12 years to recollect that he had a claim against the respondents.

The rationale is **Civil Case No. 128 of 1962, Rawal versus Rawal [1990] KLR 275** the High Court at Mombasa it was held that;

The effect of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims.

In this case the claimant has relied on the case of **Ambassador Samson Chemai Kipkech versus AG & others [2017] eKLR** and where the court made an award in damages vide judgement delivered on 10th November, 2017. With respect this decision has since been overturned by the Court of Appeal in its entirety in **Richard Erskine Leakey & 2 others versus Samson Kipkoech Chemai [2019] eKLR** delivered at Nairobi on 7th June, 2019. See also **Njuguna Githiru versus Attorney General [2016] eKLR**.

I am inclined to quote the Court of Appeal in the case of **Beatrice Kahai Adagala versus Postal Corporation of Kenya [2015] eKLR** held as follows;

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.

[Underline added]

Accordingly, objections by the respondent are found with merit. The claims herein are time barred. As the respondent is the office of the Attorney General and not the line Ministry, no orders to costs.

Delivered at Nakuru this 23rd day of January, 2020.

M. MBARU

JUDGE

In the presence of: