



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 81 OF 2018

DANIEL KAGO GACHANJA.....CLAIMANT

VERSUS

INSPECTOR GENERAL.....1ST RESPONDENT

NATIONAL POLICE SERVICE COMMISSION.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. Before the Court is the Respondents' Notice of Preliminary Objection(PO) dated 5.1.2018, objecting to the entire suit on the following grounds-

i. THAT the suit is time barred and offends the mandatory provisions of section 90 of the Employment Act, 2007 and the Limitations of Actions Act Cap 21 Laws of Kenya.

ii. THAT the suit is an abuse of the court process.

iii. THAT the suit is incompetent and ought to be struck out with costs.

2. The preliminary objection (PO) was disposed of by way of written submissions.

The Respondent's Submissions

3. The Respondents submit that the suit is time barred as the Claimant instituted it in 2018 whereas his employment was terminated on 1st August 2008. It is their position that the Claimant was indolent in pursuing his rights. They rely of the case of **Hilarion Mwabolo vs. Kenya Commercial Bank [2013] eKLR** where the Court held that the accrual of the cause of action in a claim emanating from employment contract takes effect from date of termination as stated in the letter communicating the termination.

4. The Respondents further submit that this court does not have the jurisdiction to enlarge time for filing of this suit out of time. It is their view that a court's discretion to extend time as provided under the Limitations of Actions Act is limited to a cause of action relating to negligence, nuisance or breach of duty. They rely on the case of **Timothy M. Mukalo vs. Reuben Alubale Shiramba & 3 Others [2005] eKLR** and **Divecon vs. Samani [1995-1998] 1 EA 48 at page 54.**

5. It is submitted that the Claimant has not stated any grounds as to why the claim was filed in 2018. The Respondents rely on the case of **Fred Mudave Gogo vs. G4S Security Services (K) Limited [2014] eKLR** where the Court held that the time for filing a suit could be extended upon the Court being moved by a party who has good grounds for their delay.

The Claimant's Submissions

6. On the other hand, the Claimant submits that time did not start running from 2008 as alleged by the Respondents since there are disciplinary and appeal processes that are yet to be concluded. He further submitted that by dint of section 3 (2) of the Employment Act, the Act does not apply to the Kenya Police, amongst others and as such, section 90 of the Employment Act does not apply to this case. He relies on **Guantai Nkunja vs. National Police Service Commission & 2 Others [2017] eKLR** and **Joseph Wambugu Kimenju vs. Attorney General [2013] eKLR.**

7. In addition to the foregoing, the Claimant submits that the time limit under section 90 of the Employment Act does not apply in this case

since it is embedded on infringement of constitutional rights which have no limitation period. He relies on the cases of *OI Pejeta Ranching Limited vs. David Wanjau Muhoro* [2017] eKLR, *Eric Sangura Nasoko vs. National Police Service Commission & 4 Others* [2018] eKLR, *Jane Atieno Otieno vs. National Police Service Commission & 3 Others* [2018] eKLR, *Felister Waithiegeni Mugweru vs. National Police Service Commission & 2 Others* [2018] eKLR and *Beatrice Wanjiru & 2 Others vs. The Attorney General & Another* [2017] eKLR.

8. The Claimant further submits that time does not start running before the dismissal/removal is communicated to the employee and relies on the case of *Ezekiel Nyangoya Okemwa vs. Kenya Marine & Fisheries Research Institute* [2016] eKLR.

Issues for determination

9. After carefully considering the rival pleadings and submissions by both parties, I find that the main issue for determination in the instant PO is whether the suit herein is time barred and therefore incompetent. The threshold of a valid preliminary objection in civil proceedings was set out in the case of *Mukisa Biscuit Manufacturing Company Limited vs. West End Distributors Limited* [1969] EA 696 where the Court stated as follows-

“A first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of PO. A PO 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 ascertained or if what is sought is the exercise of judicial discretion...”

10. The issue herein is a point of law and relates to limitation of time which has the potential of terminating the entire suit if the court allows the Preliminary Objection. Consequently, I return that the Preliminary Objection raised fits within the four walls of a PO as envisaged by **Mukhisa Biscuits case** and I will now proceed to consider its merits.

11. The Claimant has submitted that since his claim raises issues on constitutional infringement, it is not time barred because there is no time limit for instituting claims based on constitutional violations. The respondents have however contended that the claimants suit is founded on employment contract which is subject to limitation of time which cannot be extended by the court.

12. I have carefully considered the pleadings filed by the claimant and found no doubt that the Claimant has raised issues of constitutional infringement being violation of his right under article 27 (1), 35, 47 and 50 of the Constitution. However, in my view, the said Articles were only stated conveniently to articulate the claimants claim for unfair termination of his contract of service as opposed to a genuine agitation for constitutional infringements. The context in the said pleading remains that of violation of terms of an employment contract under the Force Standing Orders rather than violation of Fundamental rights and freedoms under the Bill of Rights in the Constitution. Accordingly, I find that the facts of the case are distinguishable from the facts in the precedents cited by the claimants in opposing the PO.

13. If the claimant wanted to sue for infringement of his Fundamental rights, he should have moved the court by a petition under the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012** as required by Rule 7 of the ELRC Procedure Rules, 2016 and justify the delay. I must agree with the respondents that the suit herein is founded purely on contract of employment. It is therefore my considered view that the suit herein is a breach of an employment contract claim clothed with the garment of constitutional provisions as disguise to circumvent the statutory provisions on limitation of actions.

14. Of course I agree with the claimant that section 90 of the Employment Act does not apply to this case pursuant to section 3 (2) (c) of the Employment Act which provides that the Act does not apply to the Kenya Police. However, the Preliminary Objection succeeds on ground that it is incompetent and ought to be struck out for being time barred. The relevant law is section 3(2) the Public Authorities Limitation of Actions Act which provides that:

“No proceedings founded on contract shall be brought against the Government or local authority after the end of three years from the date on which the cause of action accrued”

15. Section 2 of the Public Authorities Limitation of Actions Act defines proceedings against the government to include: -

“... proceedings against the Attorney General or any Government department or any public officer as such.”

16. The proceedings herein are founded on contract and were brought against the Government after the end of three years from the date when the cause of action accrued. The claimant has pleaded in paragraph 2.25 of the Claim that he was dismissed from the police force on 30.9.2008. He further pleaded in paragraph 2.30 of the Claim that on 11.1.2010, he received communication from the respondents that his appeal against the dismissal had been dismissed by the Public Service Commission.

17. From 11.1.2010, the limitation period of three years ended on 11.1.2013. However, the claimant brought this suit on 29.1.2018, which was more than 5 years after the expiry of the limitation period.

It is trite that the issue of limitation is not a mere technicality but it goes to the jurisdiction of the court. Consequently, I find that the PO has merits and proceed to strike out the suit with no costs.

Dated and delivered in Nairobi this 7th day of February, 2020.

ONESMUS N. MAKAU

JUDGE