REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 201 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

SHEM KISANYA MAJANI.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF NAIROBI.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

On or about the year 1979, the Claimant was retained by the Nairobi City Council, the 1st Respondent as a City askari at a monthly salary of Kshs.407, which was later increased to Kshs.16,445 and a house allowance of Kshs.8,500. Between 14th September, 1987 and 23rd October, 1987, the Claimant, underwent a training course at Embakasi Administration Police Training College for a period of 6 weeks, after which the Claimant was promoted to the position of an Inspector grade II.

In 1989 the Claimant went to Embakasi Administration Police Training College for a further 6 weeks training, after which he was promoted to the position of an acting Inspector Grade I. On 28th November, 2011, the Claimant was promoted to the position of Superintendent III, City Inspectorate. During this time the Claimant worked in various places including Sasuma Dam.

In 1991, the Claimant was transferred back to Nairobi as in charge of security vans, at City Hall building.

On 15th June 2003, the claimant was arraigned in court, with the offence of assault causing actual bodily harm during a domestic quarrel with his wife. He pleaded guilty on 18th June 2003 and was convicted and sentenced to 3 year's imprisonment without the option of a fine. He appealed against the sentence and was placed on probation for 1 year.

The claimant was removed from the payroll in August 2003 following his conviction and sentence by the Magistrate's Court. On 5th April 2005, the claimant was summarily dismissed from employment on account of his conviction. Upon his appeal to the Public Service Commission, the decision to summarily dismiss the claimant was set aside and the claimant reinstated back to work.

The respondent complied and reinstated the claimant back to work and immediately retired him on 26th August 2009 on grounds that he had attained the mandatory retirement age of 55 years, having attained the retirement age on 31st December 2007.

In his memorandum of claim, his evidence in court and in his written submissions the claimant states that at the time of his retirement, the mandatory retirement age was 60 years. That as a consequence he lost 6 years' service.

He further averred that he was underpaid his pension based on a basic salary of Kshs.14,967 instead of Kshs.16,445.

He prays for the following reliefs in his statement of claim dated 5th January and filed on 19th February 2015 –

1. The 1st Respondent's termination of the Claimants employment was unlawful and the Claimant is entitled to terminal benefits and damages.

2. The respondents joint and severally to pay the claimant terminal dues and damages totalling to Kshs.4,832,305 as tabulated below

–

i.) One month's salary in lieu of notice 16,445

ii.) Outstanding salary for 72 months

at Kshs.16,445 1,184,040

iii.) Leave for 4 years 65,780

iv.) House allowance for 72 months 612,000

v.) Uniform for 4 years at Kshs.15,000 per year 60,000

vi.) Salary for 60 months 986,700

vii.) House allowance for 60 months 510,000

viii.) 12 months' salary as compensation 197,340

ix.) Underpayment of salary 1,200,000

Total 4,832,305

3. An order that the respondent to pay the claimant cots of this suit.

4. Any other order that the court may deem fit and just to grant.

In the 1st respondent's response to the claim dated 2nd October and filed on 31st October 2019, it is pleaded that the claimant was dismissed after his conviction. That on 1st July 2009, the Public Service Commission directed the reinstatement of the claimant, but that the period he was away be deemed as unpaid leave. That the 1st respondent indeed reinstated the claimant on 26th August 2009 2009, but retired him as he had attained the mandatory retirement age of 55 years on 31st December 2007. That upon retirement, the claimant was paid his full terminal benefits. It further states that the Government Circular that raised retirement age from 55 to 60 years took effect on 1st April 2009, and affected only those who had not attained the mandatory retirement age by 5th March 2009. The respondent further pleaded that this court had no jurisdiction to hear the claim as it was statute barred.

The 1st respondent submits that the claimant was dismissed for gross misconduct following his conviction and sentence to 3 years' imprisonment without option of a fine. That on appeal the High Court still found him guilty and only reduced the sentence. The 1st respondent relied on the David O. Owino v Kenya Institute of Special Education quoted in Kibe v Attorney General (Civil Appeal No. 164 of 2000) (unreported) where the Court of Appeal held that

> "... An acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer. The reason for this is straightforward; a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer's decision wrongful or unfair..."

The 1st respondent submitted that by the time the claimant's dismissal was reversed by the Public Service Commission he had attained the mandatory age of retirement. That his age was derived from the documents, including his identity card submitted to the 1st respondent at the time of the claimant's appointment. That the same ID Card was used in all of his payslips and he did not raise any objection throughout the period he was in employment.

On the issue of limitation, the 1st respondent relied on both Section 4 of the Limitation of Actions Act and Section 90 of the Employment Act. It submits that the suit was filed 10 years after the cause of action arose instead of 6 years in the Limitation of Actions Act and 3 years in the Employment Act.

It submitted that jurisdiction cannot be conferred by the court, relying on the decision in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR, where Nyarangi JA, stated –

> "...With that I return to the issue of jurisdiction and to the words of Section 20(2)(m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction..."

On the reliefs, the 1st respondent submits that the claimant is undeserving of all his prayers which are also poorly pleaded. That he seeks payment of salary and house allowance for the period when he had already retired, as outstanding salary. That he further pleads 4 years leave without stating the period it relates to, and severance pay for 5 years when he was not declared redundant. That the claimant further pleaded for other benefits which he did not mention in his testimony. That he does not state how he arrived at the figure claimed of Kshs.4,832,305. The 1st respondent urges the court to dismiss the claim as it has no merit.

The 2nd respondent, the Attorney General did not file a defence. It only filed a notice of preliminary objection seeking the striking out of the claim on the following grounds –

1. The 2nd Respondent has been misjoined in the proceedings.

2. The 1st Respondent is a legal entity which can sue and be sued on its own behalf.

3. Article 6(1) and (2) of the Constitution 2010, establishes counties as distinct and independent entities and can only cooperate with the national government.

4. Article 152(2) of the Constitution 2010, establishes the Cabinet and makes AG a member therein at the National level where the AG thus represents the National government other than in proceedings of Criminal nature. This is however a labour relation case where the National Government should not be a party rather the County Government is the Right party.

5. That under Article 165(5) of the constitution 2010, the AG can only appear with leave of court as a friend of the court, which in this case he has no such leave to be enjoined.

6. Section 5 of the Attorney General Act 2012 now states that the AG can only be a party to a proceeding where the National Government is a party.

7. That court cannot issue AG with orders with no legal force otherwise the 1st Respondent would be subordinate to the National Government which would offend it.

8. This court therefore lacks the requisite jurisdiction to hear and determine the matter against the 2nd Respondent in the light of the provision of the provisions of the law mentioned above.

9. The Statement of Claim as filed herein against the 2nd Respondent is a waste of court's time and an abuse of the due process of the law.

10. The 2nd Respondent therefore prays that he be struck out from the proceedings.

In the submissions in support of its preliminary objection, the 2nd respondent submitted that the Law applicable is –

a) The Constitution of Kenya 2010

b) The Attorney General Act 2012

c) Civil procedure Rules 2010.

The 2nd respondent submitted that the County Government of Nairobi is an autonomous legal entity which can sue and be sued on its own without dragging the National Government into the entire suit. It relied on Article 6(1) and (2) of the Constitution 2010, which establishes counties as distinct and independent entities and that can only cooperate with the national government.

That Article 152(2) of the Constitution 2010, establishes the Cabinet and makes Attorney General a member therein at the National level where the Attorney General thus represents the National government other than Criminal cases. It submits that this is a labour relation case where the National Government should not be a party but rather the County Government is the right party.

That the Attorney General can only be a party to this suit upon request and with the leave of the court which in this case does not apply. Besides, Section 5 of the Attorney General Act 2012 states that the Attorney General can only be a party to a proceeding where the National Government is a party. That in this case he can only be present as friend of court.

The 2nd respondent relied on the case Tom Luusa Munyasya & Another v Governor of Makueni County & 2 others [2014] eKLR, where Mbaru J. held that –

"The 3rd respondent on her part opposed the claimant's application on grounds of law noting that Article 6(1) of the Constitution establish counties as distinct and independent entities and can only cooperate with the national government as the County is autonomous and not subordinate to the national government. Article 152(2) of the constitution establish the Cabinet and makes the AG a member therein at the national level where the AG thus represents the national government apart from in proceedings in criminal cases. This is a labour relations case where the national government should not be a party rather the County is the responsible party. However under Article 165(5) the AG with leave of the court may appear as a friend of the court where the

national government is not a party. In this case the AG has no such leave to be enjoined. Based on the Attorney General Act, 2012 at section 5, it explicitly provides that the AG is only to be a party to proceedings where the national government is a party. Where the court were to grant the orders sought by the claimants against the AG, the net effect would be to bind the AG with orders that have no legal force to enforce and would mean the 2nd respondent is subordinate to the national government and offend article 6(2) of the Constitution which provide for two levels of government as distinct."

That in her ruling, Mbaru J. held as follows –

"On the more fundamental issues raised by the 3rd respondent, there is now clarity with regard to what a County Government can do and cannot do, this is outlined under the Constitution as well as statute particularly the CGA. A County is now an entity that sues and be sued and further the Attorney General Act, 2012 now remove certain functions of this office which are retained in the national government to ensure the County functions effectively as an entity with duties and responsibilities. This function of the 3rd respondent should only be applied as the claimants have with leave of the court, upon request by the County government or where there is a particular cause of action that warrant the national government to respond and or act in the enforcement of any constitutional right or rights. In this case and without going into the merits of the case, the claimants indicate in their application that they were employees of the 2nd respondent and the nature of claim is that of unfair termination by the 1st and 2nd respondents. Without going further, I will allow and extricate the 3rd respondent herein."

The 2nd respondent avers that it is settled law that civil suits involving county Government can now be handled independently by the county Government without involving the national Government and thus the 2nd Respondent should be excused from the proceedings at all costs.

That any orders which might be issued against the 2nd Respondent (the Hon. Attorney General) by this court cannot be enforced by the said parties since that would make the 1st Respondent to be subordinate to the National Government which would offend the core principle of devolution.

At the hearing, the claimant testified on his behalf. Both the 1st and 2nd respondents did not call any evidence and relied on their written submissions.

Determination

There are several issues for determination arising from the pleadings, evidence and submissions as set out herein above. The first is whether the claimant was dismissed or retired. The second is whether such dismissal or retirement was valid and finally whether the claimant is entitled to the prayers sought.

There is a further issue on jurisdiction of this court as pleaded in the preliminary objections raised by both respondents.

It is not contested that the claimant was first removed from the payroll of the 1st respondent in August 2003 after his conviction and sentence on 18th June 2003. The claimant had pleaded guilty to the charge of assault causing bodily harm to his wife contrary to Section 251 of the Penal Code. On appeal the sentence of 3 years was reduced to probation for one year. After serving probation, the claimant appealed against his dismissal to the Public Service Commission who ordered his reinstatement in 2009.

By his own evidence in court, the claimant was born in 1952. He therefore attained mandatory retirement age of 55 years on 31st December 2007. The 1st respondent too submitted that the claimant attained retirement age of 55 years on 31st December 2007. The claimant's payslips also bore the birth date as 1952 as reflected in the payslip adduced by the claimant at page 11 of his claim.

The circular extending retirement age from 55 to 60 was issued on 20th March 2009. The relevant paragraphs of the circular state as follows –

"… In order to address the above challenges and in the spirit of harmonizing the retirement age applicable to the East African Community Countries, the Government has decided to raise the mandatory retirement age for all Public Servants from 55 years to 60 years with effect from 1st April 2009, The provisions in the Pensions Act Cap 189, various Pension Schemes and other Policy Guidelines governing the Civil Service, Disciplined Services, Teachers, State Corporations, Public Universities anc. the Armed Forces regarding compulsory and voluntary retirement will remain.

Employees serving on contract as at 5th March, 2009 after attainment of the age of 55 years will, however continue to serve for the duration of these contracts. Contracts expiring before the attainment of the age of 60 years will be renewed in accordance with the provisions of the contracts.

Employees who had already received retirement notices or had their pension claims already prepared, but had not attained the age of 55 years as at 5th March, 2009, will continue to serve until they attain the age of 60 years if they so wish. …" [Emphasis added]

The letter retiring the claimant is reproduced below –

"DEPARTMENT OF HUMAN RESOURCES MANAGEMENT

26th August 2009

Shem K. Majani (C02-04619)

P. O. Box 42285 – 00100

NAIROBI

REINSTATEMENT & RETIREMENT

I write to inform you that the Public Service Commission considered your appeal and set aside the Council's decision to dismiss you from its service with effect from 15th June 2003 and resolved that the period you have been away be treated as unpaid leave.

Records held in this office however indicate that you were due for retirement on 31st December 2007 after attaining the compulsory retirement age of 55 years. You are therefore deemed to have retired from Council's employment with effect from the above date.

Please note that no payment will be made for accumulated leave and administrative leave days not covered under the terms and conditions of service as stipulated in Collective Bargaining Agreement and the Council's policies and regulations.

By a copy of this letter, the Assistant Director, Human Resources Management Payroll Complement Control is instructed to process the terminal benefits accordingly.

SIGNED

L. M. ORLALE (MS)

FOR: TOWN CLERK"

The claimant's position is that at the date of reinstatement, he had not attained 60 years and according to the circular extending retirement age, he was entitled to serve until he attained the enhanced retirement age of 60 years. The respondent's position is that as at the date the claimant attained the retirement age of 55 years, the circular had not been issued and that the circular does not affect the claimant's date of retirement at 55 years.

I would agree with the 1st respondent. The circular on retirement age was specific that only those who had not attained mandatory retirement age of 55 years were to benefit from the extended retirement age of 60 years. The claimant having attained the mandatory age of 55 years on 31st December 2007, was not eligible to be transited to the new retirement age of 60 years.

For these reasons the claim would fail on the merits.

The respondents have also raised the issue of limitation. This issue was the subject of the court's ruling delivered on 1st July 2016. The ruling inadvertently considered only the preliminary objection by the 1st respondent. Ms Akuno for the 2nd respondent informed the court that it will be relying on its submission on the preliminary objections since its preliminary objection was not determined by the court in the ruling of 1st July 2016.

In the ruling, the Judge held as follows –

2. From the facts discernable on the face of the pleadings, the claimant was retired with effect from 15th June 2003 by a letter dated 3rd February 2010. At the time the claimant was 50 years. It is alleged that an appeal from the decision of the respondent to retire the claimant is pending to date. See letter from the town clerk dated 2nd November 2009, marked 'SK8'. As at 3rd May 2012 Public Service Commission of Kenya was still addressing the matter internally. See letter dated 3rd May 2012 marked 'SK12'.

3. The respondent filed a notice of intention to raise a preliminary objection on 22nd August 2015 to wit;

a) The claimant's statement claim offends the mandatory provision of section 90 of the Employment Act and ought to be struck off;

b) The claim offends the mandatory provisions of section 3 of the Public Authorities Limitations Act.

4. It is clear to the court, that there is a dispute of fact as to when, if at all the internal machinery of the 1st respondent was exhausted in respect of this dispute. Furthermore, the retirement effected in the year 2010 is backdated to the year 2003. This takes the matter out of the purview of the Employment Act, 2007 and therefore section 90 therein.

5. The issue as to when the cause of action crystallised cannot be determined without going into the facts of the case.

6. On the basis of the Mukisa Biscuits case the preliminary objection must await the hearing on the merits."

There was no conclusive determination on the cause of action and therefore it is a matter for determination in this judgment.

From the facts of this case, the claimant's cause of action arose on 26th August 2009 when the letter of his reinstatement and retirement was issued to him. His appeal to the Public Service Commission for change of retirement date was rejected and communicated to him by letter dated 26th October 2012. The letter states that the Commission had disallowed an appeal against the applicable age of retirement submitted by the claimant.

This claim was filed on 19th February 2015. By then the claimant had been out of employment for more than 9 years, since his dismissal by letter dated June 2005, and had not worked since June 2003 when he was arraigned in court.

The argument of the claimant that he filed an appeal that had not been determined, or that the respondents were responsible for the delay and cannot be heard to say that the claim is time barred, or that the claim is a continuing breach, cannot come to his aid. In the case of Attorney General & another v Andrew Maina Githinji and another [2016] eKLR quoted in G4S Security Services (K) Limited v Joseph Kamau & 468 Others [2018] eKLR, Waki JA. held as follows –

> "…The respondents had a clear cause of action against the employer when they received their letters of dismissal on 2nd October 2010. They had all the facts which had been placed before them in the disciplinary proceedings and they could have filed legal proceedings if they felt aggrieved by that dismissal, but they did not. Having found that the cause of action arose on 2nd February 2010 and that the claim was filed on 16th June 2014, it follows by simple arithmetic that the limitation period of 3 years was surpassed by a long margin. The claim was time barred as at 1st February 2013, and I so hold."
>
> …

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. This is fortified by the decision of this court in the case of Rift Valley Railways (Kenya) Ltd V Hawkins Wagunza Musonye and another [2016] eKLR which held as follows:

> "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."

Further, in the case of Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye & another [2016] eKLR, the Court of Appeal stated –

> "For us it is clear from our reading of Section 90 aforesaid that there are no exceptions to the three year limitation period, save for cases of continuing injury or damage where action or proceedings must be brought within twelve months after the cessation thereof. This was not a case of a continuing injury or damage but one of a single act of termination. In any case the respondents have not specified when the injury or damage ceased for time to have began to run. Secondly the learned Judge did not rely on the continuing injury or damage but on the fact that the parties engaged in negotiations. Those negotiations began when time had began to run following the termination of the respondents' services.

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."

For the forgoing reasons, the claim must fail. I accordingly dismiss the case with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JULY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE