



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 603 OF 2018

JOHN MUTINDA KUNGA.....CLAIMANT

-VERSUS-

THE PRINCIPAL SECRETARY OF

DEVOLUTION AND PLANNING.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF GARISSA.....2ND RESPONDENT

THE PUBLIC SERVICE COMMISSION.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. The 1st, 2nd and 3rd Respondents, hereinafter referred to as the Respondents, filed a Notice of Preliminary Objection on 25.4.2018, which raised the following grounds:

- a) That this suit is time barred and offends the mandatory provisions of section 90 of the Employment Act, 2007 and Limitations of Actions Act Cap 22 of the Laws of Kenya.
- b) That the Court lacks jurisdiction to extend time for filing suits.
- c) That the suit is an abuse of the court process.
- d) That the suit is time barred and ought to be struck out with costs.

2. In response to the Notice of Preliminary Objection, the Claimant filed a Replying Affidavit sworn on 12.11.2019 contending that from his Statement of claim and bundle of documents, it is evident that the employment relationship between the Respondents and him is still ongoing; that by a Judgment delivered on 1.8.2008, in HC Misc 418 of 2007, his suspension from employment was quashed and he was reinstated to employment on 26.11.2008; that again by another judgement delivered on 19.4.2013 the Court declared the termination of his employment as unlawful after which he was reinstated to employment by a letter dated 25.5.2016; that the cause of action, in this suit, arose as a result of the failure by the Respondent to pay salaries following his reinstatement on 25.5.2016; that the claim is in respect of his salary entitlement during the period he was suspended and the period when his employment was unlawfully terminated; and finally the issue in the Notice of Preliminary Objection does not amount to a pure preliminary point of law as it calls upon the court to interrogate the facts.

3. The P.O was disposed of by written submissions.

Respondents' submissions

4. The Respondents submitted that the suit is *res judicata* and an abuse of court process because the Claimant has admitted that HC Misc. Application No. 418 of 2007 and HC Misc. Application No. 141 of 2011 were heard on merit and the Court delivered its decision in favour of the Claimant quashing the suspension and on 19.4.2013 declared the dismissal unlawful. They relied on the Section 7 of the Civil Procedure Act to urge that the elements of *res judicata* have been held to be conjunctive rather than disjunctive.

5. For emphasis, they relied on **Independent Electoral Boundaries Commission v Maina Kiai and 5 Others [2017] eKLR** where the

Court of Appeal held that the rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and that without it there would be no end to litigation.

6. The respondents further submitted that by dint of Article 165 (3) (b) of the Constitution, Section 12 of the Employment and Labour Relations Court and Rule 4 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013) this Court lacks jurisdiction to hear the claim, and that the action is time barred by virtue of section 4 (1) (a) of the Limitation of Actions Act and section 90 of the Employment Act because the cause of action arose on 22.2.2011 when the Claimant received his dismissal letter. According to the respondents, the time within which to file the instant suit lapsed 5 years ago. For emphasis they relied on **Fredrick Otieno Onono v The Attorney General** where the Court held that criminal charges are not a bar to an employee alleging unfair dismissal from instituting a suit against the employer.

7. They therefore submitted that the 2 suits in the High Court did not bar the Claimant from moving the Court within the 3 years from the time of the judgment that the cause action arose from that time. For emphasis they relied on **Ndirangu v Henkel Chemicals (EA) Ltd [2013] eKLR** where the Court held that section 90 of the Employment Act regulates limitation of time in employment contracts to 3 years and that section 4 (1) of the Limitation of Actions Act is not applicable.

8. They urged the Court to allow the Preliminary Objection with costs to them as the Claimant was informed of his right to appeal to the 1st Respondent but waived this right.

Claimant's submissions

9. The Claimant submitted that the employer-employee relationship between the parties is still in place and the injury is still continuing as it has not ceased. Hence, section 90 of the Employment Act is not applicable. He relied on **Mathew Orinya Oyule v Kenya Revenue Authority [2017] eKLR** where the Court held that a pending interdiction and disciplinary case amounted to a continuing injury within the living or subsisting contract of employment between the parties; and that the continuing injuries included the alleged claims of unpaid half salaries during the subsisting interdiction.

10. He further submitted that the instant Preliminary Objection does not amount to a pure point of law and relied on **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors (1969) EA 696** where the Court held that a Preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. He further relied on the case of **Oraro v Mbaja [2005] 1KLR 141** for emphasis and urged the Court to dismiss the Notice of Preliminary Objection.

Rejoinder by the respondents

11. In their rejoinder, the Respondents submitted that if the Court were to entertain the present claim, the court would be subjected to re-examining the same procedure and decisions between the same parties that were challenged in HC. Misc 418 of 2007 and HC Misc 141 of 2011.

12. They relied on **Daniel Kirui & another v Monica W. Macharia & another, Civil Appeal No. 261 of 2002** which was cited in **Thomson Kerongo & 2 Others v James Omariba Nyaoga**.

13. In conclusion, they submitted that the issue of the Claimant's salary not being paid when he was in suspension and the period he was terminated is deemed to have been substantially in issue in HC Misc. 418 of 2007 and HC JR. 141 of 2011.

Issues for determination and analysis

14. The grounds set out in the Respondents' Notice of Preliminary Objection can be compressed into one issue for determination, that is, whether the suit herein is time barred.

15. The Claimant filed the Statement of Claim herein on 27.4.2018 seeking salaries and allowances for the period starting September 2006 to 26.11.2008 and from 23.4.2009 to 25.5.2016 being the periods which he had been suspended and dismissed.

16. The Respondent's submitted that the suit is *res judicata* and is time barred, although the Notice of the Preliminary Objection did not raise the issue of *res judicata*. The Claimant's case is that the suit is not time barred because the injury is still time barred. He further argued that the Notice of Preliminary Objection does not amount to a preliminary point of law.

17. In **Mukisa Biscuit Co. v West End Distributors Ltd (1969) E.A. 696** the Court of Appeal held:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which raises by clear implication out of pleadings, and which if argued as a preliminary may dispose of the suit. Examples are on 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 has to be ascertained or what is sought is the exercise of judicial discretion...”

18. After careful consideration of the grounds raised in the Notice of Preliminary Objection, I am satisfied that a pure point of law has been raised, that is, whether the suit is time barred. I am also satisfied that that the Court does not need to ascertain the fact since it is agreed by the parties that the Claimant was previously suspended and dismissed prior to filing the current suit. The issue of res judicata was not raised in the Preliminary Objection and the claimant never submitted on it. Therefore I will not consider it.

19. The Claimant was initially suspended on 19.3.2007 and on 1.8.2008, the High Court in Misc Application No. 418 of 2007 quashed the decision to dismiss him. Thereafter, the Claimant was terminated on 22.2.2011 and by a Judgment delivered on 19.4.2013, in JR Case No. 141 of 2011, the High Court quashed the decision to dismiss him from employment.

20. The applicable law on the limitation of action herein is section 90 of the Employment Act which provides that:

“Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), 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.”[emphasis added]

21. The question is then when did the cause of action herein arise? The Court of Appeal in **Attorney General & another v Andrew Maina Githinji & another [2016] eKLR** dealt with the same questions:

“When did the cause of action in this case arise? ...there does not seem to be a direct authority from this Court on the issue, but the Employment and Labour Relations Court has pronounced itself on the matter in several cases, sometimes in conflicting fashion. In many of them however, it has been held that the cause of action for wrongful/unfair termination arises once a claimant is terminated from employment. I will refer to a few of them by way of illustration... I have considerable sympathy for the reasoning in all the above cases which leads me to the conclusion that the cause of action in this case did not arise after the conclusion of the criminal case against the respondents. The respondents had a clear cause of action against the employer when they received their letters of dismissal on 2nd October 2010.” [Emphasis Added]

22. In this case, the salary being sought is for specific periods namely 19.3.2007 – 1.8.2008 and 22.2.2011 – 19.4.2013. In the circumstances, I find that the cause of action does not constitute a continuing injury. Accordingly, I return that the cause of action accrued from the date when the withheld salary became due during the suspension and the dismissal. Considering the limitation period of 3 years set out under section 90 of the Employment Act, the claim for salary during the suspension period lapsed 3 years from 1.8.2008 being 1.8.2011. Likewise, the claim for salary withheld during the period of dismissal lapsed 3 years from 19.4.2013, being 19.4.2016.

23. I gather support from **G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR** where the Court of Appeal held:

“In the circumstances of this case we find that such ‘unpaid terminal dues’ do not constitute a continuing injury as contemplated under the proviso to Section 90 of the Employment Act. The respondents assert claims arising from the termination of their employment and dues that accrued to each of them at the end of each month. Regarding ‘a continuing injury’, the proviso to Section 90 of the Employment Act requires that the claim be made within 12 months next after the cessation thereof... In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the claimant’s dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred.” [emphasis]

24. I distinguish the **Matthew Orinya Oyule case** from the instant case, because in that matter the Claimant was facing pending disciplinary proceeding manifested by the continuing interdiction while in the instant case the suspension and dismissal were quashed.

25. In conclusion, I allow the objection and strike out the suit because it is time barred and the court lacks jurisdiction to entertain it. Each party shall bear own costs.

Dated and delivered at Nairobi this 16th day of July 2020.

ONESMUS N. MAKAU

JUDGE