



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1432 OF 2018**

**(Before Hon. Justice Hellen S. Wasilwa on 15<sup>th</sup> October, 2020)**

**ENOCK ANGOYA OMBEVA.....CLAIMANT**

**VERSUS**

**KENYA MEDICAL TRAINING COLLEGE.....RESPONDENT**

**RULING**

1. The application before this Court is the Respondent's Preliminary Objection dated 13/1/2019 based on the following grounds:-

***a. THAT the Honourable Court has no jurisdiction to hear and determine the instant suit which is time barred and filed out of time contrary to the mandatory provisions of section 90 of the Employment Act No. 11 of 2007.***

***b. THAT the instant suit is otherwise an abuse of the Court process and should therefore be dismissed with costs to the Respondent.***

2. The Claimant has opposed the preliminary objection through the grounds of opposition filed on 19/2/2020 and the Replying Affidavit of Enock Angoya Ombeva sworn on the same date.

3. The Claimant contends that this Court has the jurisdiction to hear and determine the suit as it is not time barred. The matter was referred to conciliation hence time was not supposed to start running until the conciliation process was concluded. However, the conciliation is still pending as the conciliator has not issued a certificate of settlement or disagreement to conclude the same. As such, the memorandum of claim filed on 11/10/2018 was filed within time as provided for in law.

4. The Application was disposed of by way of written submissions with both parties filing their written submissions.

**The Respondent's Submissions**

5. The Respondent submits that the suit is time barred having been filed on 2/10/2014, which was outside the 3 years limitation period stipulated in section 90 of the Employment Act hence should be dismissed with costs. The Respondent contends that it is trite law that a claim for unfair termination cannot be filed outside the 3-year period outlined in section 90 of the Employment Act.

6. They relied on the following cases to fortify their position. **G4S Security Services (K) Limited vs. Joseph Kamau & 468 Others [2018] eKLR**, **Kilimanjaro Company Limited vs. Kenya Union of Commercial Food and Allied Workers [2019] eKLR**, **Fred Mudave Gogo vs. G4S Security Services (K) Limited [2014] eKLR** and **Rift Valley Railways (K) Limited vs. Hawkins Wagonza Musonye & Another [2016] eKLR**.

7. The Respondent submitted that time did not stop running when a dispute is referred to conciliation or any other form of alternative dispute resolution mechanism and relied on the cases of **G4S Security Services (K) Limited vs. Joseph Kamau & 468 Others [2018] eKLR**, **Rift Valley Railways (K) Limited vs. Hawkins Wagonza Musonye & Another [2016] eKLR** and **Monicah Wanjiku Kanyigi vs. Our Lady of Mercy Secondary School [2018] eKLR** where the respective Courts held that time did not stop running once a dispute was referred to conciliation.

8. Finally, the Respondent submitted that this Court lacks jurisdiction to entertain the instant suit as it is time barred hence a nullity. The Respondent further submitted that it was trite law that limitation of time went to the jurisdiction of a Court to determine a matter before it, as was held in the case **Joseph Mungai Wanene vs. Housing Finance Company of Kenya Limited [2017] eKLR**. They urged this Court to

dismiss the suit with costs.

**The Claimant's Submissions**

9. The Claimant on the other hand submitted that this Court has the jurisdiction to hear and determine this suit as it was not time barred, since time did not start running until the conciliation process was concluded.

10. The Claimant contended that since the conciliation process was still pending and his appeal was yet to be determined, the suit was not time barred. He relied on the case of **William Mogeni Momanyi vs. Aga Khan University Hospital [2015] eKLR** where it was held that time under Section 90 of the Employment Act starts running after the conciliator issues a certificate under Section 62 of the Labour Relations Act and after the appeal filed by the Claimant is heard and determined.

11. The Claimant urged this Court to dismiss the PO as it was an attempt to frustrate his efforts to seek justice.

12. I have examined the averments of the Parties herein. Section 90 of the Employment Act 2007 states as follows:-

*“Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act, 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 of or in the case of continuing injury or damage within twelve months next after the cessation thereof”.*

13. The law indicates that any Claim flowing from a termination should be filed within 90 days. The only exception herein is when there is a continuing nuisance. The issue of conciliation is not part of exception and sending a matter for conciliation does not bar a party from filing their Claim. The fact that the Claimant referred this matter for conciliation did not stop them from being vigilant to file their Claim in time.

14. It is therefore my finding that the Preliminary Objection has merit that indeed the Claim as filed is time barred. I allow the Preliminary Objection and dismiss this Claim. There will be no order of costs.

**Dated and delivered in Chambers via zoom this 15<sup>th</sup> day of October, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Omwenga for Respondent – Present

Chobika for Claimant – Present