REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NO. 812 OF 2016

BETWEEN

JUMA ABDALLA GAFO .....CLAIMANT

VERSUS

POSTAL CORPORATION OF KENYA .....RESPONDENT

RULING

1. The Claimant initiated this Claim against his former Employer, a State Corporation, at the Chief Magistrate's Court Mombasa, some 15 years ago in 2004. He claims to have been wrongfully dismissed, and prays for declaration that dismissal was wrongful; he is paid terminal dues particularized at Kshs. 3,363,915; gratuity; costs; and interest.

2. The Respondent filed its Statement of Defence, on 5th October 2004, conceding to have employed and dismissed the Claimant. Dismissal was carried out in accordance with the law, and the contract governing the Parties.

3. The matter was transferred to the Employment and Labour Relations Court Mombasa on jurisdictional grounds, and assigned the current registration number. Parties subsequently amended their Pleadings to conform to the applicable Procedural Rules. The Respondent also filed a Notice of Preliminary Objection on 24th October 2018. The Preliminary Objection was filed 14 years after the Claim was filed. It is argued by the Respondent, that the Claim offends Section 24 of the Postal Corporation Act No. 3 of 1998, which provides that a Claim against the Respondent, shall not be commenced until 1 month after a written notice, containing the particulars of the Claim, and the intention to commence legal proceedings, has been served upon the Postmaster General by the Claimant or his Agent; and the action or legal proceedings shall not lie or be instituted, unless it is commenced within 12 months next, after the act, neglect or default complained of, or in the case of continuing injury or damage, within 6 months after cessation thereof.

4. Parties agreed on 22nd November 2018, to have the Objection considered and determined on the strength of their Submissions and Pleadings.

5. The record shows that the Respondent filed its Submissions on 22nd November 2018. The Claimant filed his Submissions on 1st February 2019, long after the date set for filing of Claimant's Submissions, 7th December 2018.

6. The Respondent submits that, the Claimant was dismissed on 31st March 2003 as pleaded in his Statement of Claim. The Claim was filed on 20th August 2004, way beyond the time-bar placed by Section 24 of the Postal Corporation Act. The Claimant did not issue the requisite notice under this law.

7. The Respondent relies on a catena of judicial authorities of the Court of Appeal of Kenya, in supporting the proposition that time-bar law is a jurisdictional law. ''Jurisdiction is everything, and a Court cannot arrogate itself jurisdiction it does not have,'' the Respondent submits. The judicial authorities relied upon by the Respondent are: ***Civil Appeal No. 89 of 2017, Kenya Ports Authority v. Cyrus Maina Njoroge; Attorney- General & Anor v. Andrew Maina Githinji & Anor [2016] e-KLR; Rift Valley Railways [Kenya] Limited v. Hawkins Wagunza Musonye & Anor [2016] e-KLR;*** and the notorious ***Owners of Motor vessel Lilian S v. Caltex Oil [K] Limited [1989]KLR.***

8. The Claimant counters that Section 24 of the Postal Cororation Act, is not applicable to matters relating to contracts between the Corporation and its Employees. The provision deals with acts done in execution of the Act. The Claimant relies on a High Court decision, ***Postal Corporation of Kenya v. Peter Achar & Another [2012]e-KLR*** on this interpretation of Section 24 of Postal Corporation Act. To determine the scope of the application of Section 24, one needs to identify the functions of the Corporation, as laid down in Section 5. They include rendering of postal services, financial services, and other functions or duties as may from time to time be prescribed by the Minister. Section 24 applies with regard to actions commenced against the Corporation in respect of Claims associated with functions of the

Corporation in terms of Section 5. It is submitted for the Claimant, that he was dismissed on 31st March 2003. He made an Internal Appeal to the Respondent. The Appeal was dismissed on 29th August 2003. The cause of action arose when the Appeal was rejected. The Claim was initiated on 20th August 2004, within the period given under Section 24 of the relevant Act, assuming the provision applies to employment contracts.

9. The Court defers to the Judicial Authorities from the Court of Appeal, cited by the Respondent, and agrees with the Respondent, that the Claim herein, was filed out of time. This is on the ground that decisions of the Court of Appeal, supersede those of the Courts below. The High Court decision cited by the Claimant appears to be the correct interpretation of Section 24 of the Postal Corporation Act, but is nonetheless, a decision of an inferior jurisdiction. Section 24 of the Postal Corporation Act, is a legal clone to Section 66 of the Kenya Ports Authority Act. These time-bar provisions are inserted in all laws establishing State Corporations. They are similarly worded, and all give limitation of 1 year. The provisions include Section 87 of the Kenya Railways Corporation Act (Cap 397) and Section 34 of the Kenya Airports Authority Act (No. 3 of 1991). In another High Court decision, ***Telkom Kenya Limited v. Kenya Railways Corporation [2018] e-KLR***, the Court discussed limitation under Section 87 of the Kenya Railways Corporation Act. It was held that Section 87 governs actions commenced under the specific Act. It relates to duties provided, undertaken or executed by the Corporation, specifically under the Act, ordinarily involving contracts for carriage of goods and passengers, contracts for storage of goods and for railway concessions. The limitation provisions are meant to protect the core business of the Corporation, not amend Limitation of Actions Act. In employment contracts, actions are limited in time through Section 90 of the Employment Act, and before the enactment of the Employment Act 2007, they were debatably, limited through the Limitation of Actions Act. It is doubtful that these provisions were intended by Parliament to compel Employees of State Corporations to file employment disputes against their Employers, within the very limited time of 1 year. This provision of the KPA Act was the subject matter of the Court of Appeal analysis in Appeal No. 89 of 2017. The Court of Appeal affirmed that the provision is a jurisdictional law, and KPA Employees must file their Claims within 1 year of termination. The effect of Internal Appeals, and other non-adjudicatory mechanisms, on the effective date of termination, has been dealt with in the decisions of the Court of Appeal.

10. There is need however, for practitioners of Human Resource Management, Courts, Legal Practitioners and Litigants in general, to always clearly identify when termination took effect. This is not necessarily the date expressed in the letter of termination, to be the effective date.

11. In UK Supreme Court decision ***Societe Generale, London Branch [Respondent] v. Geys [Appellant] [2012] UKSC,*** which was adopted by this Court in ***Alex Kiema Mwinzi v. Factory Guards Limited [2018],*** it was held that termination takes effect when notice is received by its addressee, or when notice pay is received by the Party entitled to notice pay. Care must be exercised also, where for instance the Employee appeals at the workplace, and summary dismissal decision, for example, is commuted to regular termination. The date first expressed as the date of termination, is not immutable. The effective date is not always the date given, in a letter of termination. Sections 36 and Section 40 [1] [f] of the Employment Act, support this interpretation. The contract of employment is not terminated [does not take effect], unless the Party entitled to receive notice, or notice pay, has received such notice or pay. This should always be an important aspect of the evidence given by the Parties, because it has important legal consequences, such as whether a Claim is time-barred, or whether certain time-specific terminal benefits, are payable. The effective date of termination, must therefore be critically looked into, and not taken at face value, by any trier of facts. It has considerable legal ramifications to the Employer and the Employee. In a more recent decision of the UK Supreme Court, ***Newcastle upon Tyne Hospitals NHS Foundation Trust v. Haywood [2018] UKSC 22,*** the Supreme Court overturned the decision of the Court of Appeal, holding that notice only took effect when it had actually been received by the Employee, and the Employee had either read, or had reasonable opportunity of reading it. This rejected the common law approach, which provides that notice is given when it is merely delivered to its addressee. This decision emphasizes that notice must not only be delivered to the addressee, but the addressee must read it, or must have a reasonable opportunity of reading it.

12. The Court agrees with the Respondent that termination, as pleaded by the Claimant, took place on 31st March 2003, and the Claim was filed on 20th August 2004, outside the time given under Section 24 of the Postal Corporation Act. His Internal Appeal against dismissal, going by the decision of the Court of Appeal, has no effect on the date the cause of action arose.

13. The 2nd limb of the Preliminary Objection, which is that, the Claim is incompetent on the ground that no notice was issued upon the Postmaster General under Section 24[a] of the Postal Corporation Act, before institution of the Claim, is not tenable.

14. The High Court of Kenya, in ***Kenya Bus Service Limited & Anor v Minister of Transport & 2 Ors [2012] e-KLR,*** declared Section 13 [A] of the Government Proceeding Act, which required Parties who desired to file Claims against the Government, to issue to the Government a 30-day notice, before commencement of proceedings, unconstitutional. This provision is the form book, which Government Agencies use, in crafting the law on notice of intention to sue, in their respective constitutive Acts of Parliament. The High Court found Section 13 [A] of the Government Proceedings Act, to be unconstitutional. The provision, the High Court concluded, is an impediment to access to justice. Section 24[a] of the Postal Corporation Act, falls in the category of Section 13[A] of the Government Proceedings Act, and is therefore unconstitutional, and incapable of the legal consequences ascribed to it by the Respondent, in these proceedings.

15. In the end, the Application succeeds on the 1st limb.

IT IS ORDERED:-

a) The Claim is time-barred under Section 24 [b] of the Postal Corporation Act, and is therefore rejected.

b) No order on the costs.

Dated and delivered at Mombasa this 22nd day of February 2019.

James Rika

Judge