



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO. 551 OF 2015**

(Before Hon. Lady Justice Maureen Onyango)

**JARED KERONGO BOSIRE.....CLAIMANT**

VERSUS

**KENYA RAILWAYS CORPORATION.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

Before the Court are two preliminary objections one dated 4<sup>th</sup> May, 2015 by the 2<sup>nd</sup> Respondent and the other dated 29<sup>th</sup> June, 2015 by the 1<sup>st</sup> Respondent which collectively raise the following issues:

1. Whether the Claim herein is time barred and does not lie in law by virtue of section 87(b) of the Kenya Railway Act, Chapter 397, Laws of Kenya.
2. Whether this Court lacks the requisite jurisdiction to entertain the matter
3. Whether the Claim against the 2<sup>nd</sup> Respondent is time barred.

**Submissions by the 1<sup>st</sup> Respondent**

It is submitted on behalf of the 1<sup>st</sup> Respondent that any action relating to the Kenya Railways Corporation Act can only be instituted within 12 months after the act, neglect or default complained of or in cases of continuing injury, within 6 months in accordance with Section 87(b) of the Kenya Railways Corporation Act which states as follows in that regard:

“Where any action or other legal proceeding is commenced against the Corporation for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect—

- a. the action or legal proceeding shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the Managing Director by the plaintiff or his agent; and
- b. the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof. “

That the Claimant in the case was an employee of the 1<sup>st</sup> Respondent pursuant to Section 79(1) of the Kenya Railways Corporation Act having been employed on 29<sup>th</sup> December 1999 and therefore the terms and conditions of his employment were subject to the Kenya Railways Corporation Act.

The 1<sup>st</sup> Respondent submits that the Claimant’s cause of action arose after he received his retrenchment letter dated 7<sup>th</sup> October 2013, which

the Claimant does not dispute receiving. The Respondent submits that this submission is anchored on the finding of the Court of Appeal in **Attorney General & Another v Andrew Maina Githinji & Another [2016] eKLR** where it stated as follows:

“in that regard “The respondents had a clear cause of action against the employer when they received their letters of dismissal on 2<sup>nd</sup> October 2010.”

It is further submitted that the Claimant admits that he was evicted from the 1<sup>st</sup> Respondent’s house in February 2009 which house he had occupied on account of the fact that he was an employee. Upon his eviction time begun to run on the issue of wrongful eviction. Therefore, failure to initiate court proceedings for 6 years makes the claim statute barred under both the Kenya Railways Corporation Act and the Employment Act.

That the Claimant additionally claims at paragraph 20 and 21 of the Memorandum of Claim that the 1<sup>st</sup> Respondent wrongfully withheld his full salary from 24<sup>th</sup> August 2006 but he nevertheless failed to file a claim for the salary allegedly wrongfully withheld till 2015, 9 years later when he purported to file this claim. That this claim is equally statute barred by both the Kenya Railways Corporation Act and the Employment Act.

The 1<sup>st</sup> Respondent is of the view that the claim is time barred by virtue of Section 87(b) of the Kenya Railways Corporation Act which limits any action or other legal proceeding commenced against the Corporation for any act done in pursuance or execution, or intended execution, of the Kenya Railways Corporation Act to be commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.

The 1<sup>st</sup> respondent relies on the Court of Appeal decision in the case of **Joel Kiprono Langat V Kenya Posts & Telecommunication Corporation [2000] eKLR** where, when confronted by an exactly similar issue stated as follows in that regard:

“It is plainly obvious from this section that appointment, discipline and dismissal of staff is an act done by the Kenya Posts and Telecommunications Corporation in pursuance of execution of the Act within the meaning of Section 109 thereof. It must follow from this that if the Appellant wished to contest his dismissal by Kenya Posts and Telecommunications Corporation he had to institute proceedings within the timeframe fixed under Section 109 of the Act. He did not ... nor did he institute the action within twelve months from the date of his dismissal. The result of this default is that the suit brought by the Appellant was incompetent and did not lie.”

That the Claimant’s contract of employment commenced on 29th December 1999 which was before the commencement of the Employment Act and is therefore governed not by the provisions of the Employment Act but by the provisions of the Kenya Railways Corporation Act, under which he was employed. The 1<sup>st</sup> respondent cites the Court of Appeal decision in **Gerald Muli Kiilu v Barclays Bank of Kenya [2016] eKLR** in which it was held:-

“The appellant’s employment having been terminated in 2005 the cause of action was governed by the repealed Employment Act Cap 226 and the repealed Trade Disputes Act Cap 234 Laws of Kenya through the saving provisions in the new laws that replaced them. It was wrong for the appellant to base his claim on the new laws and seek remedies that were not available in the repealed laws.”

It is therefore submitted that the applicable limitation period is Section 87(b) of the Kenya Railways Corporation Act which is not inconsistent with Section 90 of the Employment Act as they both apply to the same issue but in respect of different cadres of employees being those who serve on contracts of service in general *Vis a Vis* those who serve on a contract of service pursuant to a statute respectively.

The 1<sup>st</sup> Respondent urges the Court to strike out and/or dismiss the suit with costs.

## **2<sup>nd</sup> Respondent’s submissions**

It is the 2<sup>nd</sup> Respondent’s case that the Claimant’s claim offends the mandatory provisions of Section 3(2) of the Public Authorities Limitation Act as well as Section 90 of the Employment Act, 2007.

It is submitted that since the action is based on contract, the cause of action arose on the date of retrenchment which was on 24<sup>th</sup> August, 2006. Accordingly, the limitation period started to run as from that date meaning that the same expired at the end of three years, that is, on 24<sup>th</sup> August, 2009. That this suit was filed on 9<sup>th</sup> April, 2015 which was outside the limitation period and thus the suit is statute barred.

It relies on the case of **Benjamin Wachira Ndiithi v Public Service Commission & another (2014) eKLR** where the Court held that:

“This Court has however taken a different view on this matter in the case **Hilarion Mwabolo Vs Kenya Commercial Bank [2013] eKLR** to the effect that accrual of the cause of action in a claim emanating from an employment contract takes effect from the date of termination as stated in the letter communicating the termination. The fact that an employee whose employment has been terminated seeks a review or an appeal does not mean that accrual of the cause of action is held in abeyance until a final verdict on the review or appeal.”

That since this matter is statute barred, the Court has no jurisdiction to entertain the same and it should down its tools. Any proceedings thereafter will be a nullity and an exercise in futility. As such, the 2<sup>nd</sup> respondent submits that the Claimant’s suit and application should be

dismissed with costs to the Respondents. The 2<sup>nd</sup> Respondent relies on the case of *Thuranira Karauri -vs- Agnes Ncheche Civil Appeal No. 192 of 1996* where the Court of Appeal held that Limitation goes to the jurisdiction of the Court and a suit that is time barred is incompetent and should be struck out and the Plaintiff remains non-suited forever.

### **Claimant's Submissions**

The Claimant submits that he is a suspended employee of the 1<sup>st</sup> Respondent who has never been terminated. In the letter of suspension issued on 24<sup>th</sup> August, 2016, it refers to suspension pending the outcome of a case against him. That he was acquitted on 25<sup>th</sup> March, 2013 and wrote to the Respondent to be reinstated which he served on the Managing Director but he has never been reinstated.

It is submitted that the Claimant is still an employee on suspension and this case was brought within 2 years after the proceedings of the criminal case were concluded and as such the matter is not time barred under the Employment Act.

### **Determination**

There are two separate causes of action in this matter. The first is in respect of the arrest and prosecution of the claimant as set out in the notice of intention to sue the Attorney General under Section 13A of the Government Proceedings Act. It is in respect of this claim that the 2<sup>nd</sup> respondent, the Attorney General has raised its preliminary objection under Section 90 of the Employment Act and Section 3(2) of the Public Authorities Limitation Act.

Section 3 of the Public Authorities Limitation Act Cap 39 of the Laws of Kenya provides as follows –

#### **3. Limitation of proceedings**

**1. No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.**

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

**3. Where the defence to any proceedings is that the defendant was at the material time acting in the course of his employment by the Government or a local authority and the proceedings were brought after the end of—**

**a. twelve months, in the case of proceedings founded on tort; or**

**b. three years, in the case of proceedings founded on contract, from the date on which the cause of action accrued, the court, at any stage of the proceedings, if satisfied that such defendant was at the material time so acting, shall enter judgment for that defendant.**

The claim against the Attorney General being founded on the tort of arrest and malicious prosecution, are time barred after 12 months as provided under Section 3(1) of the Act.

The cause of action in wrongful arrest and malicious prosecution accrues upon termination of the criminal proceedings in favour of the accused person. There must be proof of malice or a primary purpose other than that of carrying the law into effect in setting out a claim for malicious prosecution.

In *Stephen Gachau Githaiga & Another v Attorney General [2015] eKLR* the court held that –

“Finally, the initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a plaintiff’s case for malicious prosecution, regardless of whether the defendant is a private or public actor. Malicious prosecution, as the label implies, is an intentional tort that requires proof that the defendant’s conduct in setting the criminal process in motion was fueled by malice. The malice requirement is the key to striking the balance that the tort was designed to maintain: between society’s interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect.

Quoting from the Supreme Court of Canada decision in *Nelles v. Ontario*[10], the Alberta Court of Appeal, in *Radford v Stewart*, said:-

"There are four elements to the tort of malicious prosecution: the prosecution must have been initiated by the defendant, the proceedings must have been terminated in favour of the plaintiff, there must be an absence of reasonable and probable cause and there must be malice or a primary purpose other than that of carrying the law into effect."

The cause of action having accrued upon the acquittal of the claimant on 22<sup>nd</sup> March 2013 and the claim herein having been filed on 9<sup>th</sup> April 2015, the claim against the Attorney General lapsed upon the expiry of 12 months from date of acquittal being on 22<sup>nd</sup> March 2014.

The authorities cited by the 2<sup>nd</sup> respondent being the case of *Benjamin Wachira Ndiithi –V- Public Service Commission & Another (2014)*

**eKLR**, being a decision arising out of an employment relationship, is not relevant to this suit in so far as the 2<sup>nd</sup> respondent is concerned as there was no employment relationship between the claimant and the 2<sup>nd</sup> respondent.

With respect to the 1<sup>st</sup> respondent, the cause of action arose upon the claimant being informed that he had been retrenched vide letter dated 7<sup>th</sup> October 2013. Paragraph 2 and 3 of the said letter states –

“The Board of Directors has considered your request and decided that, in the prevailing circumstances you be retrenched in similar terms as your other colleagues who left service during the Concession of the Corporation.

In view of the foregoing, the retirement benefits for which you are eligible are set out in regulations 7, 17, 18 and 29 of the Kenya Railways Corporation’s (Pensions) Regulations 1983. In your case you are eligible for Pension Gratuity since your pensionable service is less than the mandatory 10 years qualifying period.”

His claim is thus not statute barred as he came to court before the 3 year limitation period lapsed from the date of that letter.

I therefore strike out the suit as against the Attorney General as it is statute barred while the claim on termination of employment will continue as against the 1<sup>st</sup> respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF FEBRUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**