



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC CAUSE NO. 564 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 13th March, 2019)

JOEL SILA MWEMA.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

1. On 22nd March 2017, the Claimant filed a claim against the Respondent challenging his dismissal and sought the following reliefs:-

- a. A declaration that the procedure adopted by the Respondent in dealing with the Claimant was unlawful, illegal and unprocedural.*
- b. A declaration that when dealing with the Claimant, the Respondent acted without the law and with impunity.*
- c. This Honourable Court be and is hereby pleased to quash and/or set aside the Respondent's decision/order/decreed and/or judgement dismissing the Claimant from its employment.*
- d. This Honourable Court be and is hereby pleased to order and/or direct the Respondent to reinstate the Claimant to its employment as a teacher forthwith without any demotion whatsoever.*
- e. The Respondent be and is hereby ordered to pay the Claimant special damages worth the unpaid salaries and allowances thereto for all the period of his suspension, interdiction from the Respondent's employment on 19th November 2011 and his subsequent dismissal on 9th March 2012, together with the accrued interest thereof till payment in full.*
- f. General damages for staying without a salary for a period of one year, the embarrassment and negative publicity meted against the Claimant by the Respondent during his dismissal from Respondent's employment.*
- g. Costs of the claim.*

2. Subsequently, the Respondent filed the Preliminary Objection dated 15th May 2017 opposing the Claimant's claim on the following grounds:-

- a. THAT the substantive claim on which this Application is premised is statute barred pursuant to the provisions of Section 3 (2) of the Public Authorities Limitation Act as read together with Section 90 of the Employment Act 2007 and ought to be struck out.*
- b. THAT these proceedings have been commenced contrary to the law.*

3. There is no record of the Claimant's response regarding the Preliminary Objection despite being directed to file the same on 29th January 2019.

Submissions by the Parties

4. The Respondent in its submissions dated 15th May 2017, submits that this Honourable Court lacks jurisdiction to entertain the suit herein

on the ground of limitation of time. The Respondent relies on the case Supreme Court of Kenya case: **Re the Matter of the Interim Independent Electoral Commission [2011] eKLR** where the Court held:-

“... that jurisdiction flows from the law, and the recipient-Court is to apply the same with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

5. The Respondent submits that Section 12 (1) (a) of the Employment and Labour Relations Court Act is not express and absolute in granting this Court its jurisdiction to hear and determine disputes relating to or arising out of employment between an employer and an employee. It is the Respondent's position that the section is subject to statutory limitations such as:-

1. Section 5 of the Civil Procedure Act, Cap 21 Laws of Kenya grants any court jurisdiction to try all suits of a civil nature excepting suits which its cognizance is expressly or impliedly barred.

2. Section 3(2) of the Public Authorities Limitation Act, Cap 39 Laws of Kenya which provides that no proceedings founded on contract shall be brought against the government or a local authority after the end of 3 years from the date on which the cause of action accrued.

3. Section 90 of the Employment Act 2007 prohibits 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 3 years next after the act, neglect or default complained of.

6. Therefore, the claim herein was unlawfully instituted as it was not commenced within the period required by law and ought not to be considered by this Court. The Respondent relies on the principle set out in the case of **Republic vs. Kiambu Land Dispute Tribunal & 2 Others ex parte Wambui Chege Macharia & 2 Others [2016] eKLR** to submit that since the ground for the suit arose on 9th March 2012, the suit ought to have commenced at that time. The principle in the case is to the effect that an application for judicial review should be commenced when the ground for the Application arose.

7. The Respondent submits that the cause is a nullity since it is time barred and as such this Court lacks the jurisdiction to hear and determine it. Consequently, the cause is incurably defective hence unsustainable. The Respondent relies on the cases **Mary Wambui Munene vs. Peter Gichuki King'ara & 2 Others [2014] eKLR** and **Macfoy vs. United Africa Co. Limited [1961] 3 All ER.**

8. The Respondent concluded by submitting that the Court lacks jurisdiction and ought to dissipate the cause herein.

9. The Claimant in his submissions dated 13th February 2019 and filed on 14th February 2019, submits that his suspension was unprocedural and unlawful because it was not authorized by a full Board of Governors (BOG) meeting. The BOG had a duty to convene a meeting and discuss the issue concerning the allegations made against the Claimant. Further, the grounds for the interdicting and subsequently dismissing the Claimant were not supported by evidence.

10. It is the Claimant's position that this Honourable Court has jurisdiction to entertain the claim herein since the claim was instituted within 3 years. The Claimant submits that time started running when his appeal was rejected by the Teacher Service Commission Appeals Tribunal and not when he was interdicted by the BOG. To support this, the Claimant argues that a party is supposed to exhaust the internal dispute solving mechanism provided the employer's respective Code of Regulations before commencing Court proceedings.

11. It is the Claimant's submissions that Courts have the duty to provide justice even where there is technicality of procedure. He relies on Articles 47, 48 and 50 of the Constitution which accord an individual the right to fair administrative action, access to justice and the right to a fair hearing, respectively.

12. The Claimant submits that the Respondent has not demonstrated that the continuance of these proceedings will prejudice its case. He concludes by urging this Honourable Court to dismiss the Respondent's Preliminary Objection.

13. I have examined all the submissions of the Parties. From the Pleadings, the Claimant was dismissed on 9.3.2012. He filed this Claim on 22.3.2017, 5 years later.

14. Section 90 of Employment Act 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”.

15. There is no indication that there was any continuing injury after 9.3.2012 that warranted the institution of this case in 2017.

16. In view of Section 90, this Claim ought to have been filed by 9.3.2015. Given that the Claimant filed this claim late, I find that the claim is time barred and this Court has no jurisdiction to handle it. I therefore dismiss this Claim accordingly for want of jurisdiction and for being time barred.

17. Costs to the Respondents.

Dated and delivered in open Court this 13th day of March, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Omari for Claimant – Present

Ruto holding brief Oyucho for Respondent – Present