



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.190 OF 2014

SAMMY THUO KANGEA.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF NAKURU.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

The claimant is a male adult who was employed by the respondent in the defunct Municipal Council of Nakuru now under the 1st respondent and the 2nd respondent herein is sued as the chief legal advisor of government.

The claimant was employed as a Treasurer until the year 2002 when unwarranted criminal charges were levelled against him and later got acquitted.

The claimant was to retire on 14th September, 2004 but was not paid his terminal dues on account of the on-going disciplinary process which the respondent's permanent secretary of local government had noted the respondents were reluctant to resolve.

The 1st respondent was unable to resolve the disciplinary matter as of 11th June, 2013 and this denied his the rights and benefits in employment.

Due to the interdiction of the claimant by the respondent, his terminal dues were not calculated as required and is claiming the following;

- a) Basic salary Ksh.38, 391.00 x 20/12
- b) Ksh.63, 985.00 x 8.5 years Ksh.6, 526,470.00;
- c) House allowance ksh.48, 000 x 12 x 8.5 Ksh.4, 896,000.00;
- d) Super fund contribution 6,526,470 x 12 ½ / 1000 Ksh.815, 808.75;
- e) Leave allowance 5% of salary ksh.460, 692;
- f) Accumulated leave
- g) Balance prior to 2002 = 225 days
- h) 2003 to 2013 = 10x30 = 300 days = 525/30 = 17.5 months x 63,985 Ksh.1, 119,737.50
- i) Interest Ksh.13, 818,708.25
- j) The claimant is also seeking compensation under section 49;
- k) Compensation or damages; and
- l) A formal retirement letter be issued to him.

The claimant testified that upon employment by the Public Service Commission he was deployed to work for the respondent under the defunct Municipal Council of Nakuru. He was wrongly accused to have committed a criminal offence and charged in court but was acquitted. At the time the disciplinary matter completed his retirement was not due until the year 2004 but the respondent failed to communicate this fact to him. By letter dated 11th June, 2013 the county secretary informed the claimant of the closing of the disciplinary matter and the claimant had been retired on age grounds.

The claimant also testified that the 1st respondent by letter dated 9th July 2003 informed him that in a resolution at its meeting held on 29th April, 2003 it was resolved to have his name deleted from the payroll and he be referred to the Ministry for redeployment. His disciplinary case was discussed by the 1st respondent on 19th July, 2005 without allowing the claimant a hearing. He filed judicial review proceedings in Nakuru JR No.559 of 2005 and the court quashed all the proceedings and resolutions passed by the respondent.

By letter dated 7th April, 2004 the Ministry directed the 1st respondent to expedite the disciplinary proceedings. Nothing was done until 14th September, 2004 when the claimant was due to retire but could not do so due to the pending disciplinary action by virtue of Regulation 34(1) of the Public Service Commission (Local Authority Officer) 1984. The non-resolution of the matter denied the claimant his terminal benefits.

On 11th June, 2013 the Ministry of Devolution and Planning wrote to the 1st respondent to close the disciplinary proceedings against the claimant so as to help process the retirement benefits.

By letter dated 16th October, 2007 the 1st respondent issued communication to the claimant that his terminal dues were Ksh.841,816.00 allegedly paid in instalments which was for the due salaries and not terminal dues. These payments were not in tandem with clause 29(1) (e) of the CBA and this meant when the claimant was paid his last instalment on 22nd November, 2011 was his last day at work with the respondent.

Defence

The 1st respondent in defence has made general denials save that terminal dues were paid to the claimant on 14th September, 2004 all at Ksh.841, 816.05 and has since the year 2004 not heard of any objections by the claimant. The claims now made are illegal and includes monies already paid and received by the claimant.

The defence is also that the claims made by the claimant involves a contract of employment which became due on 1st September, 2004 and are time barred and shall raise objections in this respect.

No evidence was called by the respondent and there was no attendance at the hearing.

At the close of the hearing, the claimant filed written submissions.

Determination

From the pleadings and evidence by the claimant it merges to the court that while in the employment of the 1st respondent he was arrested in April, 2002 and charged in Nakuru Criminal Case No.740 of 2002 over alleged obtaining money by false pretences. He was later acquitted.

The claimant has also admitted that on 4th December, 2004 the 1st respondent paid him Ksh.841,816.05 alleged to be terminal dues on the assumption that he had retired on 11th June, 2004 but in his view these payments related to his owing salaries.

From these facts the issues which emerge for the court determination are the following;

When employment terminated;

Whether the remedies sought are due; and

Who should pay costs.

The respondent in defence states that the claimant was paid his terminal dues on 1st September, 2004 at ksh.841,816.05 and that the claims made are time barred. This issue of law was never addressed and the respondent did not attend at the hearing. The defence has also largely been left bare by the 1st respondent failing to file any work records.

What can clearly be discerned from the claimant's evidence is that he was employed by the public service commission and seconded to the respondent by letter dated 16th July, 1992 as treasurer and which position he held until the year 2002 when he was charged in court over alleged obtaining money by false pretences contrary to section 275 of the Penal Code. He was interdicted by letter dated 15th April, 2002.

By letter dated 9th July, 2003 the claimant was informed by the 1st respondent that he had been removed from the payroll and his name deleted and was referred to the Ministry of Local government for redeployment.

The claimant filed **Judicial Review No.559 of 2005** to quash the decision of the 1st respondent and the resolutions passed and which the High Court allowed.

Part of the pleadings filed by the claimant is the Order under **Nakuru Judicial Review Application No.559 of 2005** granting him leave to move the court by judicial review to have the proceedings, resolutions and decisions of the 1st respondent at its meeting held on 19th July, 2005 for purposes of being quashed.

Following the leave granted and time of 21 days, the claimant has not attached or made any submissions as to what he did on these Orders. Even where the leave and time was allowed to cause to be quashed the subject orders removing the claimant from the payroll and following the decisions of the 1st respondent at its meeting on 19th July, 2005 there is no matter that the claimant applied to be reinstated back on the payroll and employment of the 1st respondent after the criminal arrest and being charged in court in February, 2002.

What is apparent is that after the claimant was charged in court in February, 2002 he did not resume duty and even where he did, his last payments from the 1st respondent were on 1st September, 2004.

The proceedings in Nakuru Judicial Review No.559 of 2005 put into perspective, the claimant not reinstated back into employment and his last payment by the respondent being on 1st September, 2004 the claimant stood outside of the 1st respondent's employment since.

The suit herein was filed on 10th June, 2014.

Despite the letter by the Ministry of Devolution and Planning dated 11th June, 2013 directing the 1st respondent to address the disciplinary matter of the claimant, there was no reinstatement, payment of salaries or engagement with the claimant as an employee of the 1st respondent since 1st September, 2004. The alleged extension of employment for the claimant by virtue of letter dated 11th June, 2014 is therefore not correct. The 1st respondent had effectively deleted his name and removed him from the payroll effective 1st September, 2004.

The Court of Appeal in addressing the issue of time limitation in the case of **G4S Security Services (K) Limited versus Joseph Kamau & 468 others [2018] eKLR** held that Time does not stop running on the commencement of reconciliation or other alternative dispute resolution mechanisms provided for under the Constitution or any other law. In this regard, the last relations between an employer and employee ending the relationship where by constructive dismissal, termination of employment or the payment of terminal dues in itself becomes material.

This position is buttressed in the case of **Attorney General & another versus Andrew Maina Githinji and another [2016] eKLR** where the Court of Appeal in addressing preliminary objections raised on the grounds and application of section 90 of the Employment Act, 2007 held as follows;

...The respondents had a clear cause of action against the employer when they received their letters of dismissal on 2nd October 2010. They had all the facts which had been placed before them in the disciplinary proceedings and they could have filed legal proceedings if they felt aggrieved by that dismissal, but they did not. Having found that the cause of action arose on 2nd February 2010 and that the claim was filed on 16th June 2014, it follows by simple arithmetic that the limitation period of 3 years was surpassed by a long margin. The claim was time barred as at 1st February 2013, and I so hold.

In employment and labour relations claims, time does not stop running for whatever reason(s). Once time is lapsed an extension is also not permissible under any law.

In the case of **Maersk Kenya Limited versus Murabu Chaka Tsuma [2017] eKLR** it was held that even during the Court Vacation, time was running. An employment and labour relations claim had to adhere to the timelines set out under section 90 of the Employment Act, 2007 read together with section 4(1) of the Limitation of Actions Act. In the case of **James Mugeru Igati versus Public Service Commission of Kenya [2014] eKLR** the court held that the institution of criminal proceedings against an employee or investigations leading to suspension of an employee is not a bar on time. Time still runs for the purposes of urging a case in employment and labour relations as under section 90 of the Employment Act, 2007. Pending investigations or criminal proceedings are regulated under a different legal framework as against employment and labour relations disputes. As noted above in the case of **G4S Security Services (K) Limited versus Joseph Kamau & 468 others [2018] eKLR**, conciliation proceedings do not stop time running.

Similarly in this case, where the claimant was removed from the payroll by the 1st respondent vide letter dated 9th July, 2003 and then paid terminal dues on 1st September, 2004 and even where the claimant felt such terminal dues ought to have been his allegedly unpaid salaries, as of such date(s) he ought to have moved the court with speed to address his employment claims with the respondents. The applicable statute, the repealed Employment Act Cap 226 Laws of Kenya allowed him up to 6 years to move the court. This was not done until 10th June, 2014.

The letters and communication from the Ministry did not extend time. The claimant remained removed from his employment with the respondent as at 9th June, 2003 and was paid his terminal dues as a result on 1st September, 2004. To file suit in June, 2014 is way out of the limitation period.

Even where the respondents have failed to attend at the hearing, the time limitation and the claims made is an issue of law the court cannot ignore.

Time thus lost, the court cannot move a step forward. The court is without a crucial power, jurisdiction is lacking. Without it the court must stop. Suit herein is struck out. No orders on costs.

Delivered in open court at Nakuru this 30th day of April, 2019.

M. MBARU

JUDGE

In the presence of: