



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.63 OF 2018

JOHN KIMANI GITAU.....CLAIMANT

VERSUS

PUBLIC SERVICE COMMISSION.....1ST RESPONDENT

KENYA REVENUE AUTHORITY..... 2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

The ruling herein relates to the 2nd respondent's Notice of Preliminary Objections filed on the 10th April, 2019 and on the grounds that;

- 1. The suit as filed is without merit, amounts to an abuse of the court process and is but a mere attempt to circumvent the clear provisions of the law.*
- 2. The suit as filed is statutorily barred by dint of section 90 of the employment Act, 2007.*
- 3. The suit as filed is statutorily barred by dint of section 3 of the Public Authorities Limitation Act Cap 39 as read together with section 3(2) of the Kenya Revenue Act Cap 469.*

The 2nd respondent shall seek that the entire suit be struck out with costs to the respondents.

The parties made oral arguments.

The 2nd respondent submitted that the claim herein was filed on 15th February, 2018 while the claimant left the employment of the 2nd respondent in February, 1997 which is 22 years ago. Section 90 of the Employment Act, 2007 allow suits to be filed within 3 years and this claim is time barred as held by the Court of Appeal in the case of **AG and others versus Andrew Maina Githinji & others [2014] eKLR** and **Benjamin Mbithi versus PSC [2014] eKLR**.

The claimant in reply to the objections submitted that the objections made by the 2nd respondent do not meet the principles set out in the case of **Mukhisa Biscuit Manufacturers Co. Ltd versus West End Distributors Co. Ltd [1969] E.A** as there is no point of law addressed and such objections cannot be discerned from the pleaded facts and which requires the call of evidence.

On 21st November, 2017 the claimant applied for the review of the decision by Public Service Commission on his disciplinary case and a reply was done on 2nd January, 2018. The claimant is filed on 23rd March, 2018 upon the conclusion of the disciplinary process.

The 2nd respondent's defence is that the claimant was on secondment with them while the 1st and 3rd respondent's defence is that by letter dated 14th June, 2000 the claimant was directed to treasury and that he had been dismissed from his employment with the 2nd respondent and upon appeal, this letter was cancelled vide letter dated 19th January, 2000. Upon the review decision, the last communication was 2nd January, 2018 the effective date and the matter is properly filed in court.

Determination

From the Memorandum of Claim, the claimant at paragraph 5 pleads that he was employed by the 1st respondent on 26th November, 1992 and deployed to the Ministry of Finance. He was seconded to the 2nd respondent in July, 1995. In 1996 the 2nd respondent stopped paying his salary.

The claimant also pleads that by letter dated 20th February, 1997 he was deleted from the payroll of the 2nd respondent and advised to seek redress with the permanent secretary, Treasury. By letter dated 8th October, 1997 the claimant was informed by the 2nd respondent that his secondment with them had been terminated and was to seek clarification on his employment with the 1st respondent.

At paragraph 14 the claim is that by letter dated 18th February, 1998 the 1st respondent dismissed the claimant from its service on account of desertion of duty on 26th November, 1996. He lodged appeals with the 1st respondent to reconsider the dismissal. By letter dated 21st November, 2017 the claimant applied to have the dismissal reviewed by the 1st respondent. A reply was by letter dated 2nd January, 2018.

From the above, the court reading of the pleadings, employment terminated by the dismissal of the claimant by the 1st respondent vide letter dated 18th February, 1998.

Time started running as of such date.

Any claims therefrom and relating to employment of the claimant were regulated under the provisions of the repealed Employment Act Cap 226 Laws of Kenya and which required employment claims be made within six years.

The Court of Appeal in the case of **David Waweru versus Hon. Attorney General & Another [2017] eKLR** citing with approval the case of **Boniface Inondi Otieno versus Mehta Electricals Ltd [2016] eKLR** as follows;

*There is a long line of authorities on the application of **section 4 (1)** [of the Limitation of Actions Act] and we do not share the desperation of the appellant, through counsel, that the law is in a state of confusion or flux in the ELRC. Yes, some conflicting decisions in that court exist. But this Court, which guides the ELRC, has been emphatic that there is no discretion to extend the time limitation of six years set under **section 4 (1)** of LAA ... The Court has also held in **Boniface Inondi Otieno case (supra)** that the pursuit of a parallel remedy does not stop time from running, thus overruling the ELRC which had extended sympathy to the appellant on account of having pursued similar remedy before another court.*

Effectively, in employment and about relations, all claims arising or where the cause of action arose with the dismissal of the claimant by the 1st respondent on 18th February, 1998 the Employment Act, 2007 is futuristic and not applicable. As the 2nd respondent had only received the claimant upon secondment and which was terminated on 8th October 1997, upon return to the principal employer and 1st respondent, employment was terminated by dismissal as at 18th February, 1998. The cause of action accrued as of such date. See **Robert Matoya Mageto versus Bidco Oil Refineries Limited [2017] eKLR**.

When then does a cause of action accrue?

This is answered by the Court of Appeal in the case of **David Ngugi Waweru versus Attorney General & another [2017] eKLR**;

... On the accrual date of the cause of action which has a direct bearing on running of time, the Claimant takes the view that the cause of action in his case did not accrue until 8th August 2006 when he was notified that his employment file had been closed, thus dashing any hopes of his reinstatement to the public service.

*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. In the instant case, the Claimant's termination from the 1st Respondent's employment took effect on 1st October, 2000 as communicated by letter dated 29th September, 2000. It follows therefore that the cause of action upon which the Claimant's claim is based accrued on 1st October, 2000 and that is the date when time began to run as against the Claimant's claim?*

Similarly, in this case, the application for review by the claimant herein to the 1st respondent did not extend time. Employment terminated upon the issuance of letter of dismissal from employment. Such date is 18th February, 1998 a period of over six years contemplated in law as the time sufficient to file any claims with regard to wrongful termination of employment under the repealed Employment Act Cap 226.

To file suit after the lapse of such time and on 23rd February, 2018 is way out of the limitation period. The suit is effectively time barred. It cannot be sustained and is hereby struck out. Each party shall bear own costs.

Delivered at Nakuru this 10th day of July, 2019

M. MBARU

JUDGE

In the presence of:

.....