

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2242 OF 2014

PETER HILARY ODHIAMBO.....CLAIMANT

- VERSUS -

THE ATTORNEY GENERAL ON BEHALF

OF THE MINISTRY OF INTERIOR AND

COORDINATION OF NATIONAL GOVERNMENT.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 30th August, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 17.12.2014 in person. The claimant alleged that the termination of his employment was unfair and he prayed for payment of a sum of Kshs.8, 134, 475.60 upon several headings set out in the memorandum of claim. He also prayed for interest at 20 % and a certificate of service. The claimant subsequently appointed Nchogu, Omwanza & Nyasimi Advocates to act in the case.

There is no dispute that the respondent employed the claimant on 02.01.2008 as the District Supplies and Procurement Assistant for the Western Kenya Community Driven Development & Flood Mitigation Programme at monthly pay of Kshs.69, 667.00 plus Kshs. 2, 000.00 in monthly airtime. The claimant was suspended from employment by the letter dated 09.10.2009 following some audit report findings. The claimant's employment was subsequently terminated by the letter dated 28.05.2010 and effective the date of suspension being 09.10.2009.

The respondent's preliminary case (as per the submissions filed on 24.07.2019 through L. Odhiambo, Litigation Counsel) is that the claimant's suit is time barred because the suit was filed after the lapsing of the 3 years of limitation as prescribed in section 90 of the Employment Act, 2007. At paragraph 32 of the memorandum of reply filed on 01.10.2015 the respondent had pleaded thus, "**32. The respondent further contends that the claimant's claim is scandalous, frivolous, and vexatious and does not disclose any reasonable cause of action in law considering that the action of the respondent is in accordance with the law.**" At the hearing Counsel for the respondent urged that the suit was time barred under section 90 of the Employment Act, 2007.

For the claimant it was submitted that it was true that the suit ought to have been filed within 3 years from the date of the termination but the Court should also consider the intervening circumstances that may alter the point the time of limitation may start to run. It was submitted that the claimant received the termination letter on 29.06.2010 and he filed an administrative appeal on 29.06.2010 on the grounds that he had been unfairly suspended. On 02.12.2010 the Permanent Secretary wrote to the Director of World Bank, the entity that was financing the Project, to find out why the claimant had been recommended for suspension whereas the audit report had not implicated him. The appeal was not decided and the claimant says he decided to move the Court on 17.12.2014. The respondents allege that the appeal was decided. It could be that in an appropriate proceeding about the fate of the administrative appeal the claimant may seek appropriate orders. What is clear in the instant case is that there is no doubt that the suit was filed outside the 3 years of limitation. It is also clear that the claimant did not seek orders that the appeal which might be pending determination be decided one way or the other in accordance with the applicable regulations and the contractual terms.

The Court is bound by the Court of Appeal's holding in **Attorney General & Another –Versus- Andrew Maina Githinji and Another [2016]eKLR** and cited for the respondent thus, "...**The respondents had a clear cause of action 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 February 2013, and I so hold.**"

The Court considers that indeed parties agreed on the administrative appeal procedure and the claimant's proper remedy would be to seek specific performance of such contractual provision or such other appropriate remedy but which was not subject of the present case. It might be that all is not lost for the claimant in that regard as judicial review proceedings might be available. The administrative appeal may be pending and that the preliminary objection was raised belatedly on the date scheduled for hearing of the suit and not categorically pleaded in the memorandum of reply and the Court returns that the parties shall bear own costs of the suit.

In conclusion the suit is hereby struck out for being time barred with orders that each party shall bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 30th August, 2019.

BYRAM ONGAYA

JUDGE