



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.34 OF 2019

HENRY KIPCHUMBA TARUS.....CLAIMANT

VERSUS

POSTAL CORPORATION OF KENYA.....RESPONDENT

RULING

By application dated 8th October, 2019 the respondent, Postal Corporation of Kenya is seeking to have the suit filed on 18th March, 2019 struck out on the grounds that it offends the provisions of section 90 of the Employment Act and there is no cause of action against the respondent.

The application is premised on the provisions of section 90 of the Employment Act and Rules 2 and 17 of the Employment and Labour Relations Court (Procedure) Rules. The application is supported by the annexed affidavit of Samuel Mburu, the Legal Manager for the respondent.

The deponent thus avers that the cause of action arose between December, 2008 and 2009 when the claimant was interdicted, suspended and dismissed for gross misconduct by the respondent. The dismissal from employment took effect on 1st December, 2008 and the claimant ought to have moved the court within 3 years and such time lapsed within the meaning of section 90 of the Employment Act.

In reply the claimant filed his Replying Affidavit and on the grounds that he was wrongly and unfairly interdicted by the respondent on 1st December, 2008 on allegations of gross misconduct. During such period he was retained on half pay leaving a balance of Ksh.62, 820.00 unpaid.

At the end of the interdiction by letter dated 26th March, 2009 the claimant was suspended for a period of 25 months and 10 days.

By letter dated 29th October, 2009 the claimant was dismissed from his employment by the respondent and being aggrieved he lodged an appeal by letter dated 13th November, 2009. By letter dated 26th April, 2011 the claimant was reinstated back to his employment on conditions that his period of suspension be treated as unpaid leave and a warning was issued.

The claimant also avers that the decision of the respondent was contrary to articles 47, 48, 50 and 10 of the constitution. the claimant therefore appealed against the decision vide letter dated 25th May, 2017 and which ordered for the refund off Ksh.211,327.40 instead of Ksh.276,407.58 which had been deducted from his salary. The appeals committee also ordered the claimant be retained on the terms given under reinstatement.

The respondent paid Ksh.211, 327.40 instead of Ksh.276, 407.58 which is less by Ksh.65, 080.00.

The internal disciplinary process under the respondent's regulations ended with the decision vide letter dated 25th May, 2017. The claim was filed on 18th March, 2019 within the time.

The claimant also avers that time limitation for filing suit stopped running upon the appeal decision vide letter dated 25th May, 2017. Such appeal process is envisaged by the respondent's Code and the application filed by the respondent is without merits and should be dismissed.

Both parties made oral submissions. There is a list of cases filed by the claimant.

Section 90 of the Employment Act, 2007 is premised on mandatory terms and which requires that all suits relating to employment and labour

relations be filed with the court within 3 years from the date the cause of action arose. See **Kenya Electrical Trades & Allied Workers Union versus Kenya Power & Lighting Co. Ltd [2015] eKLR**; **G4S Security Services (K) Limited versus Joseph kamau & 468 others [2018] eKLR**.

The claimant asserts that upon dismissal from his employment by the respondent on 29th October, 2009 he appealed such decision and by letter dated 26th April, 2011 he was reinstated back to his position. Such reinstatement was conditional and he thus appealed. The appeal was only concluded and decision communicated vide letter dated 25th May, 2017.

As such, employment ceased as of 29th October, 2009.

There was reinstatement back to employment on 26th April, 2011.

In the Memorandum of Claim, the claimant is seeking for the payment of various dues and including;

- Payment of salary due from December, 2008 to March, 2009;
- Allowances due from April, 2009 to May, 2011;
- Salaries due from April, 2009 to May, 2011;
- Allowances due from April, 2009 to May, 2011;
- Interests on the refunded amounts of Ksh.207,511.16 from April, 2009 to date;
- Underpaid salary;
- Employers pension contribution ksh.220,735.75; and
- NSSF contributions and Certificate of Service.

These claims are therefore premised on employment of the claimant.

In the case of **Attorney General & another versus Andrew Maina Githinji and another [2016] eKLR** the Court of Appeal in addressing the provisions of section 90 of the Employment Act, 2007 held that;

...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.

The position thus addressed by the Court of Appeal, In tabulation of time as to when the cause of action arose, the effective date is that of end of employment. This cannot be pegged on the process of appeal even where such is provided for by the employment. Section 90 of the Employment Act, 2007 provisions does not accommodate time extensions by application of such an appeals process once employment terminated.

Upon letter dated 29th October, 2009 the claimant had 3 years to move the court and which time lapsed on 28th October, 2012.

There was conditional reinstatement vide letter dated 26th April, 2011. The claimant made an appeal against the conditional reinstatement. The decision on appeal was communicated on 25th May, 2017 and which the respondent has admitted that the claimant was entitled to a refund of 20% of Ksh.1, 056,637 being the amount of Ksh.211, 327.40 the amount recovered less outstanding balance of Ksh.3, 838.

Where the claimant was therefore aggrieved by his conditional reinstatement and back into employment, he ought to have filed his claims with the court within the meaning of section 90 of the Employment Act, 2007. Upon reinstatement on 26th April, 2011 any owing dues should have been made on or before 25th April, 2014.

Save for the admitted amounts vide the letter of the respondent dated 25th May, 2017 the claimant cannot apply such communication to revive claims which lapsed as of 28th October, 2012 or on 25th April, 2014. Such claims are time barred by operation of the law.

Is there continuing injury herein?

In **George Hiram Ndirangu versus Equity Bank Limited [2015] eKLR** the court held that the logical meaning of continuing injury or damage would therefore be violation of rights under an employment contract such as salary underpayment or failure to pay accrued dues. In the instant case the court returns that the continuing injury includes the alleged admitted and unpaid dues determined as of 25th May, 2017.

Save for the admitted continuing injury and dues held with regard to letter dated 25th May, 2017 to file for claims which arose last on 25th April, 2014 is out of time.

Accordingly, claims made with regard to prayers (i), (ii) (1), (2) (a), (b), (c), (d), and (5) of the Memorandum of Claim are hereby found time barred and are struck out. Save for the admitted amounts with regard to Prayer (ii)(3) and vide letter dated 25th May, 2017 the application dated 8th October, 2019 is found with merit and is hereby allowed.

The claimant shall amend the Memorandum of Claim accordingly.

Delivered at Nakuru this 7th day of November, 2019.

M. MBARU

JUDGE

In the presence of: