



IN THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1615 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 15th February 2018)

DAVID GIKANDU KIEHA.....CLAIMANT

VERSUS

KOFINAF COMPANY LIMITED.....RESPONDENT

RULING

1. The Respondents herein have raised a Preliminary objection on the following grounds:-

1. The Court has no jurisdiction as the claim is time barred by limitation.

2. They aver that the Claimant was terminated on 15th November 2012 as per the demand letter dated 26th February 2015 in the Claimant's documents. There is therefore no justification as to why the Claimant failed to pursue this claim in 2015 when he sent the demand letter as he was still within the statutory time limited to file the case by the 26th February 2015.

2. They aver that the delay is unacceptable as it prejudices the interests of the Respondent in defending itself against the Claimant's claim by holding the Respondent at ransom and putting the Respondent in a continuous anxious position.

3. They therefore submit that the claim is time barred as provided for under Section 90 of Employment Act 2007 which 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 un less it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof”.

4. They have also cited the matter of the **Interim Independent Electoral Commission** SC Constitutional Application No.2 of 2011 (2011) eKLR and in **Samuel Kamau Macharia and Another vs Kenya Commercial Bank Limited and 2 Others** SC Application No. 2 of 2012 (2012) eKLR, where the SC discussed the issue of jurisdiction as follows:-

“A Court's jurisdiction flows from either the Constitution or legislation or both. Such a Court may not arrogate to itself jurisdiction through the craft interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity”.

5. The Respondents submit that this Court has no jurisdiction to extend time the claim having been filed on 12th August 2016 and the cause of action having occurred in 2012.

6. The Claimants filed their submissions and they contend that this claim is not time bared.

7. They aver that the cause of action occurred on or about 1st May 2015 and the claim was filed on 12th August 2016 within the limitation period. To support this, they state that there is no evidence that the Claimant was terminated in 2012. They aver that the Respondent cannot have terminated the claimant and keep paying his NSSF upto December 2015 as its employee. Based on this, they ask Court to dismiss the Preliminary Objection.

8. I have looked at the Memorandum of Claim filed herein which indicates that the Claimant was terminated on 1st May 2015. There is also attached the Claimant's NSSF Statement Appendix AWG2 showing remittances of NSSF dues upto December 2015.

9. The Claimant's position is that he was suspended from duty but not terminated. He was told to stay away until the criminal proceedings were determined. The Respondents have not produced any documents to show they terminated him in 2012.

10. That being the position, it is my finding that the issue of the Claimant's termination is a triable issue and which cannot be determined through a Preliminary Objection. I will therefore dismiss the Preliminary Objection and direct that the case proceeds for hearing.

Read in open Court this **15th day of February, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kanyiri for Respondent – Present

Claimant – Absent