



**REPUBLIC OF KENYA**

**THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2026 OF 2017**

**(Before Hon. Justice Hellen S. Wasilwa on 14<sup>th</sup> March, 2018)**

**BRAMWEL OKUNDA MAYIENGA .....CLAIMANT**

**VERSUS**

**TEACHERS SERVICE COMMISSION .....RESPONDENT**

**RULING**

1. The Application before Court is a Preliminary Objection dated 27.10.2007 being raised by the Respondents herein on the grounds that the claim herein dated 23.9.2017 is statute barred pursuant to the mandatory and express provisions of Section 90 of the Employment Act 2007.
2. The parties agreed to proceed with this application by way of written submissions. The Respondents submitted that the Claimant was dismissed from service vide a letter dated 26<sup>th</sup> April 2012 and this case was filed on 10<sup>th</sup> October 2017, 5 ½ years after the cause of action arose.
3. The Respondents aver that this being the case, the claim is time barred by virtue of Section 90 of employment Act.
4. The Claimants Respondent opposed this Preliminary Objection. They filed grounds of opposition to the Preliminary Objection dated 27<sup>th</sup> October 2017.
5. They submitted that the Preliminary Objection is bad in law and brought in bad faith because the Respondents instituted disciplinary proceedings on 25<sup>th</sup> November 2011 and deliberately stalled the same until 15.6.2017 when the Respondent vide a letter dated even date communicated to him that the appeal and application for review of the Teachers Service Commission (TSC) had been dismissed. In the circumstances, the Claimant aver that the case cannot properly fall under Section 90 of Employment Act.
6. I have examined all the submissions of the Parties. I also note that the Claimant was indeed dismissed vide a letter dated 26<sup>th</sup> April 2012. The Claimant filed an appeal against the dismissal on 14<sup>th</sup> May 2012 and this appeal was also dismissed and the dismissal appeal rejected vide a letter dated 15.6.2017.
7. That notwithstanding, the Claimant did know that he had been dismissed on 26.4.2012 and this is evidenced from his own letter 19.11.2015. The question then is when failure to communicate the appeal dismissal meant that the dismissal was stayed?.

8. The Court's view is that under Section 90 of Employment Act, a claim brought for termination of employment must be brought within 3 years. This period cannot be extended by the Employment and Labour Relations Court. This was the ruling by the Court of Appeal in **Benjamin Wachira Ndathi vs Public Service Commission (2014) eKLR** which opined as follows:-

**“No one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no Court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action ..... A perusal of Part III shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that “the wording of Section 41) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked”.**

9. I would like to point that the review/appeal process by the Respondent is an administrative independent process and the Courts process will not stall or be paused by reasons of the said appeal being filed. The dismissal was affected on 2012. That is when time started running.

10. The other internal administrative processes were to continue and indeed continued but the dismissal had already been effected. The Claimant should have filed his claim by 25<sup>th</sup> April 2015. He failed to do so and only came to Court on 15/6/2017. He came albeit too late and that is the position of the Court.

11. I find the claim before me time barred and I dismiss it accordingly in its entirety.

**Dated and delivered in open Court this 14<sup>th</sup> day of March, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Ngere for Respondents – Present

Applicants – Absent