REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 215 OF 2017

EPHRAIM GACHIGUA MWANGI.....CLAIMANT

VERSUS

1. TEACHERS SERVICE COMMISSION

2. BOARD OF MANAGEMENT

THOGOTO TEACHERS COLLEGE.....RESPONDENTS

RULING

1. The preliminary objection by the Respondents is to the effect that the Claimant's suit is statutorily time barred and grossly offends the mandatory provisions of Section 90 of the Employment Act No. 11 of 2007 and that the honourable court has no jurisdiction to hear and determine the claim. The Claimant did not file any grounds in opposition or affidavit after the notice of preliminary objection was served. The parties filed submissions in support and opposition of the objection. The Respondent submitted that the Employment Act expressly provided for the limitation of actions arising out of labour matters under Section 90 of the Act. The Respondent argued that since the Claimant was re-deployed from the position of principal to classroom on 7th January 2013, there was a limitation as to when he could challenge the re-deployment in terms of Section 90. The Respondent asserts that moving the court in 2017 was out of time. The Respondent cited various decisions of my fellow judges and the Court of Appeal in **Divecon v Samani [1995-1998] 1 EA 48** and stated that there was no jurisdiction to extend time.

2. The Claimant objected to the preliminary objection and stated that the demotion which formed the crux of the claim was a continuing injury which continues until it is stopped. Reliance was placed on the cases of **Dorothy Nchabira Bernard *v* Solution Sacco Limited [2015] eKLR** and **Gitau Harrison Joshua *v* Teachers Service Commission & Another [2014] eKLR** and submitted that the demotion was a continuing injury. The definition of continuing injury in **Blacks' Law Dictionary** was given as *an injury that is still in the process of being committed* and the Claimant argues that he is still an employee of the 1st Respondent albeit continuing to serve as a classroom teacher but not as principal. The Claimant thus submitted that the preliminary objection was misplaced as the injury he suffered is a continuing wrong.

3. The remit of a preliminary objection is well set out in law. In the case of **Mukisa Biscuits Ltd *v* West End Distributors Ltd (1969) EA 696. In that case, Law JA and Newbold P. held as follows:-**

> *"So far as I am aware, a preliminary objection consists of a point of Law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."*

Sir Newbold P. stated in the same decision as follows:-

> *"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessary increase costs and, on occasion, confuse the issues. This improper practice should stop."*

4. **This has stood the test of time and t**he objection taken before me is on the issue of jurisdiction and therefore fits within the prism of the **Mukisa Biscuits** case. The Claimant asserts that his demotion was and still is a continuing injury. Section 90 of the Employment Act provides as follows:-

> *Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act (cap 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained of or in the case of continuing injury or damage within twelve months next after the cessation thereof.*

5. The law is clear. If there is a continuing injury or damage, limitation is capped at 12 months from the cessation thereof. The demotion that took place was an incident. The fact that the effects reverberate to date do not affect the incident contained in the letter of re-deployment. By parity of reasoning, after dismissal a person may suffer economic hardship and his social standing irreparably altered or damaged. That does not however entitle the dismissed employee to claim 4 or 5 years later on account of the dismissal being a continuing wrong since the effect of the dismissal may be continuing. This is an incorrect reading of the law. The court finds that the wrong complained of was finite in time

and was on the basis of the demotion dated 7th January 2013 and therefore limitation begun to run on 7th January 2013 when his cause of action against the demotion arose. He opted to exercise his right on 13th June 2017 whereas he had until 7th January 2016 to file suit for the demotion. The suit is therefore out of time and in keeping with the determination in **David Ngugi Waweru *v* Attorney General *&* Another [2017] eKLR** where the Court of Appeal held that there is no room to extend time in case of limitation under Section 90 of the Employment Act, I hold that the suit is hopelessly out of time and is struck out with costs to the Respondent.

It is so ordered.

Dated and delivered at Nyeri this 10th day of April 2018

Nzioki wa Makau

JUDGE