



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO. 424 OF 2017**

**FRANCIS MAINA WAHOME.....CLAIMANT**

**VERSUS**

**THE MANAGING DIRECTOR NYERI WATER & SEWERAGE CO. LTD....RESPONDENT**

**RULING**

1. The preliminary objection by the Respondent is that the court lacks jurisdiction to entertain the Claimant's claims on the grounds that the claims are barred by limitation under Section 90 of the Employment Act 2007. The Claimant filed a reply to the preliminary objection and stated that there was an appeal filed against the dismissal of the Claimant in 2016 and that the provisions of Section 8 of the Employment Act cannot stand as time started to run after the act of appeal against the Respondents.

2. The Respondent submitted that the Claimant was dismissed on 18<sup>th</sup> November 2011 and therefore this suit could not be entertained due to limitation in terms of section 90 of the Employment Act. The Claimant is opposed and submits that the decision to dismiss him was only affirmed after his appeal which he lodged upon dismissal. He stated that determination of the appeal was made in 5<sup>th</sup> December 2016. The Claimant asserts that the appeal was closed in December 2016 when the decision on the dismissal was confirmed and therefore the only option then was present the legal process for the court to determine. The Claimant relied on the case of is **Ezekiel Nyangoya Okemwa v The Kenya Marine and Fisheries Research Institute [2016] eKLR** where Rika J. held "*the claim was filed on 28<sup>th</sup> June 2013, less than a year after the claimant learnt of his termination. The claim was therefore filed in time. Whether one considers the time limits in the Limitation of Actions Act or the Employment Act 2007, the preliminary objection is declined.*" He urged the court therefore dismiss the preliminary objection with costs to the Claimant.

3. On limitation, I think that all is clear in order for party to fall within the time limit prescribed under section 90 of the Employment Act, 2007 one must file the suit within three years of the dismissal. The case of **Ezekiel Okemwa v Kenya Marine Fisheries Institute** (supra) is distinguishable from the case before me. In that case Rika J. was dealing with a dismissal that had occurred one year before the suit was filed. The Court of Appeal in various decisions on the subject has made a determination that is binding on this court regarding limitation. In the case of **Attorney General & Another v Andrew Maina Githinji & Another [2016] eKLR** the Court of Appeal stated the following about limitation of time per Waki J.

*By expressly inserting **Section 90**, the intention of Parliament, in my view, at least in part, must have been to protect both the employer and the employee from irredeemable prejudice if they have to meet claims and counter claims made long after the cause of action had arisen when memories have faded, documents lost, witnesses dead or untraceable. It is understandable therefore when the Section peremptorily limits actions by the use of the word 'shall'.*

4. In view of the foregoing it is amply clear that since the Claimant was dismissed on 18<sup>th</sup> November 2011, he should have filed suit on or before 18<sup>th</sup> November 2014 as time began running on the date he was dismissed and not from the date his appeal was confirmed. This suit is therefore hopelessly out of time having been filed in 2017 about 6 years from date of accrual of the cause of action. The only option available to this court is to hold that it must be struck out. The preliminary objection succeeds and I strike out the suit with costs to the Respondent.

It is so ordered.

**Dated and delivered at Nyeri this 9<sup>th</sup> day of April 2018**

**Nzioki wa Makau**

**JUDGE**