

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 447 OF 2017

DAVID MUCHIRA MATHENGE.....CLAIMANT

VERSUS

KENYA POWER & LIGHTING CO. LTD.....RESPONDENT

RULING

1. The Respondent objects to the suit by the Claimant on the grounds that the claim herein is time barred and grossly offends the mandatory provisions of section 4(1) of the Limitation of Actions Act chapter 22 Laws of Kenya, section 3(2) of the Public Authorities Limitation Verify Act, chapter 39 of the Laws of Kenya and section 90 of the Employment Act, 2007. The Respondent prays that the entire suit be struck off with costs to the Respondent. The parties opted to file submissions and the Respondent's submissions to the Preliminary Objection were filed on 13th February 2018. In their submissions, the Respondent submits that the Claimant was employed by the Respondent as a cashier grade III on 15th September 1999 and subsequently confirmed to this position. It states that sometimes in 2004 arising from the Respondent's routine internal audit, it was discovered the Claimant had, in collusion with others, defrauded the Respondent of substantial sums of money in excess of Kshs. 9 million and that the Respondent in line with the provisions of the employment agreement summarily dismissed the Claimant on 7th May 2004 for the fraud which amounted to a gross violation of the terms and conditions of his employment. It was stated that all subsequent appeals against dismissal were heard and determined, wherein the decision to dismiss the Claimant was upheld. The Respondent submits that in view of the Limitation of Actions Act as well as section 3 of the Public Authorities Limitation Act and section 90 of Employment Act, 2007 the Claimant's claim is time barred. The Respondent submits that the only issue that this court should determine is when the cause of action arose. The Respondent cited the case of **Attorney General & Another v Andrew Maina Githinji & Another [2016] eKLR**. The Respondent submits the cause of action arose on 7th May 2004 and that time began to run on 7th May 2004, that the Claimant has brought the suit 13 years after the cause of action accrued and therefore there is no basis to sustain the suit. The Respondent submits the Claimant seems to erroneously believe the cause of action arose upon final verdict of the appeal he preferred. The Respondent reiterates that the accrual of the cause of action emanating from employment is that in the letter communicating the termination. It was submitted that the fact that an employee's employment has been terminated and the employee seeks a review or an appeal does not mean that accrual of the cause of action is held in abeyance until a final verdict on the review or appeal is made. The Respondent submits the claim cannot be saved under the provisions of section 27 of the Limitation of Actions Act which provides for the extension of limitation periods in certain cases. The Respondent submits that the claim is manifestly statute and that there is no room provided for under the Employment Act to extend time in employment matters and consequently prays the court terminates the proceedings forthwith and the claim be dismissed in its entirety with costs.

2. The Claimant's submissions were to the effect that that upon dismissal he was charged for the Chief Magistrate's Court at Nyeri on account of the same events that ostensibly led to his summary dismissal. He submits that he was however acquitted of the offence on 6th February 2009. Subsequently, upon acquittal, the Claimant approached the Respondent with a view to being reinstated but the Respondent rejected the request for reinstatement in May 2009 and the Claimant having been informed of this then wrote demanding payment of outstanding dues. It was then that the Respondent wrote to the Claimant informing him that it was carrying out investigations into the matter and would revert to him with the results of investigations as soon as was possible. That was on 22nd September 2009. The Claimant submitted that he did not receive any communication from the Respondent regarding the said investigation and he therefore sought to inquire about progress of the same. The Claimant submitted that vide a letter dated 6th February 2017 the Respondent informed the Claimant that he was required to appear before its appeal committee on 18th February 2017 further advising that at the said appeal the Claimant was at liberty to call a witness who should be an employee of the Respondent. He submitted that he attended the hearing on 8th February and vide letter of 12th July 2017 was informed that his appeal had been rejected for loss of trust by the Respondent. It was after learning of the outcome of the said appeal that the Claimant filed this claim. The Claimant admits that initially the cause of action arose on 7th May, 2004 and submits that the Respondent is estopped from raising the defence of limitation in the suit as a defence. He submits that the Respondent elected to undertake investigations which led the Claimant to believe the claims to be ongoing and further this was reinforced by the invitation to the appeals committee to ventilate his grievances regarding his dismissal. The Claimant submitted that Respondent led him to believe investigations into his claim for unfair summary dismissal were being addressed and that even the slightest chance existed for its decision to summarily dismiss him to be overturned or alternatively his outstanding dues would be settled following those investigations. The Claimant submits that it was on this belief that he acted in the manner complained of by the Respondent and filed the suit in 2017 after the dismissal of his appeal. The Claimant submitted the striking out of the suit would be an antithesis to substantive justice and would go against the maxim of equitable estoppel which comes to the Claimant's aid. The Claimant urged the dismissal of the preliminary objection with costs. Reliance was placed on the case of **Sita Steels Ltd v Jubilee insurance Company Ltd [2007] eKLR** cited with approval in the case of **Petro Oil (K) Ltd v Jubilee insurance Co, Ltd [2015] eKLR**. The Claimant submits that in the instant proceedings the Respondent waived its right to set up a defence of limitation of time by the implication and by leading the Claimant to believe it was investigating his grievance and inviting him to attend the appeal hearing for summary dismissal the took place 12 years before.

3. Limitation of actions are set out under the Limitation of Actions Act Section 4(1) for cases that had cause of actions accruing before 8th June 2008 when the Employment Act 2007 came into effect. Section 90 of the Employment Act 2007 applies to all dismissals after 8th June

2008. In this case the dismissal was on 7th May 2004. Whereas there was an investigation and a subsequent appeal hearing in February 2017, the Claimant was dismissed in 2004 and had to file suit on or before 7th May 2010. He did not. The suit before me is out of time and the maxim of equitable estoppel would not apply. The suit is therefore struck out but I will order that each party bears their own costs.

It is so ordered.

Dated and delivered at Nyeri this 5th day of April 2018

Nzioki wa Makau

JUDGES