



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 141 OF 2014

(FORMERLY MACHAKOS HCC 173 of 2009)

(Before Hon. Justice Hellen S. Wasilwa on 30th May, 2018)

JOSHUA M. MUSYIMI.....CLAIMANT

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....RESPONDENT

RULING

1. What is before the Court is a Preliminary Objection by the Respondent raised in paragraph 10 of the defence stating that the suit as drawn and filed offends the mandatory provision of Section 3 of the Public Authorities Limitations Act and Section 13A Governments Proceeding Act.

Submissions

2. The Respondent filed their submissions where they averred that the Claimant was dismissed from civil service with effect from 4th April 2006 whereas this suit was instituted vide a plaint dated 3rd June 2009 and filed in Court on 4th June 2009, wherein the Claimant seeks a declaration that his dismissal was illegal and unprocedural.

3. Further he seeks damages for wrongful and malicious prosecution making the claim to be founded on both contract and tort.

4. The Respondent aver that the cause of action arose on the date of dismissal which was 4th April 2006 hence the limitation period started to run as from that date, meaning that the same expired at the end of three years therefore the Claimant ought to have brought this suit within 3 years but instead it was filed on 4th June 2009 which was outside the limitation period and thus the suit is statute barred. They were guided by the case of **Benjamin Wachira Ndiithi Vs Public Service Commission & another [2014] eKLR.**

5. They further aver that the claim for malicious prosecution against the Respondent is based on tort and the action should have been brought within 1 year. The Claimant was arrested and charged in Machakos CM's Criminal Case no 3453 of 2003 and since the Claimant was acquitted on 28th September 2005, the cause of action arose on that date. He therefore ought to have brought this suit for malicious prosecution within 1 year that is on or before 27th September 2006. This is guided by the case of **Charles Wanduto Kihoro Vs National Bank of Kenya Ltd & another (2004) eKLR.**

6. They state that the suit brought is statute barred as it offends the mandatory provisions of Section 3(1) & (2) of the Public Authorities Limitation Act Cap 39 Laws of Kenya as well as Section 90 of the Employment Act 2007 and this goes to the root of the jurisdiction of the Court to entertain the dispute.

7. They further state that the suit is misconceived, frivolous and amounts to abuse of Court process and urge the Court to be vigilant and guard against abuse of its process by striking out the suit for being time barred.

8. The Claimant filed his submissions where he submits that he filed his claim on 4th June 2009 which is the period within 3 years from 11th December 2007 when his window of appeal was closed.

9. He avers that the issues of tort for wrongful and malicious prosecution touch on fundamental rights and freedom or Bill of rights in which limitation of action or time bar would not be an excuse or defence. Article 24 of the Constitution is very clear on issues of injustice, which

led to the interfering with the Claimant's freedom and human dignity.

10. He further avers that his rights to sue is founded in common law and urge the Court to find that the claim is good to be tested at the full trial as opposed to dismissing the same at preliminary stages without according him a chance to be heard.

11. I have considered the averments of both parties. From the Plaintiff paragraph (9) the Claimant was dismissed vide a letter dated 9th May 2006 with effect from 4th April 2006 on account of negligence of duty.

12. Given that the dismissal occurred during the dispensation of the repealed Employment Act, the limitation period is guided by Cap 22 Section 4 which states that:-

1) *"The following action may not be brought after the end of 6 years from the date on which the cause of action occurred:-*

a) action founded on contract

b)"

2) *Action founded on tort may not be brought after the end of three years from the date of which the cause of action accrued:*

Provided that an action for libel or slander may not be brought after the end of twelve months from such date".

13. In view of the above provision of law, it is true that certain parts of this claim is time barred and others are not. In order not to distort the claim, I will dismiss the Preliminary Objection and allow the main claim to proceed so that the issues of limitation will be addressed by the parties in their main claim. It is so ordered.

14. Costs in the cause

Dated and delivered in open Court this 30th day of May, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wangechi for Respondent – Present

Applicant – Absent