



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.212 OF 2017

WILLIAM KADIMA & 18 OTHERS CLAIMANTS

VERSUS

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES RESPONDENT

RULING

The ruling herein relates to Notice of Preliminary Objections filed by the Respondent, National Social Security Fund Board of Trustees in the Statement of Defence filed on 18th September, 2017 under paragraph 2, 3 and 5 as follows;

2. the following claimants are former employees of the respondent who exited employment through VER sometime on 30//2013 as admitted again in paragraph 20 of the memorandum of claim namely;

- a. Irene Kanyoro*
- b. Pamela Ndombi*
- c. Susan Mukiri*
- d. Bernke ndambuki*
- e. Carolyn chebii*
- f. Stenly Rotich*
- g. Jeridah mbaka*
- h. Michale Mbuvi*
- i. Donde Mudembei*

3. the claim by the said employees is time barred having left in on 30/4/2013 and the claim was filed after 3 year window is closed as per section 90 of the Employment Act, 2007.

5. The respondent shall raise a preliminary objection during the hearing of this matter regarding jurisdiction of this court and section 90 of the Employment Act, 2007 which states thus: ...

The claimants filed Grounds of Opposition to the Preliminary objections. Both parties made their oral arguments in court.

The respondent submits that the claim is filed out of time pursuant to the provisions of section 90 of the Employment Act where at paragraph 20 of the Memorandum of Claim the claimants assert that the cause of action arose in 2013 after the respondent programme on voluntary early retirement. That on 1st March, 2013 the claimants communicated to the claimants about the voluntary early retirement and on 30th April, 2013 left the employment of the respondent. the claim herein was then filed on 15th May, 2017. Such time was out of the 3 years provisions under section 90 of the Employment Act, 2007 and the claim should be dismissed.

The claimants in response submits in their grounds that all facts of the claim have not been denied save for the objections made. The cause of action only arose when the respondent implemented a PriceWaterhouseCoopers (PWC) restricting and skills mapping report in November,

2011. A total of 131 employees under job grade 5 and 6 were with discrimination deprived of their rightful earnings by the respondent. On 25th February, 2014 the respondent appointed a committee under Mrs Milkah Bwondora to investigate the discriminative salary payments, underpayments and discrepancies with a view of harmonisation. The committee completed its report in May, 2014. Its recommendations was an undertaking to pay salary arrears and the respondent admitted to owing Kshs.45,915,113.79 and which includes amounts claimed in the memorandum of Claim.

On 21st February, 2017 the respondent acknowledged the debts owed to the claimants in salary arrears. Such acknowledgement lifted the limitation period. The Bwondara committee report having been submitted in November, 2014 acknowledging a debt in salary arrears extended time.

There is a letter of the respondent dated 9th September, 2016 to the Commission on the Administrative Justice, a constitutional commission with an acknowledgement that the claimants are owed salary arrears.

The claimants relied on several authorities and cases in **Kisii County Government versus Masosa Construction Company Ltd [2015] eKLR; Gateway Insurance Company Limited versus Nairobi City Council [2009] eKLR.**

The fact of the claimants set out under paragraph 2 of the respondents Statement of Defence having left the employment of the respondent is not denied. termination of employment is not contested save for submissions that following termination of employment on 30th April, 2013 the respondent has received a report from its committee acknowledging that employees in Grade 5 and 6 had been underpaid. That such acknowledgement have also been made by the respondent's chairman and to reports submitted to the Commission on Administrative Justice.

Section 90 of the Employment Act, 2007 provides for time limitation on claims based on employment and for which the remedies are set out under the same legislation. The law provides that;

90. Limitations

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based on 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 or in the case of continuing injury or damage within twelve months next after the cessation thereof.

In this case, when did the cause of action arise?

The Court of Appeal in the case of **Attorney General & another v Andrew Maina Githinji & another [2016] eKLR** while addressing a matter similar such as this and while addressing the question of what constitutes 'a cause of action' held as follows;

“A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.”

That definition was given by Pearson J. in the case of **Drummond Jackson vs. Britain Medical Association (1970) 2 WLR 688** at pg 616. In an earlier case, **Read vs. Brown (1889), 22 QBD 128**, Lord Esher, M.R. had defined it as:-

“Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court”.

Lord Diplock, for his part in **Letang vs. Cooper [1964] 2 All ER 929 at 934** rendered the following definition:-

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

The Court of Appeal further held that;

... By expressly inserting Section 90, [of the Employment Act, 2007] 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 preemptorily limits actions by the use of the word 'shall'.

In the case of **Benjamin Wachira versus Public Service Commission & another [2014] eKLR**, the court held as follows;

On the accrual date of the cause of action which has a direct bearing on running of time, the Claimant takes the view that the cause of action in his case did not accrue until 8th August 2006 when he was notified that his employment file had been closed, thus dashing any hopes of his reinstatement to the public service.

*This Court has however taken a different view on this matter in the case **Hilarion Mwabolo –vs- Kenya Commercial Bank [2013] eKLR** to the effect that accrual of the cause of action in a claim emanating from an employment contract takes effect from the date of termination as stated in the letter communicating the termination. The fact that an employee whose employment has been terminated 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.

Conversely in this case, employment of the claimants by the respondent ceased with effect from 30th April, 2013. This fact was within the knowledge of the claimants when they filed suit on 15th May, 2017 a period of over 3 years since and to be exact, four (4) years after the fact of termination of employment.

The exceptions cited by the claimants in their submissions and references to the cases of **Kisii County Government versus Masosa Construction Company Ltd [2015] eKLR** and **Gateway Insurance Company Limited versus Nairobi City Council [2009] eKLR**, in my view relates to matters unrelated to causes of action arising out of employment as stipulated under the Employment Act, 2007 and where section 90 apply in mandatory terms. The reasons set out in the cited cases to extend time in civil cases are not available under section 90 of the Employment Act, 2007. All claims which arise out of employment and have a remedy under the Act, should be commenced within a time period of three (3) years.

Termination of employment whether lawful or unlawful is actionable from the date it is effected. Matters taking place at the employer's work place after such termination of employment do not apply to such an employee. The failure to commence suit within the allowable time is at the peril of such an employee.

Accordingly, the objections by the respondent are with merit and are hereby allowed. The claims relating to employees terminated on 30th April, 2013 are time barred. Such are dismissed. The claimant shall amend the Memorandum of Claim removing claimants set out under paragraph 2 of the Statement of Defence from the record.

Delivered in open court at Nakuru this 15th day of May, 2018.

M. MBARU JUDGE

In the presence of:

Court Assistants: Nancy Bor & Martin Oletiyana

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