



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 2034 OF 2014**  
**MARY SYEVUTHA MUVEVA.....CLAIMANT**  
**VERSUS**  
**KITUI COUNTY GOVERNMENT.....RESPONDENT**  
**KENYA COUNTY GOVERNMENT**  
**WORKERS UNION.....INTERESTED PARTY**  
**RULING**

**Introduction**

1. The application before me is a Notice of Motion dated 9.2.2018. It is brought by the Respondent in the suit and it seeks the striking out of the suit with costs. The application is based on the ground set out on the body of the motion plus the supporting affidavit sworn by Mr. Alexander Kimanzi on 9.2.2018. The main grounds of the motion are that the suit is statute barred and the Court lacks jurisdiction to entertain it. That the claimant having been dismissed from her former job on 26.6.2009, the last date to institute her claim would have been 26.6.2012 and not 13.11.2014. In the applicant's view, the suit was filed 2 years out of time which was otherwise an abuse of the Court process.

2. The claimant has opposed the application by filing the Replying Affidavit sworn by on 12.3.2018. The gist of the affidavit is that the application lacks merits, it is an abuse of Court process, and it is otherwise a delaying tactic intended to derail the matter from expeditious disposal. She denied that the suit is statute barred and contended that after her dismissal on 26.6.2009, she lodged an appeal against the dismissal on 20.7.2009 as provided under clause 33 of the collective Agreement (CBA). The appeal was made to the Public Service Commission(PSC) but after investigations by the Kitui CID Divisional Headquarters, no evidence against the claimant was found and the matter was returned to the respondent vide the letter dated 21.1.2010. Thereafter the Claimant engaged the respondent through conciliation at the Ministry of Labour until 26.6.2014 when the conciliator issued a Certificate of non-reconciliation and authorized the parties to refer the dispute to this Court. According to the claimant time stopped running when she lodged her appeal with the PSC on 20.7.2009 and it started again on 26.6.2014 when the conciliator issued a certificate of non-resolution of the dispute and referred the same to this Court. She therefore maintained that the suit having been filed on 13.11.2014, it is not statute barred as alleged by the applicant.

3. The application was disposed of by written submission, which were high highlighted by counsel on 12.3.2018.

**Analysis and Determination**

4. After careful consideration of the pleadings, application, Affidavits and the rival submissions, the following issues arose for determination:

- (a) Whether the claimant was dismissed from employment on 26.6.2009.
- (b) Whether time was suspended by the filing of the appeal at the PSC on 20.7.2009 until 23.4.2014 when certificate of non conciliation was issued by the conciliator appointed by the Labour Ministry.
- (c) Depending on the answer to a & b above, whether the suit is time barred.

**Dismissal on 26.6.2009**

5. The respondents letter dated 26.6.2009 to the claimant stated as follows:

***“In the Finance, Staff and General Purposes Committee held in the Municipal Chambers on 9th of June, 2009, under Min (FSGP 5/2009 and which was adopted by a full council meeting held on the same date.***

***It was recommended to the Public Service Commission that you be dismissed from Municipal Council of Kitui Service as from 9th June 2009 on account of being found guilty of Defrauding it Kshs.110,740.00 (Kenya shillings one Hundred ten thousand seven hundred and forty only) within a period of two months by forgoing council receipts.***

***You have a right of appeal to the Public Service Commission on the Council’s decision, through the Town Clerk, within forty two days upon receipt of this letter.***

**P. O. ADUONDO**

**TOWN CLERK**

**Copy to: .....**”

6. There is no dispute that the Claimant appealed to the PSC on 20.7.2009 which was within the 42 days window given by the letter dated 26.6.2009. There is also no dispute that the minutes of the council and claimant’s appeal were forwarded to the PSC by the respondent’s letter dated 2.12.2009 which letter alleged that there was case of fraud by the claimant. Finally, it is common knowledge that on 21.1.2010, the PSC wrote to the respondent and returned the claimants files to her with directions to revert back with the criminal investigation report to facilitate the finalization of the case. My keen perusal of the record presented to Court has not seen any further correspondence from the respondent to the PSC. However I have seen a letter from the Divisional CID Headquarters at Kitui addressed to the office of the Prime Minister dated 6.1.2011 referring to the letter by the PSC dated 21.1.2010 by which the Divisional CID officer stated that no complaint against the claimant in respect of the matter raised in the said appeal was ever lodged to that office and further confirmed that there were no investigations pertaining to that matter was being carried.

7. In view of the foregoing matters, it would appear to me that the claimant was never summarily dismissed from her employment as pleaded herein. The reasons for the foregoing opinion is that the resolutions by the full council of the respondent was a mere recommendation to the employer, PSC for dismissal of the claimant effective 9.6.2009. With the claimants appeal dated 20.7.2009, the PSC was obligated to investigate the matter before approving the recommendation. The request for the police investigation report from the respondent vide her letter dated 21.1.2010 was never responded to and the matters went into a limbo. In deed the letter dated 6.1.2011 from the Divisional CID Headquarters Kitui further cements my view that the respondent never followed up to the matter and instead another person raised the matter with the police through the office of the Prime Minister.

8. Without any other evidence to prove the respondent availed the police investigations report to the PSC and the matter was considered and determined by approval of the summary dismissal of the claimant, my firm opinion is that the dismissal of the claimant from the respondent was never approved by the PSC and to date it remains a recommendation. It is therefore my further opinion that all the conciliation proceeding proceeds before the Ministry of Labour and now before this Court are founded on a misconception that the claimant was summarily dismissed from service by the letter dated 26.9.2009. The said misconception is mutual to both parties and is it is seen clearly running through all the steps of the said proceedings before the conciliator and this Court.

#### **Statute Barred Suit**

9. In view of the foregoing findings that the dismissal of the claimant never took effect after the failure by the PSC to give its approval, it is clear that the issue of statute bar does not arise. Consequently, it is my holding that the Application now before the Court is devoid of merits and it must fail.

#### **Disposition**

10. The Notice of Motion dated 9.2.2018 is dismissed with no order as to costs. The parties are directed to either settle the matter amicably and in good faith considering the finding herein that they were both misconceived about the effect of the letter by the respondent dated 26.6.2009 and the response by the PSC dated 21.2.2010.

**Dated, Signed and Delivered in Open Court at Nairobi this 22nd day of June, 2018**

**ONESMUS N. MAKAU**

**JUDGE**