



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1286 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

BENEDICTA KINYA MUTUAMWARI.....APPLICANT

-Versus-

PUBLIC SERVICE COMMISSION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

There are two applications before me for consideration. The first is filed by the claimant vide notice of motion dated 10th May 2017 seeking orders restraining the respondent from evicting the claimant or interfering with the claimant's occupation of House No. LG 553A in Shauri Moyo Estate.

The second is a notice of preliminary objection filed by the respondent seeking the dismissal of the suit on grounds that it is time barred under Section 90 of the Employment Act, is grossly incompetent, misconceived, frivolous and an abuse of court process and further that the court lacks jurisdiction to determine the same.

The preliminary objection will be dealt with first since if it succeeds the court would not have jurisdiction to determine the claimant's application and must down its tools as was stated in the case of **OWNERS OF MOTOR VESSEL "LILLIAN S" -V- CALTEX OIL KENYA LIMITED**.

Section 90 of the Employment Act 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 or 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.

The claimant argues that the cause of action arose upon the dismissal of her appeal against termination on 20th February 2015 and therefore limitation period did not start running until that date. It is therefore her argument that her claim is not time barred.

The respondent on the other hand argues that the cause of action arose on the date of dismissal on 26th January 2012 and the limitation period of 3 years under Section 90 of the Employment Act expired on 25th January 2015, yet the suit was filed on 27th July 2015. The respondent relied on the decision in **BENJAMIN NDIITHI -V- PUBLIC SERVICE COMMISSION & ANOTHER** in which it was held that –

*"This Court has however taken a different view on this matter in the **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."*

The respondent further relies on the Court of Appeal decision in **THURANIRA KARAUARI -V- AGNES NCHECHE** in **Civil Appeal No.**

192 of 1996 in which the court held that limitation goes to the jurisdiction of the court and a suit that is time barred is incompetent and should be struck out and the plaintiff remains non-suited forever. The respondent further relied on the Supreme Court decision in **SAMUEL KAMAU MACHARIA & ANOTHER -V- KENYA COMMERCIAL BANK LIMITED & 2 OTHERS [2012]** where the court held that

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“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

It is not in doubt that the claimant was dismissed from employment on 26th January 2012. She thereafter sought review of the dismissal and was informed by letter dated 13th May 2014 that her application for review was unsuccessful. This suit was filed on 27th July 2015.

Section 90 provides that no suit shall commence 3 years after “*the act, neglect or default complained of...*” In her memorandum of claim at paragraph 8 the claimant has pleaded that the cause of action is the termination of employment on 26th January 2012. As stated in the case of BENJAMIN NDIITHI, the cause of action is reckoned from the date of dismissal and not the determination of an appeal or review against the said dismissal.

For the foregoing reason I find that the claim herein is time barred and this court therefore has no jurisdiction to determine the same. The claim is accordingly dismissed for want of jurisdiction and for being time barred.

There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF AUGUST 2018

MAUREEN ONYANGO

JUDGE