



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NO 733 OF 2015

TIRAS WAIYAKI THUKU.....CLAIMANT

VERSUS

KENYA BROADCASTING CORPORATION.....RESPONDENT

RULING

1. By a notice of preliminary objection filed on 21st December, 2017 the respondent sought that the claim herein be struck out by reason of the fact that the suit was statute barred. Counsel further contended that the amendments sought introduced new causes of action which contravened the provisions of section 90 of the Employment Act.
2. The claimant opposed the preliminary objection contending that the intended amendments challenge his dismissal on grounds that it violated article 50(1) of the Constitution. According to counsel, the invocation of section 90 of the Employment Act as a basis of the preliminary objection cannot hold any water in the light of the constitutional edicts set out under article 50(1).
3. It would seem that counsel for the claimant does not deny that the claim as filed is forbidden by section 90 of the Employment Act. Counsel seems to contend that article 50(1) of the Constitution overrides section 90 of the Employment Act hence the suit should be sustained. Counsel in essence is submitting that section 90 of the Employment Act in essence offends article 50(1) of the Constitution hence should be null and void to that extent.
4. The initial claim as filed states among others that the claimant in February, 2006 was granted study leave to pursue a bachelors degree at the University of Roehampton London which he completed in the year 2009. Upon completion the claimant was admitted in the same University for a Master's degree whereupon he sought the extension of his study leave from the respondent. By a letter dated 14th July, 2009 the respondent wrote back to the claimant informing him that the extension of his study leave had been declined as he was no longer the respondent's employee as he had been deemed to have deserted duty with effect from 1st May, 2009 when his study leave ended.
5. The claimant further stated that he was awarded a partial scholarship and enrolled for his Master's degree which he completed in 2010 and thereafter enrolled for a second masters degree which eh completed in 2013 and returned in 2014. Stopping here for a while, the contractual relationship between the claimant and respondent was brought to an end on 14th July, 2009 when the respondent wrote to the claimant informing him he was no longer the respondent's employee having been deemed to have deserted duty with effect from 1st May, 2009 when he failed to return to work upon expiry of his study leave.
6. The respondent may have been wrong in doing so in doubt but the relationship was brought to an end all the same. The claimant ought to have pursued the issue of legality or otherwise of the termination of his services within three years from the 14th July, 2009 which was by July 2012. The claimant did not do so. The claimant now seeks to amend the statement of claim to include among other things claim for damages for unlawful termination which led to psychological torture, trauma, embarrassment, domestic difficulties, besmirching of his character as a man and as a professional broadcaster/media personality (public figure).
7. Whereas the claimant contends that the amendments sought were to bring his grievances in the context of article 50(1) of the Constitution, no particulars have been pleaded to show in what way or manner did the respondent violate his rights under article 50(1) of the Constitution as required in any allegation of breach of constitutional rights and or fundamental freedoms. The amendments sought if allowed comprise of ordinary employment contract disputes and no material has been pleaded sufficient to escalate them to constitutional questions.
8. Considering that the claimant has not pleaded in the intended amendments the provisions of the constitution alleged to have been violated and in what manner, the court cannot help but construe the introduction of constitutional issues through argumentation by counsel as a contraption to circumnavigate clear provisions of section 90 of the Employment Act.

9. The preliminary objection is therefore found to be merited and the claim is hereby struck out with costs for being statute barred.

10. It is so ordered.

Dated at Nairobi this 5th day of October, 2018

Abuodha Jorum Nelson

Judge

Delivered this 5th day of October, 2018

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.