



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2365 OF 2017**

**GEORGE OWINO.....CLAIMANT**

**v**

**POSTAL CORPORATION OF KENYA.....RESPONDENT**

**RULING**

1. George Owino (Claimant) was suspended by Postal Corporation of Kenya (Respondent) through a letter dated 11 November 2010.
2. On 2 February 2011, the Respondent wrote to the Claimant informing him that it had been decided to dismiss him from service with effect from 11 November 2010.
3. On an undisclosed date in 2010, the Claimant was charged before the Homa Bay Magistrate's Court with offences of stealing by servant and obtaining money by false pretences.
4. In a judgment delivered on 2 February 2016, the Magistrates Court acquitted the Claimant on all the counts he was facing.
5. Armed and on the strength of the acquittal, the Claimant instituted legal proceedings against the Respondent on 29 November 2017 and he stated the Issues in Dispute as
  - a) Unlawful termination of employment
  - b) Wrongful arrest and malicious prosecution
  - c) Refusal to pay terminal dues and benefits
  - d) Compensation for unlawful termination of employment.
6. When the Respondent was served with the Court documents, it filed a *Notice of Preliminary Objection* on 22 February 2017 contending that the Cause was time barred. Section 90 of the Employment Act, 2007 and Section 24 of the Postal Corporation of Kenya Act were cited.
7. The Claimant filed a *Reply to the Notice of Preliminary Objection* on 28 March 2018 and a *Further Replying Affidavit to Preliminary Objection* on 22 October 2018.
8. The parties also filed elaborate submissions and case law on 13 November 2018 and 30 November 2018, and the Court took arguments on 3 December 2018.
9. It is not in dispute that the Claimant was dismissed through a letter dated 2 February 2011.
10. Because that is the date the Claimant was informed of his dismissal that is the date his cause of action for unlawful termination of employment accrued.
11. The instant proceedings were lodged with the Court on 29 November 2017, some 6 years after the cause of action accrued.
12. Section 90 of the Employment Act, 2007 provides for a limitation period of 3 years in causes of action arising out of employment contracts.

13. That the action was commenced outside the prescribed period is not in doubt.

14. In attempting to overcome the 3 year limitation, the Claimant asserted that limitation was a *technical issue* curable by invoking the provisions of Articles 50 and 159 of the Constitution and that the cause of action constituted a *continuing injury*, and therefore accrued on 2 February 2018.

15. The Court does not agree with the proposition that a claim for unfair termination of employment constitutes a *continuing injury* within the context of section 90 of the Employment Act, 2007.

16. Termination of employment occurs once and is complete once the employee is informed of the fact.

17. And if the Court were wrong on that view, section 90 of the Employment Act, 2007 envisages institution of causes of action comprising *continuing injury* within 12 months of the cessation.

18. If the *injury* sustained or occasioned to the Claimant ceased with the acquittal on 2 February 2016, he ought to have commenced legal action on or before 1 February 2017. The Claimant moved the Court in 29 November 2017.

19. The Court will also endorse as applicable in this Cause, the Court of Appeal's decision in *Attorney General & Ar v Andrew Maina Githinji & Ar* (2016) eKLR that the learned judge fell into error in holding that time could only run from ..... when the Respondents were acquitted of criminal charges that arose from the same facts and circumstances giving rise to the dismissal.

20. The Claimant further contended that the limitation provision in section 90 of the Employment Act, 2007 should give way to the provision of Article 159(2)(d) of the Constitution.

21. Limitation, as was stated in *Divecon v Samani* (1995-1998) EA 48 is not merely a *procedural issue* but goes to *jurisdiction* and therefore, in the view of the Court, the aforesaid Article cannot be of assistance to the Claimant.

22. Lastly, the Court does not find the *suspension letter* as amounting to an undertaking/estoppel (in terms of section 39 of the Limitation of Actions Act) by the Respondent that it would await the conclusion of the criminal trial before taking disciplinary action against the Claimant.

23. The upshot of the above is that the Court upholds the preliminary objection and finds that the unfair termination of employment cause of action is statute/time barred.

24. The Claimant also set out a plea of *illegal confinement and malicious prosecution*.

25. However, the Claimant failed to include all the necessary parties to such a cause of action.

26. The Court therefore orders that the Memorandum of Claim herein be dismissed with no order as to costs.

**Delivered, dated and signed in Nairobi on this 7<sup>th</sup> day of December 2018.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Ms. Odembo instructed by Celyne Odembo & Associates

For Respondent Mr. Wachira instructed by Kipkenda & Co. Advocates

Court Assistant Mamo