



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 213 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

BERNARD AMORO MUTENDI.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

Before me is a preliminary objection dated 2nd May 2017 filed in court on 11th May 2017. The purport of this preliminary objection is that the claim herein by the claimant against the Respondent is statutorily time-barred pursuant to Provisions of Section 3(2) of the Public Authorities Limitation Act as read together with Section 90 of the Employment Act, 2007. Based on the aforesaid provisions of the law, the respondent prays that this suit be struck out.

From the submissions filed by the Respondent it is contended that the cause of action arose sometimes on or about 2nd April 2013 when the respondent made a decision inter-alia to warn the claimant and retire him on 10 /50 year rule. The Respondent further contends that the Claimant did not file his claim in this court until 26th July 2016 which was a period of 3 years 3 months and 24 days , and yet under section 90 of the Employment Act the Claimant ought to have filed this case before the expiry of three years from the date the Respondent took action which is the alleged basis of this suit claim.

The Respondent also raised reliance on Section 3(2) of the Public Authorities Limitation Act.

For the aforesaid reasons the Respondent avers that this suit as filed is therefore a non-starter and that this court lacks jurisdiction to hear the same. The respondent submits that this suit lacks merit and should therefore be struck out and this court should down its tools in the hearing of this suit.

The claimant vehemently opposes this preliminary objection on points of law for the following reasons:

1. That the Respondent made a decision to terminate the employment of the claimant on 2nd April 2013, that this was not the final decision that the Respondent made in as far as the employment of the Claimant is concerned. A perusal of the memorandum of claim paragraph 9 reveals that vide the claimant's letter dated 1st August 2013 which is Appendix J the claimant did not accept the decision of the respondent following which the respondent reviewed its decision of 2nd April 2013 because the foot note of the letter dated 23rd January 2014 from the Respondent to the claimant at the foot note to wit

“This amends ours Ref: Tsc/Disc/No.0553/02/2012/2013/12 dated 2nd May 2013 which still stands.”

2. Appendix L which is a letter dated 15th day of April 2015 from the respondent to the claimant it is a letter intimates or informs the respondent of the hearing of his appeal which was to be held on the 24th April 2015 and apparently the said appeal was heard by the respondent as Appendix M which is a letter dated 7th May 2015 which at the bottom line upheld the decision that had been taken on 2nd April 2013 and its contents are clear that the Claimant's appeal was heard on the 24th April 2015.

3. That there were decisions made at various times by the Respondent concerning the employment of the Claimant as a matter of fact and it is not true that the decision that the Claimant is challenging was the one made on 2nd April 2013 but a final decision of the Respondent on 24th day of April 2015 when the appeal and the whole process before the said Respondent ended.

4. Annexure 3 to the memorandum of response by the Respondent which are copies of the proceedings and decisions from 24th April 2015 to 26th July 2016 when this suit was filed. It is a period of one year three months and 2 days. That this suit was properly filed and within the time stipulated under Section 90 of the Employment Act. The contention by the Respondent herein should therefore be disallowed.

5. That the preliminary objection or point of law should be dismissed because reliance on Provisions the Public Authorities Limitation Act is too far. The Respondent is not one of those entities that the said Act applies. Section 2 of the said Act defines the "proceedings" as follows "means civil proceeding in the High Court or a subordinate court.

(2) For the purposes of this Act-

(a) Proceedings against the Government includes proceedings against the Attorney-General or any Government department or any public officer as such;

(b) Proceedings against a local authority includes proceedings against any person employed by a local authority and sued or intended to be sued as such;

(c) A person is under a disability while he is a minor or of unsound mind or is detained in pursuance of any written law, which authorizes the detention of persons suffering from mental disorder or unsoundness of mind.

From the above definition no mention is made of the Teachers Service Commission or any commission as being one of those entities that are covered by the Provisions of this Act. In fact the head note to the Act is explicit. It provides as follows: "**An Act of Parliament to provide for the limitation of proceedings against the Government and a local authority, and for purposes incidental to and connected with the foregoing**"

In its submission in support of the preliminary objection, the respondent argues that the court lacks jurisdiction to entertain the suit relying on the decision of the Supreme Court in **Re The Matter of the Interim Independent Electoral Commission [2011] eKLR** where the court stated –

"... that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution."

The respondent further submits that the jurisdiction conferred on this court under Section 12(1)(a) of the Employment and Labour Relations Court Act is a special jurisdiction conferred upon the court pursuant to Article 262(2) of the Constitution which is not absolute, that the jurisdiction is subject to Section 3 of the Civil Procedure Act which provides that –

"In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force."

It is further the respondent's submission that Section 12(1) of the Employment and Labour Relations Court Act is subject to express statutory limitations under Section 5 of the Civil Procedure Act, which provides that–

Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred.

The respondent further submits that the Limitation under Section 12(1)(a) of the Employment and Labour Relations Court Act is subject to the provisions of Section 3(2) of the Public Authorities Limitation Act, Cap 39, Laws of Kenya as read with Section 90 of the Employment Act, 2007 that –

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 respondent submits that the act forming the basis of the suit herein arose out of the decision of the respondent to warn and retire the claimant on 2nd April 2013, that the impugned act of the respondent was its disciplinary proceedings of 2nd April 2013. That the suit herein was instituted on 26th July 2016, over there (3) years, three (3) months and twenty four (24) days after the decision of the respondent to warn and retire the claimant under the 10/50 year rule.

That the suit herein is unlawfully instituted as it was not commenced within three years next after the act, neglect or default complained of as stipulated in law and the same ought not to be entertained by this Court.

The respondent relies on the principle developed in **Republic -v- Kiambu Land Dispute Tribunal & 2 Others Ex-Parte Wambui Chege Macharia & 2 Others [2016] eKLR**. That the principle of determination of the commencement date for the time limitation is directly applicable to the suit herein. In that matter the Court concurred, at paragraph 16 thereof, with the decision in **Raila Odinga & 6 Others -v-**

"It is therefore clear that applications for judicial review must be commenced within 6 months from the date when the ground for the application arose. The law does not state that the application be made from the date when the applicant became aware of the decision or when the decision was issued to the parties."

The respondent submits that since the cause of action arose on 2nd April 2013, the suit ought to have been commenced on 2nd April 2017 which fell within three years next after the impugned decision of the respondent was made. That the import of the time limitation in law is that a suit so affected is a nullity as it offends the law itself. The respondent submits that any suit which is a nullity is void and strips the court of jurisdiction before such suit is filed.

The respondent relied on the Supreme Court decision in **MARY WAMBUI MUNENE -V- PETER GICHUKI KING'ARA AND 2 OTHERS [2014] eKLR** and urges the court to find that it has no jurisdiction to entertain this matter and down its tools forthwith.

The respondent further submits that the suit being a nullity and void, it is incurably bad and lacks the legs upon which to stand, relying on the authority of **MACFOY -V- UNITED AFRICA COMPANY LIMITED [1961] 3 ALL ER** in which Lord Denning held –

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad, you cannot put something on nothing and expect it to stay there. It will collapse."

The respondent submits that limitation goes to the root of a court's jurisdiction and the court therefore has no jurisdiction to entertain the suit in its entirety, urging the court to dismiss the claim with costs.

Determination

The issues arising for determination in this suit are when the cause of action in the claim accrued, the applicable law and whether the claim is statute barred.

On the accrual of cause of action, the claimant's prayers in the memorandum of claim are relevant. At paragraph 11 and 12 of the claim the claimant prays this –

1. That the action by the Respondent to interdict and/or finally warn and retire the claimant under 10/50 year rule was without lawful cause and/or basis and that the same was unjustified in the circumstances.
2. That despite several demands having been made to revoke and review the Respondent's decision aforesaid, the said respondent has neglected and/or refused to do so making the filing of this suit necessary.

In his prayers, the claimant seeks the following reliefs –

- a) A declaration that the decision to warn and also retire the Claimant under 10/50 year rule was improper, illegal and wrongful and the respondent be compelled to rescind the said decision and reinstate the Claimant to his employment.
- b) That the Respondent be ordered to pay the Claimant's salary for period from February 2013 to the date of reinstatement.

From the foregoing it is evident that the cause of action is the decision to warn and retire the claimant under the 10/50 year rule which according to him was improper, illegal and wrongful. The cause of action thus arose on the date of communication of the said decision being the letter dated 9th July 2013.

In the notice of preliminary objection the respondent relies on Section 3(2) of the Public Authorities Limitation Act and Section 90 of the Employment Act, 2007.

As correctly pointed out by the claimant, the Public Authorities Limitation Act does not apply to the respondent. Section 2 of the Act defines proceedings under Section 2 thereof as –

- (a) **Proceedings against the Government includes proceedings against the Attorney-General or any Government department or any public officer as such;**
- (b) **Proceedings against a local authority includes proceedings against any person employed by a local authority and sued or intended to be sued as such;**
- (c) **A person is under a disability while he is a minor or of unsound mind or is detained in pursuance of any written law, which authorizes the detention of persons suffering from mental disorder or unsoundness of mind.**

The relevant law is therefore Section 90 of the Employment Act, which provides that –

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.

On the issue whether the claim is statute barred, having found that the cause of action arose on 9th July 2013 and the claim herein having been filed on 26th July 2016, it is time barred by 17 days as under Section 90 of the Employment Act, the claim must be filed within 3 years.

As was stated in the case of **DIVECON -V- SAMANI**, that no court has jurisdiction to entertain a claim filed after the lapse of the limitation period. This court therefore lacks jurisdiction to entertain the claim herein and must down its tool as was stated in the case of **OWNERS OF 'MOTOR VESSEL 'LILLIAN S' -V- CALTEX OIL (KENYA) LIMITED [1989] KLR 1** per Nyarangi JA at page 14 –

“I think that it is reasonably plain that the question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has not power to make one more step.”

The preliminary objection by the respondent must on the foregoing grounds succeed. The same is upheld with the result that the claim herein is struck out. There shall be no orders for costs.

DATED AND SIGNED AT NAIROBI ON THIS 9TH DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 6TH DAY OF DECEMBER 2018

MATHEWS NDERI NDUMA

JUDGE