



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 270 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

DAVID AGONGO KUGO.....CLAIMANT

Versus

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

The Respondent herein the Teachers Service Commission raised preliminary objection by its Notice of Preliminary Objection dated 4th November, 2014 on grounds that the Claimant's claim herein is time barred and grossly offends the mandatory provisions of section 90 of the Employment Act No.11 of 2007. It prays that the entire claim be struck out with costs to the Respondent.

In its written submissions in support of the preliminary objection the Respondent submitted that the claimant was dismissed from service on 21st June 2010 as confirmed by the letter of dismissal appended to the memorandum of claim as Exhibit 3. The Respondent submits that the cause of action therefore arose on 21st June 2010 and any action against the Respondent based on the dismissal ought to have been filed within 3 years being on or before 21st June, 2013. The Respondent submits that section 90 of the Employment Act which provides for the limitation period of 3 years is couched in mandatory terms and prohibits filing of any suit outside the statutory limitation period.

The Respondent submits that the court record confirms that the claim herein was filed on 2nd October 2013, four months outside the statutory bar and accordingly should be dismissed with costs. The Respondent relied on the decision of this court in Mombasa Industrial Court Petition No.1 of 2013. **Josephat Ndirangu v Henkel Chemicals (EA) Limited** in which Radido J, held -

"It is not disputed that the Claimant was dismissed on 24th August, 2009. At the time of dismissal, the Employment Act had been in operation for nearly one year. Section 90 of the Act now regulates limitation of time in employment contracts to three years. The cause should therefore have been filed on or before 24th August, 2012. But it was lodged in court on 15th March, 2013. It was time barred. Section 4 (1) of the Limitation of actions act is not applicable and therefore the Claimant cannot be heard to argue that the limitation was 6 years.

The Respondent further relied on Nairobi Industrial Cause No.846 of 2013, **FRED MUDAVE GOGO v G4S SECURITY SERVICES (K) LTD (2014)** in which Mbaru J stated as follows -

"It cannot be denied that the cause of action herein is based on a contract of employment. The Claimant's employment was terminated on 8th August 2008, a period over 3 years from the date of filing this claim in the Industrial Court on the 5th June, 2013 and therefore by operation of the law, the claim

had already lapsed. There are no good grounds advanced for the delay in causing the claimant/applicant from filing the claim in good time. This is not a mere technicality as it touches on the substance of the claim and a fundamental flaw if not addressed before parties file their claims."

The Respondent submitted that limitation is a jurisdictional issue that goes to the root of a suit and cannot be cured under Article 159(2) (d) of the Constitution relying on the decision of the court in Nairobi High Court Miscellaneous Application No.316 of 2012, **James Muriithi Ngotho & 4 others v Judicial Service Commission [2012]** in which the court while addressing the subject held -

"Though I agree with the Applicants that the court is enjoined by the Constitution to administer substantive justice, I am persuaded to agree with Mr. Issa for the Respondent that the limitation period of 6 months prescribed under section 9(3) of the Law Reform Act is not a procedural technicality. It is a statutory limitation of time for the filing of applications seeking leave to apply for orders of Certiorari."

"It is therefore a requirement imposed by substantive law and it cannot be said to be a procedural technicality which can be ignored under Article 159 2(d) of the Constitution. It is equivalent to the statutory periods of limitation prescribed under the limitation of Actions Act for instituting actions based for example on contract or tort among others and I think it would be stretching it too far to hold that statutory provisions relating to time can be equated to procedural technicalities envisaged under Article 159(2) (d) of the Constitution of Kenya 2010."

We all know that what is normally regarded as procedural technicalities would be in the nature of procedural lapses that do not go to the root of the matter under consideration. They would for example include lapses like using the wrong mode of moving the court for certain reliefs/orders e.g. filing a notice of motion to seek leave to commence judicial review proceedings instead of a chamber summons as prescribed under Order 53 Rule 1 Civil Procedure Rules or citing the wrong provisions of the law while the substance of the application shows clearly that the law cited is not applicable to the subject of litigation among may others."

The Respondent further relied on the decision in **Mombasa Industrial Court Petition No.1 of 2013 (supra)** where the court held -

"To my mind, similar principles in respect of what the Court of Appeal stated about section 4(1) of the Limitation of Actions Act apply in respect of section 90 of the Employment Act and I would for the sake of clarity state that no employee has the right or power to bring after the end of three years from the date of dismissal or termination, an action founded on a contract of service and that the Industrial Court has no right or power to entertain such claims or extend time for bringing such action. I state so bearing in mind that the Employment Act, 2007 has no provision for grant of leave to institute claims out of time or to extend time within which to commence such actions."

The Respondent submitted that the claim is bad in law, incurably defective and ought to be dismissed for want of jurisdiction.

The Claimant opposed the preliminary objection and in its submissions dated and filed on 24th October 2014, submits that the Claimant was arrested and charged at Kapsabet Principal Magistrates Court in Criminal Case No.653 of 2010 which lasted 3 years from 24th February, 2010 to 3rd July, 2013. It is submitted that the Respondent dismissed the claimant on 21st June 2010 while the criminal case was pending in court.

It is submitted for the Claimant that the cause of action did not arise on 21st June, 2010 because he had already been arraigned in court and charged with the offence of defilement. It is submitted that Judgement in the said case was delivered on 3rd July 2013, when according to the claimant the limitation period started running. The Claimant submits the suit was filed on 14th October, 2013 two months after his acquittal and amended on 31st July 2014, pursuant to leave of the court granted with consent of the parties on 30th July, 2014.

It is submitted that the issue of limitation was not raised by the Respondent at the hearing on 30th July, 2014 until after the defence was filed on 11th August, 2014. It is submitted further that the issue of limitation is not pleaded in the Respondent's defence filed on 15th November 2013, that the Respondent has not responded to the Amended Memorandum of Claim and that the preliminary objection has not been pleaded by the Respondent.

It is submitted that Mombasa Industrial Court Petition No.1 of 2013 JOSEPHAT NDIRANGU v HENKEL CHEMICALS (EA) LTD is not applicable to the present suit as the facts are not the same, that in the present case the date of commencement of cause of action arose from the date of acquittal in the criminal case. It is submitted that the Claimant could not have filed the present case while still facing criminal charges instituted by the Respondent.

It is submitted that the claim is not time barred under section 90 of the Employment Act and the preliminary objection should be dismissed.

Determination

I have considered the submissions of parties. The issues that arise for determination are two, first, when the cause of action arose in this case, and second, if the claimant's suit is time barred.

Section 90 of the Employment Act provides as follows -

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 relevant words are -

"next after the act, neglect or default, complaint ..."

I therefore have to consider what is the act, or the neglect, or default, or complaint in the claimant's memorandum of claim.

At paragraphs 11 and 12 of the Memorandum of Claim the claimant pleads thus-

11. The Claimant avers that the dismissal from employment as a Teacher and removal from register by the Respondent on 21st June, 2013 was unlawful and legally unjustifiable.

12. The Claimant thus seeks declaration that the dismissal from service on 21st June, 2010 and removal from Teachers Register by the Respondent while the Criminal case against him was pending was in violation on the TSC Act Cap 212 and the Employment Act No.11.

The prayers are as follows -

- a) **Reinstatement to the register of Teachers under the Teachers Service Commission.**
- b) **Payment of full salary arrears from April 2010 at Kshs.31,500/- per month to date or until payment in full.**
- c) **General damages for unlawful dismissal.**
- d) **Costs of this suit.**

e) Interest on (b), (c), (d) and (e) at court rates.

None of the prayers of the Claimant are in respect of the arraignment in court or the acquittal.

Again section 44(4) (g) provides that the following are grounds of summary dismissal -

An employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

This means that under the Employment Act an employer is authorised to dismiss an employee for committing or being suspected on reasonable grounds of committing a criminal offence against the employer or to the substantial detriment of the employer.

Further, the charges against the claimant in the Criminal case were those of defilement while the grounds upon which he was dismissed was professional misconduct. The Claimant's averment that it is the Respondent who preferred charges against him is also not factually correct. It is the police who charged him.

In any event, an acquittal in a criminal case is not always akin to a discharge from liability in a civil case as the standards of proof in the two are different. In a criminal case the standard of proof is "beyond any reasonable doubt" while in a civil case it is on "a balance of probability."

From the foregoing it is obvious first, that it is not the Respondent who charged the claimant and the Respondent therefore had no control over the prosecution of the case, and, secondly that the cause of action as properly pleaded in the Memorandum of Claim, arose upon the dismissal of the claimant and his removal from the Register of teachers on 21st June 2010.

On the second issue, there is no contention that the limitation period for claims arising from employment is 3 years. The cause of action having arisen on 21st June, 2010 and the claim herein having been filed on 2nd October 2013, it was filed more than 3 years from the date of the cause of action and is time barred.

As was stated in the case of JOSEPHAT NDIRANGU (Supra) and FRED NUDAVE GOGO (Supra). limitation is not a mere technicality but a fundamental flaw as it touches on the substance of the claim.

The Court of Appeal was very categorical in the case of DIVECON v SAMANI that "No court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for bringing action."

In the present case the limitation period being 3 years, we can substitute or restate what the court of Appeal stated to mean -

"No court may or shall entertain an action brought under the Employment Act after 3 years."

For the foregoing reasons, I find that this court has no jurisdiction to entertain the claimant's claim herein on grounds that it is statute barred under section 90 of the Employment Act. On these grounds I allow the preliminary objection and strike out the Memorandum of Claim.

There shall be no orders for costs.

Dated and signed and delivered this 2nd day of February, 2017

MAUREEN ONYANGO

JUDGE