



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 17 OF 2016
JOSEPH SITATI NATOCLAIMANT
VERSUS
KENYA PORTS AUTHORITYRESPONDENT
R U L I N G

INTRODUCTION

1. The claimant was employed by the respondent until the year 2004 when he was dismissed for gross misconduct. His appeal against the said dismissal was allowed by the Appeals Committee in the year 2008 but the respondent's Managing Director (MD) failed to approve the recommendations by the HR department to reinstate the claimant. In the meanwhile the claimant filed suits number HCCC 94 and 95 of 2005 which were heard and determined by the High court.

2. On 25/1/2016, the claimant brought this suit claiming ksh.

35, 335,841 made up of arrears in salary, allowances, bonuses and pension. The respondent has responded to the new suit by filing a notice of Preliminary Objection (P.O.) dated 17/2/2016. The grounds upon which the P.O is raised are that the suit statute barred and *res judicata*.

RESPONDENT'S CASE

3. Mr. Ombinchu learned counsel for the respondent submitted that the suit was statute barred whether looked at from the date of the dismissal of the claimant in 2004 or 2008 when the respondent's MD failed to approve the recommendations by the HR office to have the claimant reinstated. In his view, if we take 2004 as the date when the cause of action arose, Section 4(1) of the Limitations Act, which was the applicable law then on the limitation, provided for a limitation period of 6 years. In that regard, 6 years lapsed in 2010.

4. On the other hand, the counsel, submitted that if the date the cause of action arose was 2008 aforesaid, then the applicable law is Section 90 of the Employment Act which limits the period to sue on employment contracts to 3 years from the date the cause of action arose. In that respect, the counsel, submitted that the 3 years span lapsed in 2011. Consequently, according to the counsel the suit having brought in 2016 is statute barred and ought to be struck out.

5. In addition the foregoing defence, Mr. Ombinchu submitted that the suit is *res judicata* because the issues in the suit were determined on merit by the High Court in HCCC 94 and 95 of 2005.

CLAIMANT'S CASE

6. Mr. Tindika, learned counsel for the claimant opposed the PO on grounds that the suit was founded on the constitutional rights to property, and that the issues were not covered in the said HCCC 94 and 95 of 2005. According to him, the decision in HCCC 94 of 2005 allowed the claimant to bring other suits to ventilate his other claims. As regards the statute bar, the counsel submitted that the suit raised constitutional issues including the manner of termination of claimant's employment and deprivation of property right in the money earned. He cited Article 40 of the constitution that guarantees the right to property and Article 260 of the constitution which defines property as including money. In view of the said constitutional issues, the counsel submitted that the statute bar erected by Section 90 of the Employment Act and Section 4(15) of the Limitation of Actions Act does not apply to this suit. Finally the counsel submitted that some of the claims made are not static but accruing over time and as such they are not statute barred.

ANALYSIS AND DETERMINATION

7. After careful consideration of the pleadings, filed and the submissions by counsel, the only issues for determination are:

- a. Whether the suit is statute barred.
- b. Whether the suit is *res judicata*.

STATUTE BARRED SUIT

8. There is no dispute that the claimant was dismissed in 2004 and even after his successful appeal, he was never reinstated to his employment. The cause of action founded on that dismissal therefore arose in 2004 and the applicable law on Limitation period was Section 4(1) of the Limitation of Actions Act. The said provision limited the period for commencing suit founded on employment contract to six years from the date the cause of action arose. Six years in this case lapsed in 2010 as correctly submitted by the defence counsel and therefore this suit is statute barred because it was commenced on 25/1/2016.

9. By making the foregoing opinion, I have dismissed the claimant's contention that the suit is raising constitutional issues related to manner of termination of employment and deprivation of property in form of salary and allowances, bonuses and pension. Whereas, I do appreciate that the said reliefs are founded on the constitution, I regret to observe that they are prima facie anchored on the contract of employment between the parties herein. It is clear that, what triggered the dispute herein was the termination of the said contract which is a matter which need not invoke the procedure for constitutional violations because the Employment Act has provided for the primary mechanisms to deal with termination of employment contracts. Considering the reliefs sought by the suit, there is no doubt that the claim is for monetary compensation arising from the contract of employment to which Section 90 of the Employment Act and Section 4(1) of the Limitation of Actions Act applies.

RES JUDICATA

10. In view of the finding herein above that the suit is statute barred I see no point of determining the issue of *res judicata* because the court lacks jurisdiction to continue entertaining it. I must therefore down my tools.

DISPOSITION

11. The suit is struck out for being statute barred. No order as to costs.

Dated, signed and delivered this 31st March 2017

O. N. Makau

Judge