



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 262 OF 2016

MESHACK OTIENO KACHUODHO CLAIMANT

V

COMMISSIONER GENERAL KENYA REVENUE AUTHORITY RESPONDENT

RULING

1. The Claimant commenced legal proceedings against the Respondent on 8 July 2016 alleging breach of contract in that the Respondent promoted him in 2008 but maliciously concealed from him the promotion, a fact he only became aware of in January 2016 when he was clearing after retirement. He seeks damages of up to Kshs 16,919,112/- which he would have earned in the higher grade.
2. The Respondent filed a Statement of Response and Notice of Preliminary Objection on 28 July 2016.
3. The objection was not prosecuted until 28 February 2017 when the Court insisted that it be urged.
4. The objection is that the suit be struck out on the grounds that
 1. It is fatally defective as it offends the provisions of
 - (a) Section 3(1) of the Public Authorities Limitation Act Cap 39 Laws of Kenya
 - (b) Section 4(1) of the Limitation of Actions Act Cap 21 Laws of Kenya
 - (c) Section 90 of the Employment Act Cap 11 of 2007
 2. THAT the Claimant's claim filed on 8th July, 2016 is misconceived and an abuse of the court process and the same ought to be dismissed with costs to the Respondent.
5. The Court has given due consideration to the objection, Claimant's skeleton submissions, oral submissions in Court and the authorities cited.
6. The Claimant's contention that he became aware of the letter of promotion while clearing after retirement is not disputed and in fact the Respondent in its Response admitted that a letter promoting the Claimant was issued in error and was withdrawn immediately.
7. If the contention by the Claimant is correct, at least on the papers, then the cause of action being advanced by the Claimant cannot be defeated by dint of either the *Public Authorities Limitation Act*, the *Limitation of Actions Act* or the *Employment Act* because of the provisions of section 26 of the Limitation

of Actions Act.

8. The section provides Where, in the case of an action for which a period of limitation is prescribed either;

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) **the right of action is concealed by the fraud of any such person as aforesaid; or the**

(c) **action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it. (my emphasis)**

9. The Claimant in this respect has alleged malicious concealment, and in that case his advocate's submission that time did not begin to run until the discovery of the promotion letter by the Claimant in January 2016 is correct and sound in law.

10. Section 3(1) of the Public Authorities Limitation Act relates to *tort(s)* and is therefore inapplicable in the instant case, while the provisions of section 26 of the Limitation of Actions Act overrides the limitation provision in section 4(1) of the Limitation of Actions Act and section 90 of the Employment Act, 2007.

11. The Court therefore overrules the preliminary objection and directs that the Cause be progressed for hearing on the merits.

12. Costs in the cause.

Delivered, dated and signed in Nakuru on this 17th day of March 2017.

Radido Stephen

Judge

Appearances

For Claimant Mr. Mboya instructed by Tom Mboya & Co. Advocates

For Respondent Mr. Nemiso instructed by Carole Mburugu Advocate

Court Assistant Nixon