



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 33 OF 2016**

**DANSON MWANGI KIROBI.....CLAIMANT**

**VERSUS**

**BRITISH ARMY TRAINING UNIT IN KENYA.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 5<sup>th</sup> May, 2017)

**RULING**

The claimant filed the memorandum of claim on 18.02.2016 through Abuor & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the claimant's employment was a term contract by operation of the law.
- b. Payment of work injuries suffered by the claimant.
- c. Future medical expenses for replacement of lenses and glasses every year.
- d. Salary in lieu of notice and compensation for unfair and unlawful termination.
- e. Special damages of Kshs. 18, 730.00 together with costs of the suit and interests.

The respondent opposed the suit by filing on 12.04.2016 the notice of preliminary objection on the grounds that the court lacked jurisdiction to determine the suit because it was time barred under section 90 of the Employment Act, 2007 as the claimant alleged that the termination was in 2011 and the injuries were in 2009.

At paragraph 3 of the memorandum of claim the claimant stated that at all material time relevant to the claim he was employed by the respondent as a pastor and chief and he was earning daily wages of Kshs. 1,000.00 per day. It is further stated in the paragraph that the claimant worked with the respondent for 3 years from 2008 to 2011. At paragraph 5 of the claim it is stated that on 30.10.2009 the claimant, while on duty, suffered an injury of the right eye.

On the claim for injuries, the parties recorded consent in court on 14.07.2016 thus, **“By consent of the parties the proper forms under the Work Injury Benefits Act, 2007 be completed and the claimant be compensated for the injuries sustained in issue in accordance with the provisions of the Act.”** Accordingly, the preliminary objection is to be determined in so far as it concerns the claim and prayer for salary in lieu of termination notice and for alleged unfair or unlawful termination.

It was submitted for the claimant that the suit was filed on 18.02.2016. Further, the claimant alleged that the termination was in 2011 and taking the last date in the year to have been 31.12.2011, then the 3 years of limitation under section 90 of the Employment Act, 2007 lapsed on or about 30.12.2014. Thus, the suit was time barred under the section when it was filed on 18.02.2016.

It was submitted for the claimant that it should be taken that the cause of action accrued sometimes in 2014 when the forms on the injury the claimant had sustained were submitted to the relevant government department; so that the 3 years of limitation would lapse in 2017 and therefore the suit was not time barred. It was also submitted that under Article 159 of the Constitution, the issue of limitation of period to file suits is a procedural technicality and should be overlooked in favour of the substantive issues in dispute.

The court finds that as submitted for the respondent the claimant was bound by the pleading in the memorandum of claim that his contract of service was allegedly terminated by the respondent in 2011. Further, the court returns that the period of limitation for filing a suit goes to jurisdiction and it is not a procedural matter but a substantive issue that goes to the competence of the trial court to hear and determine the suit. The court follows **Moses Ochieng Musa –Versus- Kisumu Water & Sewarage Company Limited [2015]eKLR** where Onyango J held, “**As regards Article 159, limitation is not a procedural technicality but a substantive law that has the effect of extinguishing the applicant’s right to make a claim in this court.**”

Accordingly, the preliminary objection filed for the respondent on 12.04.2016 would succeed in so far as it relates to the claimant’s residual claims on unfair termination and a consent having been recorded on the rest of the claims about injuries suffered by the claimant during the employment. In view of the compromise on the injury claims, and taking all circumstances into account, the court returns that each party shall bear own costs of the case. Further, while making the findings, the court returns that as the facts were not in dispute and the respondent relied on the claimant’s own pleading that his contract of service was allegedly terminated in 2011, the notice of preliminary objection as filed and served was sufficient and the respondent did not need to file a memorandum of response to anchor the preliminary objection and as was urged for the claimant.

In conclusion, the preliminary objection is upheld, the residual of the claimant’s suit alleging unfair termination is dismissed, and each party to bear own costs of the suit.

**Signed, dated and delivered in court at Nyeri this Friday, 5<sup>th</sup> May, 2017.**

**BYRAM ONGAYA**

**JUDGE**