



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

CAUSE NO. 1714 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 29th June, 2017)

JAMES KAMAU WAINAINA.....CLAIMANT

-VERSUS-

NATIONAL WATER CONSERVATION AND

PIPELINE CORPORATIONRESPONDENT

RULING

1. Before the Court is a Notice of Motion application dated 30th November 2016 under Order 51, Rule 1 of the Civil Procedure Rules 2010 and Section 90 of the Employment Act 2007 where the Respondent Applicants seek for Orders:

- 1. That the Memorandum of Claim filed herein by the Claimant be struck out;***
- 2. That costs of the suit and of the Application be awarded to the Respondent/Applicant.***

2. The Application is based on the grounds that the Memorandum of Claim filed herein on the 25th of August 2016 is statute barred having been commenced later than three years after the act or default complained of, as well as the annexed affidavit of Dorice Mwangi and on other grounds as may be adduced at the hearing thereof.

3. The Respondent/Claimants have filed a Replying affidavit dated 14th December 2016, deponed to by James K. Wainaina the Claimant. In it, he avers that the Notice of Motion dated 30th November 2016, is vexatious, frivolous and an abuse of the Court process.

4. He avers that the claim is not time barred and that in his list of documents dated 8th June 2016, and filed on the 25th June 2016 contain various letters which override that of the 17th of May 2016 that rejected his appeal from termination of employment.

5. He avers that the letters dated 7th April 2010, 8th March 2010, 4th January 2011 and 26th November 2012 all in his bundle of documents overtake the letter dated 17th May 2016. He avers that he is yet to receive communication from the Respondents Board of Directors whose deliberation should resolve the issues on his employment.

6. He avers that the Managing Director and Secretary of the Board in his letter dated 7th April 2010 which

noted the issues he raised in his letter dated 8th March 2010 and stated that he would be advised accordingly stood and as such his termination did not hold.

7. He asks for the application to be dismissed.

8. The Applicant submits that Section 90 of the Employment Act provides that:

“notwithstanding the provision of Section 4(1) of the Limitation of Actions Act, no civic 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 3 years next after the act, neglect or default complained of..”

9. The Applicant states that the Claimant filed this suit on the 25th of August 2016 for unfair and unlawful termination from employment but his cause of action arose on the 17th of May 2010. They submit that it was on the said date that a letter annexed to the Respondent’s supporting affidavit that the Claimant’s appeal against the decision of the Respondent to terminate him was unsuccessful. They submit that from the above it is clear that the cause of action arose on the 17th of May 2010.

10. The Applicant submits that the letter dated 7th April 2016 cannot in any way override the one of 17th May 2010 as it predates it and the latter gave the final position. The Claimant’s appeal was deliberated and dismissed and the board opted to uphold its previous decision.

11. They submit that allegations of negotiations as alleged from the letter dated 4th January 2011 is baseless as the letter is not signed nor does it bear any acknowledgement of receipt by the Applicant.

12. They submit that the Claimant ought to have filed the present suit before the 18th of May 2014, within the limits of the law. They rely on **Cause No. 453 of 2013 in the Employment and Labour Relations Court at Nairobi; Joseph Thuku Muchira vs. Chai Co-operative Savings & Credit Limited eKLR** where it was held that:

“In this case noting the cause of action arose on the 15th September 2008, and the suit herein was filed 3rd April 2013, this is after a period of over 4 1/2 years after the fact of termination. To file the claim this after the lapse of 3 years offends the mandatory provisions of Section 90 of the Employment Act. Such suit must fail...”

13. They urge the Court to dismiss the suit as it is statute barred and the time limitation touches on the jurisdiction of a Court to hear and determine the matter. To this end, they rely on **Cause No. 718 of 2015 in the Employment and Labour Relations Court at Nairobi; Joseph Chege Kamau vs. Jamii Bora Bank Limited (2015)** where the Honourable Judge held that:

“Further, the issue of limitation of actions is substantive and not merely procedural as it goes to the jurisdiction of the court to hear and determine claims before it.

The cause of action in the instant case arose on the 16th October 2008 and the suit therefore ought to have been filed on or before the 17th October 2011. That being the case, the current claim is way out of time and the court has no jurisdiction to entertain it or extend filing time. The result of the preliminary objection taken by the respondent is upheld and the claimant’s claim is struck out with no orders for costs..”

14. They submit that Section 90 of the Employment Act is couched in mandatory terms and that the Court has no choice but to dismiss the claim. They urge the Court to grant the prayers as sought in the Application dated 30th November 2016.

15. The Respondent/Claimant submits that the letter dated 17th May 2010 cannot be basis for limitation as

a plain reading and interpretation of the said letters' last paragraph states that:

“Please note that the investigations are still going on and issue of payment if any entitlements will be given once investigations are complete.”

16. They submit that this statement indicated that the investigations are not final and that they are still waiting for the final outcome.

17. They submit that as per the letter dated 7th April 2010 advise was still being waited upon. They therefore submit that time cannot run until the Respondent has made a final and specific explicit and impeccable letter to the Claimant on the issue which has never been done.

18. They submit that the Applicant/Respondent's application is unacceptable and the matter should go to full hearing to resolve the issues. The Applicant/Respondent cannot go against his own correspondence and parties should be given an opportunity to be cross examined on their own letters.

19. They ask the Court to dismiss the application with costs.

20. I have considered the submissions of the parties herein. From the Claimant's Appendix at page 3 of his documents, the termination letter of the Claimant is dated 26th February 2010.

21. The Claimant appealed against this dismissal on 8/3/2010 and vide a letter of 17/5/2010 he was informed that the appeal was considered but the previous decision of the board was upheld. He was told the issue of payments would only be considered after all investigations are complete.

22. The Applicants contention is that the letter of 17th May 2010 was the letter that determined the Claimant's employment and should be the basis of limitation.

23. The Claimants on their part contend that the letter was not formal as the Claimant was informed that:

“Please note that the investigations are still going on and issue of payments if any entitlements will be given once investigations are complete”.

24. My reading of the letter of 17th May 2010 indicates that the dismissal appeal had been declined and the decision to dismiss the Claimant stood. What remained was the resolution of any payments pending. The letter read as follows:

“Further reference is made to your letter on the above dated 18th March 2010 and our reply Ref. No. CON/1600/(6) on the same .

This is to confirm that your appeal was presented and deliberated in the Special Board Meeting held on 23rd April 2010.

The Board considered your appeal, but dismissed the same and upheld the previous decision to dismiss you from service. (emphasis is mine).

Please note that the investigations are still going on and issue of payments if any entitlements will be given once investigations are complete. Further, note the COR 24.6(11) state that:- “the decision of the Board in all appeal cases shall be final” and you are reminded to finalise your clearance and return any Corporation property in your possession”.

25. In my view the issue of dismissal was determined and that is when time started running.

26. Under Section 90 of Employment Act:

“Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, 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”.

27. It is apparent therefore matters of employment must be filed within 3 years from the time the cause of action occurred.

28. In this case the cause of action having occurred on 17th May 2010, the Claimant ought to have filed this case by 16th May 2013.

29. The Claimant filed this claim on 28/8/2016 more than 3 years late. This claim is therefore time barred. This Court lacks jurisdiction to extend time or even hear a matter which is filed out of time.

30. I therefore find the Preliminary Objection has merit and I allow it and find that this claim is time barred and is therefore dismissed on that account.

31. Each party to bear its own costs.

Read in open Court this **29th day of June, 2017.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Mutindi holding brief for Kahuthu for Claimant – Present

Mr. Mugogo holding brief for Mr. Inyangu for Respondent – Present