



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

CAUSE NO. 179 OF 2017

STEPHEN MUANGE MUTUA.....CLAIMANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 21st July, 2017)

RULING

The claimant filed the memorandum of claim on 09.05.2017 through Swan Advocates. The prayers in the memorandum of claim included a declaration that the respondent's indefinite interdiction of the claimant is illegal and irregular; and a prayer for release of withheld half salaries from the date of interdiction on 16.08.2010.

The respondent filed the notice of preliminary objection on 30.05.2017 through Beatrice A. Odundo Advocate and upon the following grounds:

- a) That the suit is bad in law, misconceived, incompetent and fatally defective as the claimant's claim is barred by section 90 of the Employment Act, 2007 and section 3(2) of the public Authorities Limitation of Actions Act, Cap 39 Laws of Kenya.
- b) That the claimant's claim arises out of an interdiction which took effect vide a letter dated 16.10.2010 (but the court observes that the correct date per interdiction letter is 16.08.2010). The claimant now purports to make a claim almost 7 years after the cause of action accrued.
- c) That the entire suit against the respondent herein is a gross abuse of the court process and the same should be dismissed entirely with costs to the respondent.

The respondent submits, and is not disputed by the claimant, that the claim is about the respondent's interdiction as provided in the claimant's interdiction letter dated 16.08.2010. The letter of interdiction addressed to the claimant stated as follows:

“Dear Sir,

RE: INTERDICTION

It has been reported that you were arrested on 13th July 2010 by the Kenya Anti-Corruption Commission and Charged before the Anti-Corruption Court, Mombasa on 14th August 2016.

While investigations into your alleged involvement in the case are going on and in line with the provisions of the KRA Code of Conduct, it has been decided that you cease to exercise the functions of your office.

You are hereby interdicted from duty with effect from the date of this letter.

While on interdiction you will vacate office and continue to be away until the interdiction is determined. You will be entitled to half of your basic salary and house allowance, but will not earn annual leave. You shall be required to report to the Senior Deputy Commissioner, Human Resource or her duly authorised officer once a month or such interval as may be directed.

Please surrender your Staff Identification badge and leave your contact details with your Head of Department.

Yours faithfully

Signed”

It is not in dispute between the parties that the interdiction has not been determined or otherwise lifted by the respondent. It is not in dispute that the claimant’s interdiction was due to arrest and charge in criminal case No. 2017 of 2010 where the claimant was the 2nd accused person and was acquitted on 11.12.2013 under section 210 of the Criminal Procedure Code as the prosecution failed to establish a prima facie case against the claimant as had been charged. It is submitted for the respondent that the suit is time barred under section 90 of the Employment Act, 2007 which states thus, **“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.”**

It is also submitted that the suit is time barred under section 3(2) of the Public Authorities Limitation Act, Cap 39 which states, **“No proceedings founded on contract shall be brought against the government or a local authority after the end of three years from the date on which the cause of action accrued.”**

It is submitted that the claimant slept on his rights for over 7 years and cannot therefore claim and pray as done in the current suit. It is urged that the claimant failed to take action between the date of the interdiction and the date of acquittal being 3 years and 4 months has not been explained. It urged that the court follows the holding in **George Hiram Ndirangu – Versus- Equity Bank Limited [2015]eKLR** that a criminal trial and employment dispute constitute two separate proceedings. It is further submitted for the respondent that the court follows the holding of the Court of Appeal in **Benjoh Amalgamated Limited and Another –Versus- Kenya Commercial Bank Limited [2012]eKLR** and as per **Halsbury’s Law of England, 4th Edition** that a claimant in equity is bound to prosecute his claim without undue delay because equity aids the vigilant and not the indolent and where the claimant has slept upon his right and acquiesced for a great length of time, the court of equity will refuse to aid the stale demands (like those barred by statutory time of limitation).

The claimant’s submissions to oppose the preliminary objection are as follows:

- a) In matters of employment, the provisions of Employment Act, 2007 (which in the present case was also enacted later in time) take effect over the cited provisions of section 3(2) of the Public Authorities Limitation Act, Cap 39 as per Onyango J in **Cliff Omanaga Ontita –Versus- Teachers Service Commission [2015]eKLR**. Thus section 90 of the Employment Act, 2007 governs the time of limitation in the instant case. Further, Article 41 of the Constitution of Kenya 2010 on the right to fair labour practices applies to the present dispute.

b) The dispute is about a continuing injury under section 90 of the Employment Act, 2007. The continuing injury has not ceased and the claimant is within the time of limitation.

c) The preliminary objection is therefore an abuse of court process.

The court has considered the rival submissions. At paragraph 10, 11 and 12 of the statement of response it is stated as follows:

10. In response to the paragraph 13, 14, and 15 the respondent states that acquittal from the criminal matter does not lead to automatic reinstatement as disciplinary mechanisms are yet to be concluded.

11. In response to paragraph 16 of the claimant's statement of claim the respondent states that the interdiction of the claimant was at all material times fair, in accordance with the Employment Act (Cap 226) Laws of Kenya, the Anti-Corruption and Economic Crimes Act and in accordance with the Kenya Revenue Authority Code of Conduct (revised 2005) which was in force at the time of the claimant's interdiction.

12. The respondent denies paragraph 17, 18 and 19 of the memorandum of claim and further reiterates that the claimant is in no way prejudiced because regardless of the outcome of his disciplinary proceedings he will be paid his dues in accordance with the Authority's policies.

The court has read the three paragraphs together and has reached compelling conclusive inferences that first, the parties' employment contract is living and has never been terminated; secondly the claimant is facing a pending disciplinary proceeding manifested by the continuing interdiction; and thirdly, the respondent intends to determine the pending disciplinary proceedings one way or the other (though the claimant says the respondent has neglected to do so). The court finds that the pending interdiction and disciplinary case (as alleged for the respondent) amounts to an alleged continuing injury within the living or subsisting contract of employment between the parties and as submitted for the respondent would fall within the holding of Ndolo J in George Hiram Ndirangu –versus Equity Bank Limited [2015]eKLR thus, **“....the logical meaning of continuing injury or damage would therefore be violation of rights under an employment contract such as salary underpayment or failure to pay accrued dues.”** In the instant case the court returns that the continuing injury includes the alleged unpaid half salaries during the subsisting interdiction and also includes the alleged illegality of continuing or undetermined interdiction despite the conclusion of the criminal case in issue. Thus the court returns that the alleged claims are about continuing injuries whose cessation has not come so that the suit is not time barred under section 90 of the Employment Act, 2007.

Similarly, the court returns that as the injury is continuing and living, the suit cannot be said to be time barred under section 3(2) of the Public Authorities Limitation Act, Cap 39 partly because the respondent in its own pleadings has showed that in fact, the cause of action would not yet have accrued under that section because the contract of employment is still subsisting and the respondent has not determined the interdiction or the alleged disciplinary proceedings.

In conclusion, the preliminary objection filed for the respondent on 30.05.2017 and dated 29.05.2016 (may be in error and to have been 29.05.2017) is hereby dismissed with costs with orders that parties are invited to take directions on further steps in the suit.

Signed, dated and delivered in court at Nyeri this Friday, 21st July, 2017.

BYRAM ONGAYA

JUDGE