



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO.2532 OF 2016

TOM OCHAKO.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSIONRESPONDENT

(Before Hon. Lady Justice Hellen S. Wasilwa on 18th July, 2017)

RULING

1. Before the Court is Preliminary Objection dated 3rd February 2017 where the Respondent/Applicant prays for the entire Claim to be struck out with costs to the Respondent on the grounds that:

1. The Claimant's Claim herein is statutory time barred and grossly offends the mandatory provisions of Section 90 of the Employment Act No. 11 of 2007.

2. That the Honourable Court has no jurisdiction to hear and determine the claim.

2. The Respondent/Applicant submits that the Claimant/Respondent through a Memorandum of Claim has annexed his dismissal letter dated 5th of April 2012 which confirms that his cause of action arose on that date and any action against the Respondent/Applicant based on his dismissal ought to have been filed within 3 years from the date the cause of action arose. They submit that the case has been filed on the 5th of April 2016 4 years later and is statute barred and offends the mandatory provisions of Section 90 of the Employment Act 2007 and ought to be dismissed with costs.

3. They submit that the provision of the Employment Act is couched in mandatory terms and prohibits filing of any suit outside the statutory limitations of 3 years. The Court record confirms that the matter was filed on the 8th of December 2016, 8 months outside the statutory bar, and they pray that it is dismissed with costs.

4. To this end they rely on the matter of Nairobi Industrial Cause No. 846 of 2013 **Fred Mudave Gog vs. G4s Security Services (K) Ltd [2014]** Honourable Justice Monica Mbaru in discussing a similar matter held that:

“It cannot be denied that the cause of action herein is based on a contract of employment. The Claimant's employment was terminated on the 8th of August 2008, a period over 3 years from date of filing this claim in the Industrial Court on the 5th of June 2013 and therefore by operation of the law, the claim had already lapsed. There are no good grounds advanced for the

delay in causing the Claimant/Applicant from filing the claim in good time. This is not a mere technicality as it touches on the substance of the claim and a fundamental flaw if not addressed before the parties file their claims.”

5. They submit that the question of limitation of time is a juridical one and not a procedural one and therefore it is a fatal defect that cannot be cured. It goes to the root of a suit and is not swayed by Article 159 (2) (d) of the Constitution.

6. To this end they rely on **Nairobi High Court Miscellaneous Application No. 316 of 2012 James Muriithi Ngotho & 4 Others v Judicial Service Commission [2012]**; the Court in addressing the above subject held:

“Though I agree with the Applicants that the Court is enjoined by the Constitution to administer substantive justice, I am persuaded to agree with Mr. Issa for the Respondent that the Limitation period of 6 months prescribed under Section 9(3) of the Law Reform Act is not a procedural technicality. It is a statutory limitation of time for the filing of applications seeking leave to apply for orders of Certiorari.

It is therefore a requirement imposed by substantive law and it cannot be said to be procedural technicality which cannot be ignored under Article 159 2 (d) of the Constitution. It is equivalent to the Statutory periods of limitation prescribed under the Limitations of Actions Act for instituting actions based for example on contract or tort among others and I think it would be stretching it too far to hold that statutory provisions relating to time can be equated to procedural technicalities envisaged under Article 159 (2) (d) of the Constitution of Kenya.

We all know that what is normally regarded as procedural technicalities would be in the nature of procedural lapses that do not go the root of the matter under consideration. They would for example include lapses like using the wrong mode of moving the court for certain reliefs/orders e.g. filing a notice of motion to seek leave to commence judicial review proceedings instead of a chamber summons as prescribed under Order 53 Rule 1 Civil Procedure Rules citing wrong provisions of law while the substance of the application shows clearly that the cited law is not applicable to the subject of litigation among others.”

7. The Respondent/Applicant submits that the Honourable Court has no jurisdiction to determine the issues raised in Memorandum of Claim which is statute barred pursuant to the provisions of Section 90 of the Employment Act.

8. As to date of Accrual of the Cause of Action, the Respondent/Applicant submits the accrual date has a direct bearing on the running of time. In **Hillary Mwambolo vs. Kenya Commercial Bank eKLR**, the Court in dismissing the claim held that:

“To the effect of that accrual of the cause of action in a claim emanating from an employment contract takes effect from the date of the termination. The fact that an employee whose employment has been terminated seeks a review or appeal does not mean that the accrual of the case is hereby held in abeyance until a final verdict is on the review or appeal”.

9. Further they submit that in different case, Ndolo J in dismissing a claim for extension of time held that:

“Termination kicks in from the date stated in the letter of termination. In this case although the Claimant’s termination letter was not produced, the Claimant stated in his own Memorandum of Claim that his employment was terminated on the 10th of June 2010 and the Court adopted this date as the effective date of the employment and consequently accrual date.”

10. In conclusion, they submit that the claim herein is bad in law, incurable defective and ought to be dismissed for want of jurisdiction.

11. The Claimants have filed submissions dated 7th April 2017 where they state that they are not statutory time barred. They submit that time started running as from 14th September 2016 when the Claimants appeal against his dismissal was upheld by the Respondent/Applicant and not 5th April 2012 as alleged.

12. They submit that the Respondent has in place an internal disciplinary mechanism as per the Respondent's Code of Regulation which has put in place an Appeals Tribunal mandated to hear appeals. The decision to dismiss the Claimant was arrived at on the 5th of April 2012 but the appeal against the decision was made on the 16th of May 2012. It was not promptly dealt with and was only after a protest letter from the Claimant/Respondent dated 4th June 2013, and 24th October 2014 both receipts acknowledged that the matter started being deliberated. It was only on the 14th of January 2016 that the Respondent formally invited the Claimant for hearing of his appeal which was scheduled for the 9th of February 2016. The appeal was eventually argued on the 25th August 2016 where the dismissal was upheld and communicated via letter dated 14th September 2016.

13. They therefore submit that they exhausted all internal disciplinary mechanisms as per the Respondent's Code of Regulations and he finally filed this claim on the 8th of December 2016. They urge the Court to make a finding that for the purpose of Section 90 of the Employment Act, time started running on the 14th of September 2016 when the Respondent upheld the decision to dismiss the Claimant and not on the 5th April 2012 and that the claim herein was duly filed in time in line with Section 90 of the Employment Act.

14. They submit that in the event that the Court finds for the Respondent that Section 7(5) and 10 (4) of the Code of Regulations does not entertain appeals against dismissal, and therefore time started running on the 5th of April 2012, it is then their submission that the Respondent never advised the Claimant/Respondent that it does not have jurisdiction to deal with dismissal appeal when the Claimant/Respondent presented his appeal but instead sat on it as demonstrated and eventually dismissing it. They submit that the Respondent contributed to the delay in filing of this claim by entertaining an appeal against dismissal which they knew they did not have jurisdiction to listen to.

15. They submit that where both parties are to blame for the delay, the law is set out in the case of **Austin Securities vs. Northgate English Store Ltd (1969) 1KLR 52** that:

“The Court will look at the conduct of both parties. If the defendant has considerably contributed to the delay or a fortiori has actually agreed to it, he will seldom obtain the dismissal of the action....”

16. Further in HCCC 145 of 2010 **Rosemary Wanjiru Kungu vs. Elijah Macharia Githinji & Another** the Honourable Odunga J held that:

“in the result where the defendant or his representatives such as the insurance company leads the plaintiff to believe that the claim is capable of being settled and in reliance thereof the Plaintiff or his advocate refrains from filing the suit after the limitation has run its course that may constitute ground for extending time notwithstanding the provision of section 27 aforesaid.”

17. They note that the cited case have not given any reason for justifying the delay nor for they have internal disciplinary mechanisms to be exhausted like the Respondent in this case.

18. They pray that the Court is persuaded and invokes its inherent power and order that the claim be heard on its merits in the best interest of justice.

19. They submit that the Claimant's claim is properly before Court and that the Preliminary Objection ought to be dismissed with costs.

20. I have considered the averments of both parties. It is true that the Claimant's dismissal letter is dated

16th May 2012 (Appendix 5). On 16/5/2012, he filed an appeal against the dismissal. The Commission considered the appeal on 22.8.2016 and dismissed it and upheld its decision dismissing the Claimant.

21. The Respondent's Code of Regulations for Teachers provide as follows at Section (7) (b)(ii) which states as follows:

“The notice to remove a registered teacher from the Register shall not take effect until the expiry of twenty –eight days after the service of the notice or in the event of an appeal to the Teachers Service Appeals Tribunal until that appeal has been withdrawn or dismissed”.

22. In this case, the appeal was dismissed on 22.8.2016 and this is when the cause of action arose. It is therefore my finding that the claim is not time bared in that respect. I therefore dismiss the Preliminary Objection and direct that the case proceeds for hearing.

23. Costs in the cause.

Read in open Court this **18th day of July, 2017**

HON. LADY JUSTICE HELLEN WASILWA.

JUDGE

In the presence of:

Obura holding brief Amati for the Claimant

Kalwai holding brie Naeku for the Respondent