



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

CAUSE NO. 141 OF 2016

LEONARD CHASIMBA MUNDIA.....CLAIMANT

v

EGERTON UNIVERSITY.....RESPONDENT

RULING

1. Leonard Chasimba Mundia (Claimant) commencement legal proceedings against Egerton University (Respondent) on 21 April 2016 contending that the termination of his employment on 21 February 2012 was unfair.
2. On 5 July 2016, the Respondent filed a Notice of Preliminary Objection to the effect that
 1. **THAT** this claim is statute barred pursuant to section 90 of the Employment Act, 2007.
 2. **THAT** failure to comply with the aforesaid provision of the law makes the entire claim fatally defective.
 3. **THAT** the instant claim is a nonstarter, devoid of any merit and a gross abuse of the court process and it ought to be dismissed with costs.
3. The objection was taken on 27 March 2017.
4. The Respondent urged that the cause of action accrued on 17 February 2012, when the Claimant retired, and that because the Memorandum of Claim was lodged in Court on 21 April 2016, that was against the 3 year limitation prescribed by section 90 of the Employment Act, 2007.
5. In a strong counter attack, the Claimant adopted a 3 pronged approach and submitted first, that there were facts which required to be ascertained and second, that the disciplinary proceedings against him was to await the outcome of Criminal Case No. 4281 of 2009.
6. Lastly, the Claimant urged that there was a continuing injury and therefore the second limb of section 90 of the Employment Act, 2007 was applicable and not the 3 year limitation. The Claimant appeared to suggest the cause of action accrued on 21 April 2015 when he was acquitted.
7. The parties referred to the Court of Appeal authority of *Attorney General v Andrew Maina Githinji* (2016) eKLR on continuing injury.

8. There is on record a letter dated 8 November 2010 from the Respondent to the Claimant viz,

REF: SUSPENSION

Further to our letter dated 21st August, 2009, and your appearance before a staff disciplinary committee meeting on Friday, 22nd October 2010, we wish to inform you that since you have a criminal case No. 4281/09 at Nakuru, you will remain on suspension until the same is determined.

9. In my view, the import of the letter aforesaid was to give the Claimant an undertaking that no adverse action would be taken in respect of the disciplinary case he was concurrently facing until the conclusion of the criminal case.

10. The criminal case was determined on 21 April 2015, and it is only then that the Respondent could validly move against the Claimant.

11. The suspension letter aforesaid served as an estoppel and therefore the Respondent could not raise the issue of limitation until after conclusion of the criminal case.

12. But things took a turn which impacted the estoppel.

13. On 17 February 2012, the Claimant had tendered an application for early retirement, which was accepted by the Respondent on 21 February 2012.

14. In the early retirement letter, the Claimant had stated

I hereby submit this letter for early retirement from the university service.

This has been occasioned by personal reasons. I would also like to state that I do not intent (*sic*) to pursue any claim against the University should the case against me by the university is withdrawn and all my benefits are fully paid.

15. The Claimant was paid his benefits, but the criminal case was not withdrawn.

16. In my view, the Claimant's request for early retirement rendered the promise given by the Respondent in the suspension letter superfluous, and if he felt he was forced out under circumstances entitling him to claim constructive dismissal, that cause of action accrued on 21 April 2012 when the early retirement was accepted.

17. The Claimant should therefore have instituted legal proceedings on or before 21 April 2015, and because the same were lodged on 21 April 2016, the action is caught up by section 90 of the Employment Act, 2007.

18. The Court therefore upholds the preliminary objection and strikes out the Memorandum of Claim.

19. No order as to costs.

Delivered, dated and signed in Nakuru on this 14th day of July 2017.

Radido Stephen

Judge

Appearances

For Claimant Mr. Musiega instructed by A.B.L Musiega & Co. Advocates

For Respondent Mrs. Kairu instructed by Sheth & Wathigo, Advocates

Court Assistant Nixon