



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.423 OF 2015

ANDREW N. ARISA CLAIMANT

VERSUS

THE NATIONAL POLICE SERVICE COMMISSION1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. On 8th May 2015, the 2nd and 3rd respondents filed Notice of preliminary objection on the grounds that;

a) The suit is time barred and offends the mandatory provisions of section 90 of the Employment Act;

b) The suit is an abuse of the Court process; and

c) The suit is incompetent and ought to be struck out with costs.

2. On 24th November 2015, the 2nd and 3rd respondents filed written submissions; on 25th November 2015 the Claimant filed a Replying Affidavit to the objections raised; and on 14th December 2015 the Claimant filed written submissions.

3. The 2nd and 3rd respondents submitted that the Claimant was dismissed from service on 4th October 2008 and filed the claim herein on 20th March 2015. The Claimant is based on the provisions of section 90 of the Employment Act, 2007 and therefore offends the mandatory provisions of the law in terms of the time the claim should have been filed. The claim also offends the provisions of section 3(2) of the Public Authorities Limitation Act which Act stipulates the time within which a party can file a contractual and a tortious claim against the government. That the claim is also filed contrary to the provisions of section 27 and 28 of the Limitation of Actions Act which statute only allows for extension of time in claims relating to tort for personal injuries arising from negligence, nuisance or breach of duty.

4. The respondents rely on the case of **Askah Mogendi & Another versus Shem Magara [2012] eKLR** where the Court allowed time extension due to disability and also held that only in cases of tort can such

time be extended when it has lapsed. However the case herein relate to employment and subject to section 90 of the Employment Act which requires such a claim be filed within 3 years as held in **Victoria Mukoye Muinde versus Jamii Bora Trust [2012] eKLR**.

5. In the replying affidavit, the Claimant avers that he is a former police corporal under the General Service Unit upon employment in 1997 to 4th October 2008. He was dismissed from employment on 4th October 2008 unfairly and despite lodging an appeal on 4th December 2008, there has been no hearing. In 2010, he was informed that he would be given a hearing by the National Police Service Commission but nothing positive has arisen since. He sought for reinstatement vide letter dated 13th January 2013 but the 1st Respondent failed to oblige. The Claimant also engaged the services of advocates to pursue his claim and reinstatement but on 17th January 2014, the 1st Respondent replied noting that his appeal and request for reinstatement had been rejected. He was engaged in this matter all along in good faith and under the belief that his dismissal would be reversed. He applied the provisions of article 159 of the constitution on alternative disputes resolution but did not end favourably hence the filing of the suit in court.

6. The Claimant also submitted that upon his dismissal on 4th October 2008, he has engaged the 1st Respondent seeking a review of the same and a reinstatement and also as an alternative dispute resolution mechanism under the provisions of article 159 of the constitution, this encouraged him that the matter would be resolved and the respondents cannot now turn back and claim time barred. That in **Kenya Union of Commercial Food an Allied Workers versus Water Resource management Authority and Another [2015] eKLR**, the Court held that where a party engaged in conciliation and other non-conciliatory dispute settlement mechanisms before coming to court, article 159 of the constitution apply.

Determination

7. The Claimant acknowledges that he was dismissed on 4th October 2008 and that he has since engaged in alternative dispute resolution with the 1st Respondent for a reversal of the decision to dismiss him and that he should be reinstated. The Claimant has heavily relied on the case of **Kenya Union of Commercial Food an Allied Workers versus Water Resource management Authority and Another** where the Court held that;

... There can arise intervening circumstances which would affect limitation of action in employment situations. Conciliation as provided for under the Labour Relations Act, 2007 is one such case.

8. I agree with the above finding to the extent that where there is conciliation between the parties, time stops running save that under the Labour Relations Act, such a conciliation process must be commenced with a report to the Minister as set out and upon which, a Conciliator must issue a Certificate of agreement or disagreement. From such a process, then a party can claim to have time running as from the date the Certificate is issued as against the date when the cause of action arose. The essence of section 90 of the Employment Act, 2007 therefore is crucial, as where the law makes mandatory provisions, and Part VIII [8] of the Labour Relations Act sets out the disputes resolution mechanism for conciliation, these two are not in conflict, and rather they are complimentary. However parties to each process must be aware of what process/mechanism is in motion. It cannot be assumed by the Claimant that the respondents were aware of the conciliation, negotiation, alternative dispute resolution mechanism that he was engaged in while he sent letters and received feedback from the 1st respondent. It is imperative in any such process seeking to resolve a dispute that each party comes to the negotiations table/reconciliation or as the case may be, well aware of the intentions of the other. To therefore claim that the claim was under conciliation and hence no suit was filed in accordance with the provisions of section 90 of the Employment Act, is rather too late to find justification in conciliation. The context thus in **Kenya Union of Commercial Food an Allied Workers versus Water Resource management Authority and Another** is lost. The Claimant therein had referred the matter to a conciliation process and when time started running became a question of evidence that the Court had to establish before dismissing the case.

9. Section 90 of the Employment Act, is stated in mandatory terms and where a party has failed to file suit

within 30 days, such becomes time barred. Even where the dispute is under conciliation, section 62(3) of the Labour Relations Act apply thus;

(3) A trade dispute concerning the dismissal or termination of an employee shall be reported to the Minister within –

(a) Ninety days of the dismissal; or

(b) Any longer period that the Minister on good cause permit.

10. The cause of action arose on 4th October 2008 and the suit herein was filed on 20th March 2015 and amended on 6th July 2015. As such, there is a time lapse of over 6 years that cannot be explained under any form of legal process.

The claim is time barred. The objections by the 2nd and 3rd respondents are allowed. The suit herein is dismissed. Each party shall bear their own costs.

Delivered in open court at Nairobi and dated this 20th day of January 2016.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

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