



REPUBLIC OF KENYA
 IN THE INDUSTRIAL COURT AT MOMBASA
 CAUSE NUMBER 250 OF 2013

BETWEEN

DENNIS EDWARD KOMBE
 CLAIMANT

VERSUS

- 1. MINISTRY OF WATER AND IRRIGATION
- 2. NATIONAL WATER CONSERVATION AND
 PIPELINE CORPORATION
- 3. THE ATTORNEY GENERAL
 RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Mr. Gichana Advocate instructed by Gichana Bw’ Omwando & Company Advocates for the Claimant

State Counsel Ms. Mutisya instructed by the Attorney General for the Respondents

ISSUE IN DISPUTE: UNPAID EMOLUMENTS

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

- 1. The Claimant filed his Statement of Claim on 13th August 2013. He states he was employed by the 1st Respondent between 1989 and 1991. In 1991 he was deployed to the 2nd Respondent, from where he retired in 2001.
- 2. He filed this Claim more than 12 years later, alleging when transferred, he was placed under Job Group 3C instead of 3A, the latter being in his view, the equivalent of Job Group J which he belonged to while under the parent Ministry. He states the 2nd Respondent failed to implement a directive issued by the Directorate of Personnel Management [DPM] in a circular dated 25th June 1991. The circular had directed

that all Executive Officers be upgraded. As a result of the default and wrong grading, the Claimant argues he was denied increments on basic salary, house allowance and medical allowance. He seeks the following orders against the Respondents:-

- a. Emoluments from 1st July 1991 to June 2001.
- b. General Damages for anguish and psychological torture.
- c. Any other relief the Court may deem just to grant.
- d. Costs.

3. The 2nd Respondent filed its Statement of Response on 23rd December 2013. It avers the Claimant was placed in the correct job group 3A. The circular of the DPM did not apply to the 2nd Respondent. The Claim is bad in law. The Court has not been able to trace Response filed by the other Respondents. The Attorney General appears however, to have assumed representation of all the Respondents, and to have adopted the Response filed by the 2nd Respondent.

4. The Claimant testified, and rested his case on the 15th June 2015. The Respondents called Joseph Odhiambo Ouma, Chief Human Resource and Administration Officer of the 1st Respondent, who testified on the 7th October 2015, bringing the hearing to a close. The Claimant was granted 30 days to file and serve his Closing Submissions. On 7th December 2015, the Claimant still had not filed those Submissions. Time was extended by 14 days. On 17th February 2016 the dispute was scheduled for highlighting of the Submissions. The Claimant was absent, and had not as yet, filed any Submissions. The Respondents filed their Submissions on the 16th February 2016, and gave their highlights on 17th February 2016. Award was reserved for 31st May 2016.

5. Strangely, the Claimant filed his Submissions on 24th February 2016, 4 months after he was first directed to file his Closing Submissions, and one week after the Respondents had made their final arguments. The Court had already given the date for delivery of its decision. The Claimant's Submissions were improperly filed and are hereby struck off the record.

6. The Claimant did not explain to the Court throughout his evidence, and in his Pleadings, why it took him more than 12 years, from the date of retirement to file this Claim. His Statement of Claim bears the title "IN THE MATTER OF THE EMPLOYMENT ACT 2007, AND IN THE MATTER OF THE LABOUR INSTITUTIONS ACT 2007."

7. If these are the laws under which the Claim is made, then the Claim must be time-barred under Section 90 of the Employment Act 2007, which places a ceiling of 3 years from the date of accrual of the action, on disputes arising from contracts falling under the Employment Act 2007. It was not made clear which provisions of the Labour Institutions Act have been invoked.

8. If it is assumed the Claim is made under the old Employment Act, the period of limitation as has been established in a number of decisions of the Employment and Labour Relations Court, would be 6 years stipulated for claims based on contract, under the Limitation of Actions Act Cap 22 the Laws of Kenya.

9. A period of over 12 years has passed from the date of the Claimant's retirement. It is an inordinate period, to seek enforcement of obligations which are said to have accrued between 1991 and 2001. The Claimant did not seek any leave of the Court to file his Claim out of time, just as he did not, in filing his Closing Submissions.

10. If the Court is mistaken on the limitation of time, its position is that the Claim would still fail on merit. There was adequate evidence availed by the Respondents to demonstrate the Claim lacks merit: the Claimant was deployed from the 1st Respondent in November 1989; he was Executive Officer 1 at the time of deployment; he was advised, and accepted that the 2nd Respondent did not have the designation of Executive Officer 1, and accepted the designation Personnel Officer 1 under the 2nd Respondent; he served under the 2nd Respondent's Scheme of Service until retirement in 2001; he was paid all his dues

on retirement; and lastly, he conceded in his letter dated 17th September 2004, that he had no claim with regard to placement. A claim with regard to placement should not arise 9 years after the Claimant conceded he has no such claim.

11. The Court would also uphold the Respondent's position on the DPM circular. The Claimant served under the terms and conditions of service applicable to the 2nd Respondent from November 1989. The DPM circular provided that for a person to be considered for the position of Executive Officer 1, that person must have served in the grade of Executive Officer 2 for a maximum period of 3 years; have passed part 2 of the Certified Public Secretaries [Kenya] Examination or its equivalent; and, have shown merit and ability to work performance and results. These provisions would have applied to the Claimant for him to enjoy the position of Executive Officer 1, and the benefits attaching to that position, while at the 2nd Respondent's service. He did not show the Court he satisfied these requirements. He accepted the position of Personnel Officer 1 voluntarily. He did not convince the Court, that the DPM circular applied to him at all, while in the service of the 2nd Respondent. If it applied, he did not meet the criteria given for an Officer to be considered for the position of Executive Officer 1.

12. This Claim is therefore filed way out of the time allowed by the various laws under which it is said to be made. It does not conform to the timelines on filing of claims based on employment contracts, contracts in general, and claims against the Government and its Agencies. The substantive claim on arrears of salary and damages has no merit. ***The Claim is hereby dismissed with costs to the Respondents.***

Dated and delivered at Mombasa this 27th day of June, 2016

James Rika

Judge