



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 238 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

NYANAMBA O. STEVECLAIMANT

-Versus-

TEACHERS SERVICE RESPONDENT

RULING

By a Memorandum of Claim dated 7th July, 2015 and filed on the same day the Claimant alleges that he was unfairly dismissed by the Respondent on 4th July, 2011. He seeks an order of reinstatement or in the alternative payment of all outstanding salary from date of dismissal to date of judgement.

The Respondent filed a notice of preliminary objection on 23rd July, 2015 on grounds that;

- a) The Claimant's Claim herein is statutorily time barred and grossly offends the mandatory provisions section 90 of the Employment Act No.11 of 2007;
- b) The Honourable Court has no Jurisdiction to hear and determine the Claim.

The Preliminary Objection was by consent of parties argued by way of written submissions.

The Respondent submitted that the Claimant was interdicted on 28th March, 2011 on grounds of desertion of duty, infamous conduct and negligence of duty. He was thereafter subjected to a full disciplinary process leading to his dismissal on 4th August, 2011. The Respondent submits that the Claimant ought to have filed his claim by 4th August, 2014 being the lapse of 3 years from date of his dismissal, but the claim was filed on 7th July, 2015. That the claim offends section 90 of the Employment Act which provides that:-

90. Limitations

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), 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.

The Respondent submits that section 90 is couched in mandatory terms and prohibits filing of any suit outside statutory limitation of three years. The Respondent prays that the suit be dismissed with costs for having been filed outside the statutory time

The Respondent relied on the case of **Josephat Ndiragu v Henkel Chemicals** in which Radido J. stated as follows;

"It is not disputed that the Claimant was dismissed on 24th August, 2009. At the time of dismissal, the Employment Act has been in operation for nearly one year. Section 90 of the Act now regulates limitation of time in employment contracts to three years. The cause should therefore have been filed on or before 24th August, 2012. But it was lodged in court on 15th March, 2013. It was time barred. Section 4(1) of the Limitation of actions act is not applicable and therefore the Claimant cannot be heard to argue that the limitation was 6 years."

The Respondent submitted that the question of limitation of time is a jurisdictional and not a procedural issue and therefore is a fatal defect that cannot be cured under Article 159(2) (d) of the Constitution. The Respondent relied on the ruling of Mburu J in the case of **James Muriithi Ngotho & 4 Others v Judicial Service Commission[2012]** in which the Judge held that:-

"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 a procedural technicality which can be ignored under Article 159 2(d) of the Constitution. It is equivalent to the statutory periods of limitation prescribed under the limitation of Actions Act for instituting actions based for example on contract of 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 2010."

The Respondent prayed that on the grounds raised in its submissions the claim is bad in law, incurably defective and ought to be dismissed for want of jurisdiction.

For the Claimant it was submitted that section 4(1) of the Limitation of Actions Act provides for Limitation of 6 years while section 90 provides for 3 years, that in view of the conflict this court should resort to Article 159(2) (d) which stipulates that Justice should be administered without undue regard to procedural technicalities and that the preliminary objection is a mere technicality.

Determination

The issue of limitation period as raised in the preliminary objection has been the subject of many a case both at the level of this court and in the Court of appeal.

In a recent decision in the Court of Appeal at Kisumu delivered on 31st May, 2016 (Kisumu Civil Appeal No.6 of 2015) the Court observed as follows:-

The fundamental issue is whether the trial court had jurisdiction to extend time to enable the respondent to file the suit in the first place. The answer must be in the negative. The trial court simply acted without jurisdiction. In **SAMUEL KAMAU MACHARIA & ANOTHER V KENYA COMMERCIAL BANK LIMITED & 2 OTHERS [2012]eKLR**, the Supreme Court held that:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

Similarly in the case of **James Muriithi Ngotho (Supra) Mbaru J** stated that limitation is not a procedural technicality envisaged under Article 159(2) (d) of the Constitution of Kenya 2010.

I subscribe to the same position and hold that the Claimant's contention on limitation period is not the correct position in law. Limitation is not a technicality that can be cured, say, by amendment. Once a claim is barred by limitation, the right is extinguished and the court's jurisdiction is not exercisable where a claim is extinguished and is therefore non-existent.

The Claimant raised the issue of conflict between section 4(1) of the Limitation of Actions Act and Section 90 of the Employment Act. There is no such conflict as section 90 states that the provisions thereof are "**Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, " and relate to " civil action or proceedings based or arising out of the Act or a contract of service in general."**

The foregoing being the case, I agree with the Respondent that the Claim is incurably defective, and bad in law on the face of it.

The result is that I allow the preliminary objection and hereby dismiss the claim filed by the claimant on grounds that it offends the mandatory provisions of section 90 of the Employment Act.

Dated and signed and delivered this 29th day of September, 2016

MAUREEN ONYANGO

JUDGE