



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 14 OF 2016**

**(Formerly HCCC No.389 of 2008)**

**SAMUEL THUKU MWANGI.....PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF LAIKIPIA.....1<sup>ST</sup> DEFENDANT**

**PERMANENT SECRETARY, MINISTRY OF LOCAL GOVERNMENT.....2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**(Before Hon. Justice Byram Ongaya on Friday, 28<sup>th</sup> October, 2016)**

**JUDGMENT**

The suit was commenced by the plaintiff filed on 19.12.2008 through Munene & Associates, Advocates for the plaintiff. The plaintiff was amended and a further amended plaintiff was filed on 02.08.2011. The plaintiff prayed for judgment jointly and severally against the defendants for:

- a. General damages for unlawful termination.
- b. Special damages of Kshs.1, 195, 560.00.
- c. Costs of the suit.
- d. Interest on a, b, and c above at court rates.

By a notice of change of Advocates filed on 08.08.2014 the plaintiff changed his advocates to Munene Chege & Company Advocates and who filed a further further amended plaintiff on 18.03.2015 introducing the named 1<sup>st</sup> defendant in line with the Constitution of Kenya 2010.

The 1<sup>st</sup> defendant filed the further amended statement of defence on 19.08.2011 through Gichure & Company Advocates. The 1<sup>st</sup> defendant averred that the plaintiff's suit was statutorily time barred, bad in law, incurably defective and prayed that it be struck out with costs.

The plaintiff testified that in 2003 he was serving as a civil servant in the capacity of Treasurer for the County Council of Laikipia. In February 2003 he was transferred to the Municipal Council of Karatina as Treasurer. By the letter dated 10.03.2003 the plaintiff was cleared to proceed on transfer. The plaintiff

reported at Karatina on 04.03.2003 and worked there from 10.03.2003 to 24.04.2003. By telephone on 23.04.2003 he was summoned to the 2<sup>nd</sup> defendant's office in Nairobi. The plaintiff attended as summoned and the suspension letter dated 23.04.2003 was handed to him. The claimant was suspended pending investigations on financial mismanagement of the County Council of Laikipia during the plaintiff's service at that Council.

While on suspension the plaintiff was transferred by the letter dated 24.12.2003 as Treasurer, County Council of Kitui. He was issued with a clearance certificate by the Municipal Council of Karatina on 07.01.2004. The Municipal Council of Karatina declined to pay the plaintiff for the period he had served on suspension on the ground that during that period the plaintiff had not worked for the Municipal Council of Karatina. The plaintiff was not received by the County Council of Kitui and he reported that fact to the 2<sup>nd</sup> respondent by his letter dated 10.02.2004. The plaintiff wrote his letter of 02.11.2004 complaining about the prolonged suspension and the unpaid salaries.

On 23.11.2004 the plaintiff received a letter headed revocation of transfer and lifting of suspension. The letter revoked the plaintiff's transfer to Karatina and back to Laikipia. The plaintiff lamented that such revocation was wrong in view of his intervening transfer to Kitui. Upon reporting at Laikipia the plaintiff met one Edwin Kimuyu who had been deployed at Laikipia in the same capacity of Treasurer per the letter dated 2.12.2004 and the plaintiff complained to the 2<sup>nd</sup> respondent about that confusing state of things. Upon reporting at Laikipia, the plaintiff was suspended by the letter dated 15.12.2004 on account of financial mismanagement. The particular details of the allegations were set out in the letter and the plaintiff was invited to show-cause within 14 days why disciplinary action would not be taken. It was alleged that the plaintiff had misappropriated Kshs. 2, 513, 790.00. The plaintiff replied by his letter dated 22.12.2004. The plaintiff wrote to the Secretary, Public Service Commission the letter dated 15.02.2005 complaining about failure of the correct procedures being applied in his case such as on prolonged suspension. On 26.09.2005 the plaintiff received the letter of dismissal from the public service on account of gross misconduct. The letter was dated 26.09.2005. The dismissal was effective 15.12.2004. The letter stated that the Council was to recover from the plaintiff Kshs.3, 095,800.15.

By the letter dated 30.10.2005 the plaintiff appealed to the Public Service Commission against the dismissal. The plaintiff's case was that the allegations leveled against him and leading to the dismissal were founded upon the surcharge imposed against him by the Inspectors exercising the statutory powers under the Local Government Act, Cap. 265 and that he had challenged the surcharge in accordance with the provisions of the Act. The claimant addressed his appeal to the Public Service Commission again by the letter dated 30.10.2005 and further by the letter dated 23.01.2008.

By the letter dated 17.05.2006, the Public Service Commission considered but disallowed the plaintiff's appeal against his dismissal with a right to apply for review. It is the plaintiff's case that he did not receive that letter until his advocates complained to the Commission about the pending appeal by the letter dated 20.04.2007 and the 2<sup>nd</sup> respondent replying the advocates by the letter dated 23.05.2007 conveying that the appeal had been disallowed. Subsequently and in view of the complaints about the long pending appeal, the County Council of Laikipia conveyed to the plaintiff, by the letter dated 14.12.2007, the Commission's decision dismissing the plaintiff's appeal against the dismissal. The letter informed the plaintiff about his right to apply for a review and the plaintiff testified that he opted not to apply for a review.

The **1<sup>st</sup> issue** for determination is whether the suit is time barred. The suit was filed on 19.12.2008. The decision by the Commission disallowing the plaintiff's appeal was conveyed to the plaintiff by the letter dated 14.12.2007. The initial dismissal decision was by the letter dated 26.09.2005 which stated that the dismissal was effective 15.12.2004. It was submitted for the 1<sup>st</sup> defendant that under section 3(2) of the Public Authorities Limitation of Actions Act, Cap. 39, no proceedings shall be brought against the Government or a Local Authority after the end of 3 years from the date on which the cause of action accrued. It is not disputed between the parties that the regulations that governed the plaintiff's employment entitled the plaintiff to appeal against the dismissal and it is not in dispute that the plaintiff appealed accordingly. It is also not disputed that regulation 32(7) of the applicable Public Service

Commission (Local Authority) Regulations provided that disciplinary action would not be deferred or suspended pending the determination of the appeal or application for review.

The plaintiff submitted that he was entitled to exhaust the internal disciplinary procedure and until the appeal decision was made and conveyed to the plaintiff, the cause of action had not accrued. Thus the plaintiff submitted that the cause of action accrued on 14.12.2007 when the Commission's decision disallowing the appeal was conveyed to the plaintiff by the County Council of Laikipia. Accordingly, the plaintiff submitted that the suit was not time barred.

The court has considered the 1<sup>st</sup> defendant's submissions. The 1<sup>st</sup> defendant has relied upon the **Hillarion Mwabolo –Versus- Kenya Commercial Bank [2013]eKLR** where it was held that a pending administrative appeal against the termination did not stop the running of the 6 years being the prescribed statutory time of limitation that applied in that case. The 1<sup>st</sup> defendant further cited **Benjamin Wachira Ndiithi –Versus- Public Service Commission & Another [2014]eKLR** for the holding that the cause of action accrues on the date of termination as stated in the termination letter. The 1<sup>st</sup> defendant further cited **Attorney General and Another –Versus- Andrew Maina Githinji & Another [2016] eKLR** (Per Waki, JA) for the holding that once the employee received the termination letter, the termination took effect and the cause of action accrued and that was the date from which time for the cause of action began to run as against the claimant's claim.

In view of the holdings by the courts, the following principles appear to apply as relates to a cause of action and the prescribed time of limitation:

1. Once a termination is communicated by letter, the employee is entitled to move to court within the prescribed statutory time of limitation despite contractual or statutory provisions on the right to appeal or apply for review against the dismissal.
2. The contractual or statutory right of an employee to appeal against a termination or to apply for review of the termination decision does not stay or stop the running of the time of limitation as prescribed in the statute.
3. The contractual or statutory provision that the employee shall appeal against a termination or apply for review of the termination decision does not defer or adjourn or oust the right of the employee to challenge the dismissal in this court.
4. The same principles would apply in event of a constructive or verbal termination.

If the principles apply as stated above, then the following difficult challenges arise:

1. The principle that parties to a contract are bound by the terms and conditions of the contract is overridden in the sense that the right to administrative appeal or review against the termination decision as per contractual terms or as incorporated in the contract of service by reason of the relevant legislation are diminished.
2. The courts in interpreting that contractual or statutory provision on appeal or review of termination decision does not stop the statutory time of limitation from running would mean that alternative dispute resolution especially in employment matters is greatly diminished – so that if parties or statute provides for appeal or review by way of say arbitration or mediation or conciliation, such provision is nevertheless bound by the statutory time of limitation and the parties need not wait for exhaustion of such alternative dispute resolution mechanisms.
3. The principle that no statute is superior to the other becomes a problematic issue in event of administrative appeals or reviews prescribed by statute and in view of the statutory periods of limitation.
4. If a termination decision takes effect retroactively, there would be a problem on whether time of

limitation starts running from the effective date of the termination or from the date the termination decision is made or conveyed to the employee – so that in such cases and for purposes of the time of limitation of the action justice would demand that the time runs from the date the decision is conveyed and not from the retroactive date the termination is stated to have taken effect.

It appears that coherent jurisprudence is needed in this area of law. As of now it further appears that every case will have to be evaluated and decided based on its unique circumstances. In the present case, the court considers that there was a clear regulatory provision that the appeal process did not stay the dismissal decision. In that regard it was clear or ought to have been clear to the parties that the plaintiff was entitled to move to court once the dismissal decision was conveyed and he was dissatisfied with that turn of events as per the initial dismissal letter and without having to await the outcome of the appeal process. Further, the court considers that the regulations that prescribed the right of appeal were subsidiary legislation and could not override the clear statutory provision in a primary statute, section 3(2) of the Public Authorities Limitation of Actions Act, Cap. 39, as relied upon by the 1<sup>st</sup> defendant.

As the suit was time barred, the matters in dispute would not fall for consideration by the court on their merits. Taking into account the complexity of the matters raised and the role in advancing jurisprudence, each party will bear own costs of the suit.

In conclusion the plaintiff's suit is hereby dismissed, as it was time barred under section 3(2) of the Public Authorities Limitation of Actions Act (Cap. 39), and with orders that each party shall bear own costs of the suit.

**Signed, dated and delivered** in court at Nyeri this **Friday, 28<sup>th</sup> October, 2016.**

**BYRAM ONGAYA**

**JUDGE**