

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NYERI

MISCELLANEOUS APPLICATION NO. 5 OF 2015

GEOFFREY KIRAGU NJOGU.....CLAIMANT

VERSUS

PUBLIC SERVICE COMMISSION.....1ST RESPONDENT

HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 14th October, 2016)

RULING

The applicant initiated the present proceedings by way of the notice of motion filed on 09.09.2016 through Jack Odhiambo Oronga Advocates. The applicant prayed for leave to file a petition out of time to challenge his dismissal from the public service. The respondents opposed the application by filing a preliminary objection on 19.09.2016 through P. Gisemba, the learned Litigation Counsel, for the Attorney General. The respondent urged that the intended suit was outside the time of limitation under section 90 of the Employment Act, 2007 prescribing 3 years of limitation for suits based on a contract of employment; and that the intended claim does not lie in law or otherwise as is non starter, bad in law, fatal and incurably defective. By the amended notice of preliminary objection filed on 29.09.2016 the respondents added the ground that the intended claim was *res judicata* in view of judgment in Judicial Review Application No. 31 of 2013 at Kerugoya and subsequently Civil Appeal No. 57 of 2014 at Nyeri upholding the judgment in the Judicial Review Application.

The **1st issue** is whether the intended suit is time barred. The applicant was retired in the public interest by the letter dated 08.01.2008. Three years for filing suit based on that retirement decision lapsed on or about 08.01.2011. The intended suit would therefore be time barred under section 90 of the Employment Act, 2007. The applicant has not established the provision of law under which the court would exercise the discretion to extend the prescribed three years of limitation of the action. As cited for the respondents, and following **The Hon. Attorney General and Another –Versus- Andrew Maina Githinji and Another [2016]eKLR**, (Per Waki J.A), section 90 of the Employment Act, 2007 is in mandatory terms. Thus no leave can issue in the present case for the intended suit to be filed outside the period of limitation of 3 years. The preliminary objection will therefore succeed on that ground alone and the court need not delve into the issue of *res judicata*. The court has taken into account the belated filing of the amended notice of preliminary objection and all the circumstances of the case and each party shall bear own costs of the application.

In conclusion the preliminary objection as amended on 29.09.2016 is allowed on the ground that the intended suit is incurably time barred under section 90 of the Employment Act, 2007 and with orders:

- a. The application filed for the applicant by way of the notice of motion dated 09.09.2016 is hereby dismissed.
- b. Each party to bear own cost of the proceedings.

Signed, dated and delivered in court at Nyeri this **Friday, 14th October, 2016.**

BYRAM ONGAYA

JUDGE