



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 2487 OF 2012

ELINATHAN KITIRO MWAMBURI.....CLAIMANT

VS

TELKOM KENYA LIMITED.....RESPONDENT

RULING

1. By a ruling delivered on 13th May 2014, I dismissed the Claimant's claim on the ground of limitation of time. The current application dated 11th August 2016 seeks an order for review of that ruling.
2. The application which is supported by the Claimant's affidavit sworn on 11th August 2016 is based on the following grounds:
 - a) That there is an error apparent on the face of the record in that computation of time in respect of limitation erroneously omitted the period the Claimant was undergoing hearing of his appeal against the disciplinary outcome;
 - b) That the said facts were placed before the Court but were overlooked and dismissal of the case based on an erroneous computation of time amounted to an error in law;
 - c) That the application has been brought timeously and the delay has been caused by inability by the Claimant's former Advocates to file the application;
 - d) That the error on computation of time is evident in terms of the documents filed in Court;
 - e) That there is a good and sufficient cause to review the ruling delivered on 13th May 2014;
 - f) That the Claimant was dismissed from employment on 21st August 2006;
 - g) That the repealed Employment Act was the applicable law at the time the dispute between the Claimant and the Respondent arose and that the limitation period was six years;
 - h) That the Respondent provided for an internal dispute settlement mechanism in the event an employee was aggrieved by a decision to dismiss them from employment;
 - i) That the Claimant pursued the appellate mechanism of the Respondent for a period spanning from 21st September 2006 up to 6th October 2008 when the final determination of his appeal was made;

j) That the Court made a mistake on the face of the record when it dismissed the cause based on an error that the cause of action arose on 21st August 2006 while the correct accrual date was 6th October 2008 when the final determination on the Claimant's internal appeal was made and all the internal dispute resolution mechanisms were exhausted;

k) That the practice of the courts is to calculate time from the date the internal dispute resolution mechanisms were exhausted and not the date an employee was dismissed;

l) That the error apparent on the face of the record is that the cause of action arose on 6th October 2008 and the Claimant therefore had up to 6th October 2014 to institute action against the Respondent;

m) That due to the error on the face of the record the Claimant's suit ought to be reviewed to enable him access justice in accordance with the law;

n) That unless the ruling delivered on 13th May 2014 is reviewed, the Claimant will continue to suffer unheard;

o) That it is in the interest of justice that the order sought is granted.

3. The Respondent's response is contained in a replying affidavit sworn by its Legal Manager, Caroline Ndindi on 6th September 2016. She states that even if the Court were to consider 6th August 2008 as the date when the cause of action arose, the claim would still have been statute barred for the reason that the Employment Act, 2007 came into force on 2nd June 2008.

4. Ndindi points out that Section 90 of the Act provides that claims emanating from employment contracts ought to be lodged within three (3) years. Three years from 6th October 2008 would have ended on 6th October 2011 whereas the Claimant lodged his claim on 11th December 2012.

5. She depones that there is no mistake or error apparent on the face of the record. She adds that the Claimant is guilty of undue delay, indolence and laches as there has been a delay of two (2) years and three (3) months which the Claimant has not bothered to explain.

6. It is the Respondent's case that the Claimant has not satisfied the requirements for review to justify granting of the orders sought.

7. The issue now before the Court is whether there are sufficient grounds for review of the ruling delivered on 13th May 2014 by which the Claimant's claim was dismissed on the ground of limitation of time.

8. The power of the Court to review its own decision is donated by Section 16 of the Employment and Labour Relations Court Act and Rule 33 of the Procedure Rules. Rule 33(1) provides as follows:

(1) A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling-

(a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; or

(b) on account of some mistake or error apparent on the face of the record; or

(c) on account of the award, judgment or ruling being in breach of any written law; or

(d) if the award, judgment or ruling requires clarification; or

(e) for any other sufficient reasons.

9. The Claimant's application is premised on the position taken by the Court on the accrual date being the date of dismissal rather than the date when the internal dispute resolution mechanisms were exhausted. In reaching its decision on the accrual date, the Court considered and applied the emerging jurisprudence on this matter. Any error made in this regard would be a misapprehension of the law and it seems to this is a matter for appeal and not for review

10. For this reason the Claimant's application dated 11th August 2016 is dismissed with no order for costs.

11. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF NOVEMBER 2016

LINNET NDOLO

JUDGE

Appearance:

Miss Wamwai for the Claimant

Mr. Nyaburi for the Respondent