



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 49 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

JARED MWINAMI AKALICLAIMANT

-Versus-

TEACHERS SERVICE COMMISSIONRESPONDENT

R U L I N G

The claim herein was filed by the Jared Mwinami Akali against the Respondent Teachers Service Commission alleging that he was wrongfully dismissed by the Respondent on 24th June, 2011. In the statement of claim dated 22nd February 2016 and filed on the same date the claimant seeks the following remedies -

- (a) THAT there be declaration by the Hon. Court that the dismissal and striking from roll of the claimant by Respondent is wrongful and unprocedural.
- (b) THAT upon declaratory orders being made as foregoing, the claimant be either reinstated with benefits or be paid for the period he has been out of employment and be retired on full benefits being paid.
- (c) Costs be borne by the Respondents.
- (d) Any other order deemed fit by the court.

The Respondent filed its defence on 21st July, 2016. At paragraph 31 of the Defence the Respondent pleads as follows:-

The Respondent further avers it shall raise and argue a preliminary objection at the hearing of this suit on the grounds that the claimant's case is statute barred pursuant to the mandatory and express provisions of section 90 of the Employment Act No.11 of 2007.

Together with its statement of Defence the Respondent filed a Preliminary Objection on the following grounds:-

TAKE NOTICE the Respondent herein will at the hearing of this matter raise and argue a preliminary objection on the grounds of law that the Statement of Claim dated 29th April, 2014 is statute barred pursuant to the mandatory express provisions of Section 90 of the Employment Act, 2007.

The preliminary objection was argued by way of written submissions by counsel of the parties.

In its submissions the Respondent submits that the claim is statute barred and offends the mandatory provisions of section 90 of the Employment Act, that the pleadings confirm that the Claimant was dismissed from the Respondent's Service and his name removed from the Register of teachers on 24th June, 2011 and that this court lacks jurisdiction to entertain the case. The Respondent prays that the claim be dismissed with costs to the Respondent.

The Respondent relied on the following authorities -

Julius Situma vs. Teachers Service Commission [2015]eKLR in which the court referred to **Mbarire vs. Attorney General [2014]eKLR** where Justice Nduma Nderi held

"...in view of the foregoing the Court finds that the Petitioner's Claim is founded on contract and is therefore subject to limitation"

The Court further went on to state:

"... the provisions of Section 90 of the Employment Act are mandatory. No civil action or proceedings based on or arising out of the Act or contract of service in general shall lie or be instituted after expiry of three years after the wrong complained of"

Court have ruled that a cause of action in employment suit arises at the time one party is terminated from the employment; and any review or appeal does not warrant the accrual of time to be suspended. In this case, the Respondent contends that cause of action arose immediately the claimant was terminated from employment, in this case being 24th June, 2011. However, the Claimant here delayed and brought his cause of action on 22nd February 2016, five years later.

The Respondent further submitted that this court has no jurisdiction to extend the limitation period and relied on the case of **Beatrice Kahai Adagala v The Postal Corporation of Kenya [2015]eKLR** and **Josephat Ndirangu v Henkel Chemicals (EA) LTD [2013]eKLR** in which the court held that a claim based on contract must be filed within 3 years and the court cannot extend the limitation period.

For the claimant it was submitted that the preliminary objection is misplaced as the final dismissal letter to the Claimant was served on the Claimant on 10th August, 2015 following his application for the review of the dismissal. It is the Claimant's argument that he could not file suit before the decision on his application for review was received. The Claimant relied on the decision of **Wasilwa J in KUDHEIHA WORKERS v MASH PARK HOTELS [2013]eKLR** and **CHARLES MANONO v KNH[2013]eKLR**.

Determination

There is no doubt from the pleadings in this case that the Claimant was dismissed from employment and his name removed from the register of teachers on 24th June, 2011. He thereafter appealed against the dismissal by letter dated 31st March, 2012 but the appeal could not be heard immediately following the enactment of the Teachers Service Commission Act disbanding the Appeals Tribunal. The appeal was therefore heard on 9th September, 2015 following the reconstitution of the commission. The Claimant was informed of the dismissal of the appeal by letter dated 24th September, 2015.

The twin issues for determination are therefore when the claimant's cause of action arose and whether his claim is statute barred.

According to the statement of claim the Claimant concedes that he was dismissed by letter dated 24th June, 2011. The cause of action therefore crystallised on that date which is the date when the limitation period is reckoned from.

The pendency of an appeal made to the claimant's employer is not a ground for extension of limitation period. Indeed when the claimant was informed by the Respondent's letter dated 29th October, 2013 that

the Teachers Service Appeal Tribunal ceased to exist following the creation of the Teachers Service Commission under the 2010 Constitution and that the Review Committee to hear his appeal had not been created, he should have come to court immediately.

The cases cited by the Claimant being **KUDHEIHA WORKERS v MASH PARK HOTELS** and **CHARLES MANONO v K.N.H** are unfortunately not binding on this court and in any event distinguishable. It is my opinion that the two cases were decided per incurium as the Court of Appeal whose decisions are binding on this court has decided in numerous cases that there is no room for extension of limitation period in contracts. The most emphatic decision was in **Divecon v Samani** where the Court of Appeal rendered itself thus -

No one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded in contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action.

More recently, the Court of Appeal sitting in Kisumu restated the position in **Kenya Airports Authority v Shadrack Abraham Kisongochi** when it stated that *-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."

It is instructive that the appeal in the case of Samuel Kamau Macharia was against the decision of **Wasilwa J** in which she had granted leave to the Respondent to file suit out of time.

For these reasons, the preliminary objection succeeds. I consequently dismiss the claim herein on grounds that it was filed out of time and this court has no jurisdiction to hear and determine the same.

Dated, Signed and Delivered this 3rd day of November, 2016

MAUREEN ONYANGO

JUDGE