



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1795 OF 2013

JULIUS CHELIMO KAINO..... CLAIMANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

1. The Respondent in this suit raised what in its opinion was a preliminary objection on a point of law.
2. The nature of the objection is that the claim is time barred and offended the mandatory provisions of section 90 of the Employment Act as well as section 3(2) of the Public Authorities Limitation Act. The factual basis of the objection is that the Claimant's services were terminated on 2nd March, 2010 yet he filed his claim on 7th November, 2013.
3. Counsel for the Respondent submitted therefore that limitation is not merely procedural but a substantive provision and the Court ought to deal with the issue before proceeding further.
4. The Claimant on its part submitted that he was hopeful that the Respondent acted in good faith and solely relied on the fact that he was presumed guilty of the theft as the basis of terminating his employment. The Claimant further relied on the Respondent's averments contained in its letter dated 2nd March, 2010, that the charge was the sole reason that led to the disciplinary process and he held the belief that if he was cleared of the said charges he would be reinstated to his employment.
5. Counsel for the Claimant submitted that his client was not in control of when he would be cleared of the malicious charges leveled against him. According to Counsel, it only became apparent to him that the Respondent was not willing to reinstate him when his appeal against the disciplinary decision was ignored.
6. From the record, the claimant was arrested and charged on 25th May 2009 with the offence of stealing contrary to section 275 of the Penal Code. He went through the trial process and was acquitted on 23rd October, 2012 when the Court found that the prosecution had not made enough case to warrant putting him on his defence.
7. In the meantime by a letter dated 2nd March, 2010, the Respondent retired the claimant from its services on account of the interest of the organization. The letter of retirement reminded him of his right of appeal within 30 days of the letter to Commissioner General. The Claimant appealed against the decision to retire him on 21st March, 2010 and a further appeal on February,

2013. The further appeal though out of time was premised on the Claimant's acquittal of the criminal charges.

8. The Respondent on 29th November, 2010 by a letter of that date, informed the claimant that his appeal was disallowed as no new grounds or material facts were found to warrant the review of the decision to retire him.

9. Section 90 of the Employment Act provides that:-

“Notwithstanding the provisions of section 4(1) of the Limitation of Action Act, 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.

10. The retirement letter was issued to the Claimant on 2nd March, 2010 with a rider that he could if so wish appeal against the decision within 30 days of the letter, to Commissioner General which he did on 21st March, 2010. The Respondent communicated the decision to uphold his retirement and consequently dismissing his appeal on 29th November, 2010.

11. The cause of action concerning the legality, fairness or otherwise of the claimant's retirement from Respondent's service therefore began to run on this date when his retirement was affirmed and his appeal dismissed and not on 2nd March, 2010 when the decision to retire him was initially communicated to him. To reckon the time in any other way would in essence render useless, the Claimant's right of appeal contained in the letter of 2nd March, 2010.

12. As simple computation of the time lapse between 29th of November, 2010 in the context of section 90 of the Employment Act would lead to the 30th of November, 2013 as the period when the three year's limitation period set by section 90 of the Act would lapse.

13. This claim was filed on 7th November, 2013 which was some twenty two days before the lapse of the limitation period set by section 90 of the Act. In that regard, the Court fails to appreciate and understand what informed the raising of the present preliminary objection.

14. As was observed by Newbold P. in the case of ***Mukisa Biscuit Co. v. West End Distributors (1969) E.A. 696***, the improper raising of points by way of preliminary objection does nothing but unnecessary increase costs and, on occasion confuse issues. I cannot agree more.

15. In conclusion, the Court overrules the preliminary objection and directs that the suit proceeds to full trial on merit. The Claimant shall have costs of the preliminary objection.

16. It is so ordered.

Dated at Nairobi this 23rd day of January 2015

Abuodha J. N.

Judge

Delivered this 23rd day of January 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge