



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT
AT MOMBASA
CAUSE NO. 328 OF 2013
KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL
INSTITUTION & ALLIED WORKERS.....CLAIMANTS
VERSUS
B.O.G. MOI HIGH SCHOOL KASIGAU.....RESPONDENT

R U L I N G

1. This is a Preliminary Objection by which the respondent prays for the claimant's suit to be dismissed with costs for being time barred. The basis upon which the P.O is anchored is Section 90 of the Employment Act which limits the period within which to file a claim founded on employment to 3 years or in case of a continuing injury to 12 months next after the cessation.
2. The claimant has opposed the P.O vide the affidavit sworn by the grievants on 22/10/2014. The gist of the said affidavit is that the grievants have not yet been dismissed from employment except that on 27/1/2014 the respondent wrote to them communicating the decision of her Board of Management to pay terminal dues instead of reinstating them from their long suspension.
3. The P.O was disposed of by way of written submissions in which the parties expounded on the foregoing averments in the P.O and the affidavits filed by the claimants.

ANALYSIS AND DETERMINATION

4. After considering the pleadings and the submissions, there is no dispute that the grievants were suspended from duty in May 2006 following a Burglary at the respondents officers. There is also no dispute that the grievants were charged in court in connection with the said burglary and later acquitted. There is also no dispute that thereafter the parties had a dispute over the grievants right to reinstatement of which the minister referred the same to a conciliator. It is also common knowledge that the matter was not resolved and no termination letter was ever served on the grievants until 27/1/2014 when the respondent wrote to the grievants notifying them about a compensation plan because they were not to be reinstated after all. The issue for determination is however whether the suit is time barred.

Time barred suit?

5. In answering the foregoing question, the court must consider when the cause of action arose. According to the respondent, the cause of action arose on 8/12/2009 when the parties herein executed an agreement to disagree on the issue of reinstatement. Consequently according to her, the cause of action lapsed on

8/12/2012 and as such the present suit is time barred for having been filed on 3/10/2013. The claimant has on the other hand contended that the grievants were at all material times only on suspension and no termination letter had been served on them. According to them the BOM converted the suspension of grievants by the Principal into a termination by the minutes dated 4/1/2014 which decision was conveyed by the letter dated 27/1/2014.

6. In this courts view, it would appear from the correspondents exchanged between the parties herein and the ministry of Labour officials in 2009 that the grievants services were already terminated. There is however no formal communication of such termination of employment filed by the parties herein. That not withstanding the respondent filed defence to the suit on 25/10/2013 admitting the jurisdiction of this court over the dispute and proceeded to write letters dated 27/1/2014 indicating that her BOM met on 4/1/2014 and decided not to reinstate the grievants but instead gave out a compensation plan. The foregoing correspondence served two alternative purposes according to this court, either to officially terminate the claimant or reinstate the lapsed cause of action. The end result of either of the two purposes was obviously to revive the cause of action alive.

7. As correctly submitted for the defence, the said decision by the respondent's BOM was provoked by the direction by the court to negotiate amicable settlement. The court should however not be blamed for the revival of the cause of action because it did not direct parties not to negotiate on without prejudice. Had the respondent written on "without prejudice basis", the present P.O would have made much sense than it is now. Consequently the P.O is bereft of merits in view of the letter dated 27/1/2014 aforesaid.

8. The court will once again direct the parties to consider amicable settlement in good faith and if possible in line with the assessment by the defence which was accepted by the claimants in paragraph 6&7 of her written submissions filed in court on 3/11/2014.

DISPOSITION

The P.O dated 11/9/2014 is dismissed. Each party to bear her own costs.

Dated, signed and delivered this 13th February 2015.

O. N. Makau

Judge