



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT KISUMU
CAUSE NO. 146 OF 2014

(Before Hon. Lady Justice Maureen Onyango on 19th March, 2015)

JORAM SIRE MALIT & 199 OTHERS CLAIMANTS

-VERSUS-

MUNICIPAL COUNCIL OF KISUMU & ANOR RESPONDENTS

R U L I N G

In her ruling dated 3rd December 2014 my predecessor **Wasilwa J** directed that parties file written submissions on the following issues:-

1. **Whether the claim is time barred.**
2. **The respondents capacities in this claim in view of the establishment of the County Government or whether there is need to amend the claim.**
3. **Whether the suit should proceed without amendment of pleadings in view of the 24 deceased plaintiffs.**
4. **Whether the plaintiffs retired or were dismissed.**

The parties subsequently filed their submissions.

1. **Whether the claim is time barred.**

The claimants submitted that at the time of filing the claim the limitation period applicable was 6 years as provided in the Limitation of Actions Act and the repealed Employment Act. The claimants further submitted that under Section 16A of Pensions Amendment Act 2003 any retired employee whose pension has not been paid is deemed to be retained in service until the pension is paid in full. It was submitted that the claimants whose dues have not been paid are deemed to be in service. It was further submitted that the court should invoke Article 159 of the Constitution and decide this matter without reference to technicalities.

For the respondents it was submitted that the plaint refers to terminations between 1983 and 2007 and that any claimant terminated prior to 13th March 2003 was therefore time barred. The respondents further submit that Section 89 and 90 of Employment Act provide for a limitation period of 12 months and any claim filed prior to March 2008 is time barred.

The claim herein was filed in the High Court on 13th March 2009. The law applicable would be determined with reference to the date of terminations. For any termination prior to 2nd June 2008 when the Employment Act 2007 came into force the limitation period would be 6 years as provides in Section 4(2) of the Limitation of Actions Act while any terminations from 2nd June 2008 would be subject to a limitation period of 3 years as provided in Section 90 of the Employment Act.

The limitation period of 12 months referred to by the respondent would only be applicable for continuing wrongs which would only accrue to an employee who is still in employment with reference to rights that continue to accrue with time.

The claimants have referred to Article 159 and urged that this court applies it in determining this claim. Limitation is not a procedural technicality but substantive law with the effect of barring a person from making a claim due to lapse of time. It is governed by substantive law as provided in the Limitation of Actions Act which also specifies the limited circumstances when the limitation period does not run or when it can be extended.

For the foregoing reasons, any claimant who left employment 6 years before the filing of this claim, that is before 13th March 2003, is time barred and should be struck off this claim.

2. Whether the respondents have capacity to be sued.

The claimants have submitted that the respondents have capacity to be sued by virtue of Section 59 of the Urban Areas Cities Act.

The respondents submitted that both the 1st and 2nd respondents are independent legal entities and the claim does not specify who was employed by which respondent or was transferred from the 1st to the 2nd respondent. It is further submitted that only 14 of the claimants were transferred to the respondents and some of them have since died. It was further submitted that the 1st respondent lacks capacity to be sued in view of the creation of County Government of Kisumu and the provisions of Urban Areas and Cities Act which changed the status of Municipalities.

Section 59 of the Urban Areas and Cities Act provides as follows:-

"Any legal right accrued, cause of action commenced in any court of law or tribunal established under any written law in force, or any defence, appeal, or reference howsoever filed by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against a body established by law".

Since this claim was filed prior to the enactment of the Urban Areas and Cities Act, it is covered by Section 59 of the Act and the 1st respondents liabilities under this claim would be transferred to the County Government of Kisumu by operation of the Act.

I am however of the opinion that there was a misjoinder of the claims against the 1st and 2nd respondents who are separate legal entities and whose liabilities are not the same or joint. However this is an issue that can be addressed by separating submissions on remedies for the two respondents.

3. Whether the suit should proceed without Amendment of pleadings in view of the 24 deceased plaintiffs.

It has been submitted by counsel for the respondent that the names of the deceased employees be struck out by the court as the claimants are old men and women and any prolonged proceedings would be prejudicial to them.

For the respondents it is submitted that there has been no substitution of the deceased claimants. It is further submitted that no proof of death has been filed in court to show when the deceased claimants died and whether their claims have abated. The respondents submitted that proof of death be filed in

court to determined whether or not any of the claims have abated.

I take judicial notice of the age of this case. It would be against the interest of justice to prolong the case any further. For this reasons I order that the suit proceeds with all the names of the claimants including the deceased claimants and that the issue of abatement of claim be dealt with after the suit has been determined when dealing with payment of the proceeds of the claim if any.

4. Whether the claimants were retired or dismissed.

All the evidence on record including these attached to the submissions of the claimant refer to retirement. The issue for determination should be whether or not they should be deemed to have been retained in service pursuant to Section 16A of the Pensions (Amendment) Act 2003 and the benefits attendant thereto.

From the foregoing I make the following orders:-

1. **That the names of all claimants who left employment before 13th March 2003 be struck off the list of claimants.**
2. **That the claimants file submissions on the justification for each head of claim as set out in the prayers under items 1 to 22 in the plaint.**
3. **That the claimants compile a list showing date of appointment, date of retirement and particulars of remedies sought by each claimant stating the amount claimed and how the amount claimed under each head has been tabulated to be filed within 30 days.**
4. **That the claimants do separate the list of claimants for the 1st and 2nd respondents.**
5. **That the respondents file a response to the claimant's submissions 21 days after service.**
6. **That parties take a date for mention to confirm compliance and further directions.**

Orders accordingly.

MAUREEN ONYANGO

JUDGE

19/3/2015

Appearances:-

..... for claimants

..... for respondents

CC. Wamache