



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 69 OF 2015**

**(Before Hon. Lady Justice Maureen Onyango)**

**WICKLIFF MANGOLI WEKULO .....CLAIMANT**

**VERSUS**

**TEACHERS SERVICE COMMISSION.....RESPONDENT**

**R U L I N G**

The claim herein was instituted by Memorandum of Claim dated 28th February, 2015 and filed on 2nd March, 2015. The Respondent filed a Notice of Preliminary Objection on 18th March, 2015. The grounds of objection are:

1. That the Memorandum dated 28th February, 2015 is statute barred pursuant to the mandatory and express provisions of Section 90 of Employment Act, 2007.
2. That the Claimant has failed to disclose material facts that are crucial to this claim and therefore has come before this Honourable Court with unclean hands.

The application was argued before me on 20th July, 2015. Mr. Kirenga appeared for the Claimant while Mr. Sala appeared for the Respondent.

Mr. Sala submitted that the cause of action accrued on 2nd February, 2010 while the claim was filed on 2nd March 2015, more than 5 years after the cause of action accrued. He submitted that the action ought to have been brought within 3 years pursuant to the provisions of Section 90 of the Employment Act. Mr. Sala relied on the Respondent's written submissions with list of authorities filed on 18th June, 2015. The authorities cited in the list of authorities are *Josephat Ndirangu v Henkel Chemicals [EA]Ltd [2013]eKLR*, in which Radido J stated that:-

*"It is not disputed that the Claimant was dismissed on 24th August, 2009. At the time of dismissal, the Employment Act had been in operation for nearly one year. Section 90 of the Act now regulates limitation of time in employment contracts to three years. The cause should therefore have been filed on or before 24th August, 2012. But it was lodged in court on 15th March, 2013. It was time barred. Section 4(1) of the Limitation of Action Act is not applicable and therefore the Claimant cannot be heard to argue that the limitation was 6 years".*

The Respondent also relied on *Fred Mudave Gogo v G4S Security Services (K) Ltd [2014] eKLR* in which Justice Mbaru stated as follows:-

*"It cannot be denied that the cause of action herein is based on a contract of employment. The Claimant's employment was terminated on 8th August, 2008, a period over 3 years from the date of filing this claim in the Industrial Court on the 5th June, 2013 and therefore by operation of the law, the claim had already lapsed. There are no good grounds advanced for the delay to cause the Claimant/Applicant from filing the claim in good time. This is not a mere technicality as it touches on the substance of the claim and a fundamental flaw if not addressed before parties file their claims."*

The Respondent submitted that the question of limitation of time is a jurisdictional and not a procedural issue and therefore is a fatal defect that cannot be cured even under Article 159(2)(d) of the Constitution.

The Respondent further relied on the decision of the Court of Appeal in *Divecon v Samani* where the Court held:-

*"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 on contract. The corollary 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."*

The Respondent also relied on the decision of the court in *James Murithi Ngotho & 4 Others v Judicial Service Commission [2012] eKLR* and *Bata Shoe Company (K) Limited v Laban Chema Libabu [2013] eKLR*

For the Claimant Mr. Kirenga submitted that Section 90 of the Employment Act is not applicable in the circumstances of the claim in the instant case and that the Respondent did not interpret the entire Section. He submitted that the Claimant's claim involves a continuous injury or damage and that the injury and damage had to date not ceased and Section 90 is not available to stop the claim.

Mr. Kirenga further submitted that the Respondent has never written to the Claimant either interdicting or terminating his employment, that as late as 2014 when the Claimant's previous advocates wrote to the Respondent asking for particulars and reasons the Respondent replied that the Claimant's salary was stopped on audit queries and the Claimant's case was under review. He submitted that the Claimant stopped teaching in 2014.

He submitted that the Preliminary Objection has no merit, is an abuse of court process and should be dismissed with costs.

The Claimant also relied on his written submissions on the Preliminary Objection filed on 7th July, 2015 in which he raises issues of violation of his constitutional rights under Articles 47(1) and (2), 25(b) and 41(1). He further raised issues of violation of Section 17(1) and (10) of the Employment Act 2007.

### **Findings and determination**

I have considered the Memorandum of Claim herein filed on 2nd March, 2015. The Claimant's employment has not been terminated. It is his salary that was stopped. The Respondent has not denied the same. The Claimant has not been subjected to any disciplinary process and has not been told why his salary was stopped. From the facts as pleaded in the Memorandum of Claim the Claimant has been working until 5th April, 2014 when he was issued with a letter addressed to one Cosmas Onyimbo who was to take over from him as head teacher of Lwanda Lugari Primary school but without being told what his fate is.

The foregoing being the case, the Claimant's claim is not time barred as his claim constitutes a continuing injury under Section 90 of the Act. The Section provides that claims for continuing injury or damage must be filed within 12 months next after the cessation thereof. His injury ceased on 5th April, 2014, and he filed his claim on 2nd March, 2015.

The result is that the Preliminary Objection is dismissed with costs to the Claimant and the Respondent is directed to file its response to the claim within 30 days.

**Dated signed and delivered this 9th day of October, 2015**

**MAUREEN ONYANGO**

**JUDGE**