



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1118 OF 2013

SAMUEL OLUNGA ODERA OWINO.....CLAIMANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

RULING

1. On 27th May 2014, the Respondents filed notice of preliminary objections to the claim as filed on the grounds that;

1. *The suit is time barred as it offends the provisions of section 3(2) of the Public Authorities Limitation Act Cap 39 of the Laws of Kenya.*
2. *The suit is res judicata as it offends the provisions of section 7 of the Civil Procedure Act Cap 21 of the Laws of Kenya.*

2. On 29th October 2015 both parties appeared in Court and noting the objections filed, the Court directed the parties to file their written submissions. The matter was placed for mention of 25th November 2015 for the Court to confirm that written submissions had been filed and to allocate a date for ruling. On the scheduled date, the Claimant was absent and no written submissions had been filed. The respondent filed their written submissions on this due date the 25th November 2015. In the absence of the claimant, noting the mention date was taken by consent and the written submissions by the respondent having been filed this late and on the mention date, Court will consider materials on record for the ruling on the objections raised.

3. The Respondents submitted that the claim was filed on 7th August 2013 on allegations that the Claimant joined the Kenya Police Service in 1977 and that on 21st August 1982 during the attempted military coup he was unlawfully arrested and detained without charge. He was subjected to severe torture, treated with extreme cruelty, inhuman and degrading manner. That on 28th December 1984 after being detained for 2 years without charge he was served with a letter removing him from service. The Claimant filed constitutional proceedings for redress against the government in High Court Misc. No.1526 of 2004 (O.S.) **Samuel olunga Odera versus the Attorney General** and that the respondent conceded the suit and paid compensation to him. that this suit was only with regard to his constitutional rights to liberty, security of person and protection of the law but not with regard to his employment as a police officer. The Claimant has therefore filed the claim herein seeking his employment reliefs for reinstatement, salary arrears, general and exemplary damages with costs.

4. The respondent also submitted that they filed a defence on 19th September 2013 and denied the allegations and also averred that if the Claimant was removed from service it was for a lawful cause and in accordance with the Police Standing Orders. The respondent also filed the objections herein.

5. The Respondents also submitted that the cause of action arose on 28th December 1984 when the Claimant was served with a letter of dismissal. Under section 3(2) of the Public Authorities Act, no proceedings founded on contract can be filed against the government or a local authority after 3 years from the date the cause of action arose. That in the case of **Samson O. Ngonga versus Public Service Commission & 5 Others [2013] eKLR** the Court held that the Limitation Act does not extinguish a suit but operates to bar the claim or remedy sought for. Where no grounds for exemption are shown for filing a suit out of time, the claim must be rejected. That this claim is also *res judicata* as the Claimant filed High Court Misc. No.1526 of 2004 and he claimed the violation and breach of his rights. This suit was also about the loss of the claimant's employment as an officer and to therefore claim as herein is duplication of suits.

6. That section 7 of the Civil Procedure Act bar a party from filing the current suit was a matter directly and substantially in issue before and the Court of equal status has already addressed the matter. The Respondents rely on the case of **Michael Kimutai Ronoh & 2 Others versus Consolidated Bank of Kenya Limited & Others [2014] eKLR**.

Determination

7. The issue in dispute in the claim herein filed on 7th August 2013 is the wrongful and unfair termination of service of the Claimant by the respondent.

8. The basis of the issue in dispute as pleaded on 28th December 1984 the Claimant was served with a letter purporting to remove him from the Police Force in a letter signed by GSU Commandant one J.K.A. Koskei. The Claimant wrote an appeal against his termination of employment and was later instructed to go home and never to tell anyone what happened to him or to bring any proceedings to a Court of law in any form. The Claimant has since filed HC Misc. No.1526 of 2004 (O.S.) and was paid compensation for the breach of his fundamental rights to liberty, security of person and protection of law guaranteed under the constitution. His dismissal while in custody constituted wrongful dismissal and this was not part of the matter already filed in court. That the suit concerning his employment as herein is not similar as the suit filed for breach of his fundamental rights in HC Misc. No.1526 of 2004.

9. First, the issue in dispute relates to wrongful and unfair termination. These are concepts only introduced into the Kenyan employment and labour relations and legal jurisprudence by the Employment Act, 2007. Therefore in a claim that arose before June 2008 when the Act became operational, the application of these principles and concept cannot suffice. See **Nyabuto Meroka versus Nairobi Bottlers Limited, Cause No.953 of 2012** where the Court held that;

In this regard therefore, the repealed law, Cap 226 made no provision for the concept of unfair termination as this is only introduced under the provisions of the new law – Employment Act, 2007. Based thus on the applicable law, the claim for compensation for unfair termination must fail.

10. The circumstances of the Claimant notwithstanding, where the dismissal letter was issued to him on 28th December 1984, where his employment or labour rights were concerned, the applicable law at the time was the Employment Act, Cap 226 laws of Kenya, now repealed. That law allowed an employee to file any claim based on a contract of service within a limited period of time but to claim as herein for wrongful and unfair termination is a matter I find was not addressed under the repealed law. The Court has previously delved into a matter such as this one in the case of **Banking Insurance & Finance Union (K) (BIFU) versus Ukulima Sacco Society Limited, Cause No.1109 of 2011** and held that;

The concept of 'unfair termination' or the issue as to whether a termination is 'fair' or 'unfair'

are matters now addressed under the Employment Act, 2007 unlike what is applicable under reasons for termination in the repealed Employment Act, Cap 226. From the onset I therefore find no justification on the claim for 'unfair termination' of the grievant as to so claim with regard to the nature of the claim and the facts forming such claim is a matter governed by law and this concept of 'unfair termination' is not a right outlined under the repealed law. It cannot thus arise in any claim that arose before the effective date that operationalised the rights covered by the Employment Act, 2007.

11. Secondly, Even where the suit were to be filed under the principles governing the repealed law, Cap 226, the time limitation noting the dismissal occurred on 28th December 1984 and the suit herein was filed on 7th August 2013 is way out of time. Such time has not been extended or the Claimant shown good cause as to why he was not able to file his claim within the time allowed under the applicable law.

12. With regard to the operation of the Public Authorities Limitations Act, indeed, all suits relating to employment by the government prior to the enactment of the Constitution, 2010 were regulated under this law. To file any claim outside the three (3) years limitation period is time barred. In this case, where the Claimant was released from custody after the issuance of the letter of dismissal on 28th December 1984, where there was good cause, his claim against the Respondents herein should have been filed within 3 years from the time of such dismissal. The time lapse from the date of dismissal to the date of filing the suit herein is over 29 years, which time lapse is not mitigated in any manner. It is not enough for the Claimant to state that he was directed by officers of the respondent to go home and keep silent. He cannot also wake up one morning and file the suit herein without leave and noting the mandatory provisions of section 3 of the Public Authorities Limitation Act, Limitation of Actions Act and the repealed Employment Act, Cap 226 Laws of Kenya. All these statute read together, none can aid the claim as filed herein.

13. Noting the above, the issue of *res judicata* is academic. Save that, no party should be allowed to litigate in instalments. When the Claimant moved the Court in **H.C. Misc. No.1526 of 2004**, nothing stopped him from litigating separately or within the same suit on any allegations with regard to the violation of his employment rights. Where the rights set out herein were within the knowledge of the Claimant at the time of filing such a matter before the High Court, these should have formed the bulk of his litigation. To therefore set apart employment related matters 29 years later and litigate as herein is to seek to have a second bite at the cherry. This is not the purpose of litigation. Litigation must come to an end. This is one such case.

14. This being the case, the suit before the Court cannot be sustained as the claim and remedy sought for is time barred and this Court cannot grant the remedy or the reliefs sought in their form and substance. The suit must fail in its entirety.

The preliminary objection is therefore allowed. The claim is hereby dismissed. Each party shall bear their own costs.

Orders accordingly.

Delivered in open Court at Nairobi this 30th day of November 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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