



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NUMBER 9 OF 2013

**AND**

IN THE MATTER OF HIGH COURT CIVIL SUIT NUMBER 2155 OF 2001

[BETWEEN FRANCIS JOSEPH KIMELE vs. TEACHERS SERVICE COMMISSION]

FRANCIS JOSEPH KIMELE .....  
.....APPLICANT

**VERSUS**

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

1. The Applicant filed an *Ex Parte Originating Motion* on 18<sup>th</sup> March 2013. It is brought under Section 3[a] of the Civil Procedure Act, Order 50 [1] of the Civil Procedure Rules and Section 27 and 28 of the Limitation of Actions Act, Cap 22 the Laws of Kenya. He seeks the following orders:-

[a] The Application be certified as urgent and be heard with all due haste due to its urgency.

[b] The Honourable Court grants the Applicant leave to file Claim against the Respondent out of time.

[c] In the alternative, this Application be consolidated with High Court Civil Case Number 2155 of 2001, between the same Parties and that the Court adopts pleadings in the Plaint as the Claim for this Court's determination.

2. The Application is based on the following grounds:-

[a] The time within which to file the Claim against the Respondent in the Industrial Court has lapsed.

[b] A Claim has already been filed in the High Court Suit No. 2155 of 2001, whose jurisdiction to hear and determine the Claim has been seized off by the enactment of the Industrial Court. [?]

[c] The Applicant / Claimant is desirous to have the matter concluded expeditiously or so it is towards the ends of justice on his part. [?]

The Application is supported further by the affidavit of the Applicant sworn on 7<sup>th</sup> March 2013, and a

Supplementary Affidavit sworn on 7<sup>th</sup> June 2013.

3. The Respondent filed a Replying Affidavit sworn on 5<sup>th</sup> April 2013 by the Respondent's Director in Charge of Administration, Simon Musyimi Kavisi. The Respondent gave a detailed history of the dispute, which has been marked by serial interdictions involving the Applicant and various court interventions.

4. The Advocates for the respective Parties agreed to have the Court make a ruling based on the affidavits and submissions on record.

*The Court finds that the Application must fail on the following grounds:-*

5. The Parties were before the High Court in **Nairobi High Court Civil Suit Number 2343 of 1999**. The Applicant had prayed for damages and reinstatement. The High Court availed to him damages, but concluded it could not grant reinstatement. The Applicant made a choice of forum, was heard, and remedies availed in accordance with the Court's perception of its jurisdiction. It is improper for the Applicant to return to a different forum, years later and seek more assistance based on what he failed to achieve at the first Court. Furthermore, the Industrial Court was in place and actively intervening in remedying employment wrongs in 1999, and the Applicant made a deliberate choice not to approach the Industrial Court then. The Court has noted that the Applicant has already received Kshs. 1,440,260 from decree obtained in this High Court Suit.

6. The Applicant filed **Nairobi High Court Civil Suit Number 2155 of 2001**, seeking to obtain the orders he failed to have in the previous Suit. This second suit has remained un-prosecuted at the High Court over the past twelve years. The Applicant does not explain in his current pursuit, what he has done with the second case he initiated at the High Court. He does not say why he has not sought order for transfer of that suit to the Industrial Court, rather than ask the Industrial Court to issue an order for consolidation. How does the Industrial Court, which the Applicant seems to confuse for a division of the High Court, issue orders relating to a matter that is pending in the High Court, without information on the status of that matter?

7. The last ground is about the legality of the Application. Our procedure at the Industrial Court is specifically regulated by the Industrial Court [Procedure] Rules 2010. The Civil Procedure Act only applies to the extent contemplated by the Industrial Court [Procedure] Rules 2010. The application named 'Originating Motion,' is unknown to the Industrial Justice System. The second limb on the legality of the Application relates to the Industrial Court in extending time to file Claims that are deemed statutory barred. A succession of judicial precedents made by Judges of the Industrial Court, have established that there is no law presently, that enables the Industrial Court to extend time in employment disputes. Whether through 'Originating Motion' or other 'Motions,' this Court cannot grant extension to the prescribed time limits in the filing of employment disputes. For these reasons, the Court Orders:-

***[a] The Application dated 7<sup>th</sup> March 2013 is hereby rejected with no order on the costs.***

Dated and delivered at Nairobi this 16<sup>th</sup> day of January 2014

James Rika

Judge