



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 198 OF 2013

MUTINDA ANTHONY NZIOKA.....CLAIMANT

v

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

1. Mutinda Anthony Nzioka (Claimant) filed a Memorandum of Claim against the Teachers Service Commission (Respondent) on 11 July 2013, (according to receipt issued) and the issue in dispute was stated as *failure to pay salary while Claimant was under suspension, unlawful termination, failure to pay terminal benefits and failure to pay allowance while on suspension.*
2. The Respondent was served with Notice of Summons and it filed a Memorandum of Response on 29 July 2013 and in paragraph 25 thereof it pleaded that the Cause was statute-barred pursuant to the provisions of section 90 of the Employment Act.
3. The Claimant was appointed by the Respondent as a P1 teacher on or around 21 May 2002 and posted to Njukini Primary School in Taita-Taveta county and sometime in 2007 the Respondent put him through a disciplinary process based on certain complaints and or allegations which had been made against him. The allegations were also the subject of a criminal trial wherein the Claimant was acquitted.
4. The Cause was fixed for hearing on 5 December 2013, but on that day the Claimant's advocate Mr. Oddiaga was reportedly unwell. Ms. Ruto for the Respondent though was ready to proceed and also intimated that she wanted the preliminary point on limitation to taken first. The Court directed that the preliminary objection be argued on 26 February 2014.
5. The Preliminary objection was therefore heard on 26 February 2014.
6. Ms. Ruto submitted that the Claimant was dismissed on 22 September 2008 and that the Claim was

filed on 10 July 2013, five years after the cause of action arose.

7. According to Ms. Ruto this was against section 90 of the Employment Act which has capped the limitation period to three years and she further submitted that limitation is not merely procedural but a substantive question and therefore the Court had no jurisdiction to even extend time and therefore the Cause should be struck out with costs.

8. Ms. Ruto cited two authorities, Mombasa Cause No. 214 of 2013, *Mary Kasiwa v Scorpio Enterprises Ltd* and Nairobi Misc Civil Application No. 9 of 2013, *Francis Joseph Kimele v Teachers Service Commission*.

9. Mr. Oddiaga for the Claimant opposed the preliminary objection strongly. He submitted that the letter dismissing the Claimant was not conclusive evidence that the Claimant received the letter because it was not signed in acknowledgment.

10. He also submitted that there should be evidence that the Provincial Director of Education and the Claimant's Head Teacher, to whom the dismissal letter were copied were served with the letter.

11. He further submitted that section 90 of the Employment Act should be applied in light of the obligation placed upon the Court to do justice and that limitation is purely technical and procedural and that the parties should be heard on the merit of their cases.

12. The letter of dismissal to the Claimant was dated 22 September 2008. According to the Memorandum of Claim, the letter was handed to the Claimant on the day the disciplinary hearing took place, which according to the Claimant's written statement filed in Court, took place on 22 September 2008.

13. There is no dispute therefore that the cause of action arose/accrued on or around 22 September 2008.

14. The Employment Act, 2007 came into force on 2 June 2008 and therefore section 90 thereof is implicated in this case. It cannot be disputed that the Memorandum of Claim was filed some 5 years after the cause of action arose and would on the face of it appear to have been filed outside the prescribed timeline.

15. However, the Court must also deal with the question whether limitation is a jurisdictional and substantive issue as submitted by Ms. Ruto or merely technical and procedural as advanced by Mr. Oddiaga.

16. Mr. Oddiaga did not cite or refer the Court to any authority for his proposition that limitation of time is merely a technical and procedural question. Ms. Ruto sought to rely on this Court's decision in

the *Scorpio* case already referred to.

17. It is apposite to reiterate what I stated in Mombasa Cause No. 85 of 2012, *Sila Onyango Maugo v Kaluworks Ltd*, that

limitation of time in section 90 of the Employment Act is an ingredient of the cause of action so that a cause of action becomes extinguished on the expiration of the time set and it is not only the remedy which has been barred by lapse of time. I say so because on the lapse of the three years the Respondent had acquired an accrued right entitling it to plead immunity from the cause of action.

18. The Court of Appeal has also had occasion to restate the jurisdictional issue in regard to limitation of time. In *Divecon v Samani* (1995-1998) EA 48 the Court held that

to us, the meaning of the wording of section 4(1)is clear beyond any doubt. It means that 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 to this 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.....A perusal of Part III shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that “the wording of section 4(1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked”. (emphasis mine)

19. I don't think that I need to say any more. The decision from the Court of Appeal is very explicit that limitation is an issue of jurisdiction when it states that *no court may or shall have the right or power to entertain what cannot be done...*

20. The net result is that the preliminary objection is upheld and the Memorandum of Claim is struck out with no order as to costs.

Delivered, dated and signed in Mombasa in open Court on this 28th day of March 2014.

Radido Stephen

Judge

Appearances

Mr. Oddiaga instructed by Stephen Oddiaga & Co. advocates for Claimant

Ms. Ruto Advocate, instructed by Teachers Service Commission for Respondent