REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1418 OF 2013

PAUL MWAURA MBURU……..……CLAIMANT

VERSUS

COUNTY GOVERNMENT OF NAIROBI……. RESPONDENT

RULING

On 4th September 2013 the Claimant herein filed his claim through a statement of claim dated 2nd September 2013 and supported by the verifying Affidavit of the Claimant sworn on 2nd September 2013. In the claim he alleges unfair dismissal and prays for the following orders:-

a. A declaration that the Claimant's Constitutional right to fair labour practices in accordance with Article 41 (1) of the Constitution of Kenya has been violated and continues to be violated by actions and inactions of the Respondent.
b. A declaration that the Claimant's Constitutional right to fair administrative action in accordance with Article 47 (1) has been violated by the actions and inactions of the Respondent.
c. A declaration that the Claimant was unfairly and unlawfully dismissed from his employment by the Council.
d. An order for payment of the half salary deducted from the date of interdiction to the date when he was summarily dismissed amounting to Kshs. 5094.562)= 315,859/-
e. An order for payment of the Claimant's salary from the date when the resolution to reinstate him was made to the date of determination of this suit al amounting to Shs. 10189*80= 815,120/- as at 31st August, 2013.
f. Twelve (12) months' salary in compensation for unfair termination at the rate of Kshs (10,189*12) = 122,268/-.
g. One month's salary in lieu of notice amounting to Shs. 10,189/-.
h. An order for payment of the Claimant's plus the Respondent's contribution to the Respondent's provident fund.
i. General damages for gross violation of the Claimants constitutional rights.
j. General damages for unlawful/unfair dismissal from employment.
k. Costs of this suit.
l. Interests on (d) and (e) above at court rates from the date of filing this claim until payment in full.
m. Any other relief this Honourable court deems fit to grant.

The Respondent filed it's Memorandum of Defence on 22nd October 2013 in which it denies the claim and avers that the dismissal was justified and prays that the claim be dismissed. The Respondent further avers that the claim has been filed out of time and that the Respondent will raise a preliminary objection to have the claim dismissed with costs.

On 29th November 2013 the Respondent filed a Notice of Preliminary Objection as follows:-

That the cause of action resulting to claim herein arose on the 12th May 2005 and the Claim was filed on 4th September 2013 without leave of this court to file suit out of time contrary to Section 90 of the Employment Act, 2007 hence the instant claim ought to be dismisses with costs.

The parties appeared before me for the hearing of the Preliminary Objection on 22nd January 2014. Mr.Kahuthia Murimi jointly with Ms. Kayugira appeared for the Claimant. Mr.Ongicho appeared for the Respondent.

Mr. Ongicho submitted that the cause of action arose on 12th May 2005 and the claim was filed on 4th September 2013. That there has not been any application for leave to file out of time. That this contravenes Section 90 of the Employment Act. He urged the court to dismiss the Suit with costs.

Ms. Kayugira for the Claimant submitted that the Claimant was dismissed from Employment on 12th May 2005. That he appealed against the dismissal and the committee approved his re-instatement. The approval was adopted by the full Council. The period he was out was to be treated as unpaid leave. That on 7th January 2011 the Respondent wrote to the Claimant informing him that his appeal had been unsuccessful and the issue had been closed. The Claimant's position is that time did not start running until he received the final decision. That the law applicable at that time was the then Employment Act which means the case fell under the Limitation of Actions Act. That the limitation period is therefore 6 years. That since time did not start running until 7th January 2011 the limitation period expires on 7th January 2014. The claim is therefore not time barred. Counsel referred the court to the case of Kenya **Scientific Research International Technical and Allied Institutions Workers Union V Rainald Schumacher's & Another [2012] eKLR** which the court found that time did not start running until the pre-trial procedure was concluded. Counsel further referred the court to the case of **Kenya Plantation and Agricultural workers Union V Mununga Leaf Base [2013] eKLR** in which the court again held that the limitation period did not start running until the conciliator had finalized the case. The Claimant's counsel further referred the court to **Charles Kiruthi Mwangi V G4S Security Services Ltd [2012] eKLR** where the Court decided the law applicable. Counsel urged the court to find that time did not start running until the decision of the Respondent was communicated to the Claimant. Counsel further relied on Article 152(2) (d) of the Constitution that requires that justice should be administered without undue regard to technicalities and Article 159 (2) (c) of the Constitution which encourages promotion of alternative forms of dispute resolution. Counsel further submitted that the Claimant was not indolent, that he followed up the matter until the communication of the Respondent was received.

I have considered the grounds of preliminary Objection and the submissions by both counsel. The cause of action in this claim arose on 12th May 2005 when the Claimant was dismissed. The letter of dismissal was however forwarded to the Claimant on 31st May 2005. The applicable law then was the Employment Act Cap 226 (now repealed). Under the Act the limitation period was under the Limitation of Actions Act which is 6 years for contracts. The claim should therefore have been filed within 6 years from 31st May 2005 which is 31st May 2011.

The Claimant argues that time did not start running until the pretrial procedures were concluded. The Claimant has relied on 3 authorities all of which are this court's decisions involving trade unions. The procedures for cases involving trade unions are not applicable to a case like this one which does not involve a trade union. Under the old legal dispensation cases involving trade unions were commenced by reporting to the Minister for Labour who did not have timelines for concluding the pretrial process. Even now the cases involving Unions have to go through compulsory arbitration process by way of compulsory conciliation at the Ministry of Labour as provided under the Labour Relations Act.

The Claimant has referred me to Articles 152 (2) (d) which provides for administration of justice without undue regard to technicalities and Article 159 (2) (c) which promotes alternative forms of dispute resolution. Both provisions are not applicable to this case. Limitation period is not a procedural

provision. It is substantive law that determines the validity of courses of action and also provides the strict circumstances when the limitation period is deemed not to run or may be extended. Secondly disciplinary process in employment. Relationships is not an alternative form of dispute resolution as envisaged under Article 159 (2) (c) of the Constitution.

For the foregoing reasons the claim filed herein by the Claimant has been filed outside the limitation period and is therefore statute barred. No leave

was sought to file out of time. This court does not have jurisdiction to hear claims that are statute barred.

I therefore strike out the claim with no orders as to costs.

Delivered and signed in open court on 4th April 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Ilako for Kahingira for Claimant

No appearance for Respondent