



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 953 OF 2010
BENJAMIN WACHIRA NDIITHI.....CLAIMANT
VS
PUBLIC SERVICE COMMISSION.....1ST RESPONDENT
ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Background

1. On 19th August, 2010, the Claimant filed a Notice of Motion seeking leave to file a claim for unlawful termination out of time. The application which was supported by the Claimant's affidavit sworn on 13th August 2010 was based on the following grounds:

- a. That at all material times, the Claimant was a public officer and an employee of the Government of Kenya in the Ministry of Environment and Natural Resources.
- b. That on 1st October 2000, the Claimant's employment was unlawfully terminated.
- c. That between 1st October 2000 and 8th August 2006 the Claimant made appeals and attempted to have the decision terminating his employment reversed administratively until 8th August 2006 when he was informed that his employment file had been closed.
- d. That on 14th May 2008 the Claimant filed Judicial Review Misc Application No. 279 of 2008 in the High Court of Kenya at Nairobi, seeking enforcement of his fundamental rights and freedoms under the Constitution.
- e. That the Claimant's application was dismissed on 25th June 2010 on the ground that the Claimant ought to have filed a civil claim and not an application under section 84 of the Constitution.
- f. That upon enactment of the Employment Act, 2007 all civil claims relating to employment were to be filed in the Industrial Court.
- g. That the Claimant failed to file his claim within the time stipulated by law because his Advocates held the view that his case could be determined by an application to the High Court under section 84 of the Constitution.

- h. That it is in the interest of justice that the Claimant be given an opportunity to litigate his claim.
2. The Respondents filed Grounds of Opposition together with a replying affidavit sworn by Bernadette Mwiwaki Nzioki, stating that:
 - a. The Claimant's application is bad in law and an abuse of the court process.
 - b. The application offends the provisions of the Employment Act, 2007 and the Labour Institutions Act.
 - c. The Court has no jurisdiction over the application before it.
 3. For some reason, the trial Judge, **Chemmutut J** (as he then was) did not dispense with the Claimant's application but instead issued the following orders on 18th April 2011:
 - a. The Notice of Motion filed by the Claimant be treated as claim.
 - b. The Notice of Motion re: Preliminary Objection is hereby retained pending the Respondent's Reply.
 - c. Claimant to file supplementary memo re: quantification of claim on or before 2.5.2011.
 - d. Respondents to file a reply thereto on or before 23.5.2011.
 - e. Hearing on 30.9.2011, at 11.00 a.m.

4. By time the file was allocated to me the Claimant's application for leave to file his claim out of time had not been dealt with and when Counsels for the parties appeared before me on 13th March 2014, Mrs. Okwara for the Respondents sought direction on the issue of limitation of time which remained pending. Both Counsels agreed to dispense with this issue by way of written submissions.

The Respondent's Submissions

5. In the written submissions filed on behalf of the Respondents on 27th March 2014, it is submitted that the Claimant's claim is statute barred and offends the mandatory provisions of Section 3(2) of the Public Authorities Limitation Act as well as Section 90 of the Employment Act, 2007.
6. According to the Respondents, the cause of action in this case arose from 1st October 2000 when the Claimant was retrenched. He therefore ought to have brought his claim by 1st October 2003. The Respondents further submit that the Claimant's claim cannot even be saved under Section 27 of the Limitation of Actions Act which provides for extension of limitation periods in certain cases. In the Respondents' opinion, extension of time under Section 27 of the Limitation of Actions Act is only applicable in actions based on negligence, nuisance or breach of duty but not contracts.
7. The Respondents submit that Part III of the Limitation of Actions Act which deals with extension of time does not apply to actions based on contracts. Consequently, once the Court finds that a matter based on contract is filed out of time it cannot take any further steps; it must terminate the proceedings forthwith.
8. The Respondents further contend that this suit is *res judicata* in view of the fact that the Claimant had challenged his retrenchment in Judicial Review Misc Application No. 279 of 2008 upon which the High Court ruled that there was no contravention of any of the Claimant's constitutional rights. It is the Respondents' position that the Claimant's claim was conclusively

determined by a court of competent jurisdiction.

The Claimant's Submissions

9. In the Claimant's submissions filed on 4th April 2014, it is submitted that the Claimant's claim is not based on pure contract but is mixed with constitutional issues of human rights. In this regard, reference was made to Article 43 of the Constitution, 2010 which elevates contractual employment matters to the Bill of Rights as well as Article 162(2)(a) which establishes the Industrial Court with the same status as the High Court. It is the Claimant's conclusion therefore that employment contracts have been elevated to the level of human rights and cannot therefore be treated as other contracts even for purposes of limitation of time.

10. With regard to the issue of accrual of the cause of action, the Claimant submits that his cause of action accrued on 8th August 2006 when he was notified that his case had been closed. According to the Claimant therefore his claim was filed within time whether under the Public Authorities Limitation Act, Limitation of Actions Act or the Employment Act. The Claimant further submits that the time for filing of his claim should be reckoned as 2008 when the case was filed in the High Court as opposed to 2010 when it was filed in the Industrial Court.

11. On the question whether the claim is *res judicata*, the Claimant submits that the issues in Judicial Review Misc Application No. 279 of 2008 which dealt with enforcement of fundamental rights under section 84 of the repealed constitution are different from the issues in the current claim which is based primarily on employment contract and retrenchment, with issues of fundamental rights as only supplementary. Additionally, the core issues of whether the Claimant's retirement from the civil service was lawful were never finally and fully determined since the High Court found that the suit was filed in the wrong court.

Determination

12. In my understanding, the issues for determination in this application are as follows:

- a. Is the Claimant's claim based on pure contract and does this have any effect on limitation of action?
- b. When did the cause of action arise?
- c. Is the Claimant's claim time barred ?
- d. If the claim is time barred does this Court have power to extend time?
- e. Is the Claimant's claim *res judicata*?

Nature of the Claimant's Claim

13. In the submissions filed on behalf of the Claimant, the Court was urged to hold that the Claimant's claim is not merely one of pure contract but with constitutional rights which are not restricted by limitation of time.

14. In this regard, while I agree with the Claimant that employment contracts may embody constitutional rights under the Constitution, I do not think that this elevation by itself jettisons the law on limitation as far as enforcement of these rights are concerned. In my view therefore, employment contracts remain subject to limitation either under Section 4(1) of the Limitation of Actions Act or under Section 90 of the Employment Act, 2007 depending on the effective date of the employment contract being enforced.

The Date of Accrual of the Cause of Action

15. On the accrual date of the cause of action which has a direct bearing on running of time, the Claimant takes the view that the cause of action in his case did not accrue until 8th August 2006 when he was notified that his employment file had been closed, thus dashing any hopes of his

reinstatement to the public service.

16. This Court has however taken a different view on this matter in the case *Hilarion Mwabolo Vs Kenya Commercial Bank [2013 eKLR]* to the effect that accrual of the cause of action in a claim emanating from an employment contract takes effect from the date of termination as stated in the letter communicating the termination. The fact that an employee whose employment has been terminated seeks a review or an appeal does not mean that accrual of the cause of action is held in abeyance until a final verdict on the review or appeal.

17. In the instant case, the Claimant's termination from the 1st Respondent's employment took effect on 1st October 2000 as communicated by letter dated 29th September 2000. It follows therefore that the cause of action upon which the Claimant's claim is based accrued on 1st October 2000 and that is the date when time began to run as against the Claimant's claim.

Time Barred?

18. In order to answer the question whether the Claimant's claim is indeed time barred, I need to establish the applicable limitation law. Although reference was made to the Employment Act, 2007 I do not think that law is applicable in the Claimant's case since his employment was terminated on 1st October 2000 long before the coming into effect of the new employment law in 2008. Consequently, it is my view that the Claimant's employment was governed by the repealed Employment Act (Cap 226). Limitation under Section 90 of the Employment Act, 2007 would not therefore be applicable in this case.

19. That leaves Section 3(2) of the Public Authorities Limitation Act which provides that no proceedings founded on contract may be brought against the Government after three years of the date of accrual of the cause of action and Section 4(1) of the Limitation of Actions Act which provides that actions founded on contract may not be brought after the end of six years from the date of accrual of the cause of action. Even if one were to read down Section 3(2) of the Public Authorities Limitation Act on the basis that it discriminates against a certain category of employees, the Claimant's claim must in my view be subjected to the time limits set under the Limitation of Actions Act.

20. The Claimant told the Court that limitation is a matter of technicality which can be easily tackled under Article 159 (2)(d) of the Constitution, 2010. I do not think so. As held by the Court of Appeal in the case of *Thuranira Karauri Vs Agnes Ncheche [1997] eKLR* the issue of limitation goes to jurisdiction and whenever it is raised, the Court must deal with it before proceeding any further. To my mind, even in the current constitutional dispensation, parties must come to court in time.

21. Still on the question of limitation, the Claimant asked the Court to deem his claim duly filed as from 2008 when he filed Judicial Review Misc Application No. 279 of 2008. My reading of the Judgment of **Wendoh J** in that application however, indicates that the learned Judge delivered a final verdict in the matter before her and I therefore find no basis to extend the filing date of Judicial Review Misc Application No. 279 of 2008 to cover the Claimant's claim before this Court.

Discretion to Extend Time?

22. On the question of discretion to extend time, the Respondents submit that the Court has no such power with regard to claims arising from employment contracts. On this point, the Court was referred to the Court of Appeal decision in *Divecon Vs Samani [1995-1998] 1 EA 48 at page 54* in which the Appellate Court rendered itself thus:

“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.”

23. ***Divecon Vs Samani*** has not been overturned and flowing from the doctrine of *stare decisis* it binds this Court. Moreover, the new employment law does not provide room for discretion to extend time in employment matters.

Res Judicata?

24. With regard to the question whether the Claimant's claim is *res judicata*, the Respondents submit that since the claim was fully determined in Judicial Review Misc Application No. 279 of 2008, the Claimant has no further claim to make against the Respondents. However, the Judgment arising from the case filed in the High Court is clear that the determination by the learned Judge is based on her finding that the Claimant's Petition did not disclose contravention of any constitutional rights. In my view, that finding did not extinguish the Claimant's claim in private law. Dismissal of the Petition did not therefore bar the Claimant from bringing a fresh claim before this Court subject to limitation of time as set out above.

25. In the final analysis, the Court finds that the Claimant's claim filed in this Court either by way of Notice of Motion filed on 19th August 2010 or by Supplementary Memorandum filed on 5th July 2011 is statute barred by dint of Section 4(1) of the Limitation of Actions Act. I therefore proceed to strike out the claim with no order for costs.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF JUNE 2014

LINNET NDOLO

JUDGE

Appearance:

Mr. Gacheru instructed by Kamau Kuria & Company Advocates

Mrs. Okwara instructed by the Attorney General for the Respondents