

REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI

CAUSE NO. 1020 OF 2013

JOSHUA OTIENO OBUHATSA.....CLAIMANT/RESPONDENT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT/OBJECTOR

RULING

1. The Respondent/Objector objects to the suit on the basis that the Claimant/Respondent filed the suit out of time. The parties agreed to file written submissions to dispose of the objection. The preliminary objection is dated 2nd September 2013 and is to the effect that the suit is barred in terms of Section 90 of the Employment Act. The Respondent argued that the Claimant was dismissed from service on 24th May 2002 after being subjected to an elaborate disciplinary process where his interdiction was revoked and his resignation upheld. It was submitted that Section 90 of the Employment Act barred any civil action or proceedings to be commenced 3 years after accrual of cause of action and in the case of a continuing injury or damage within 12 months. It was also submitted that the spirit of Section 90 is reiterated in Section 3(2) of the Public Authorities Act which caps the limitation to 3 years. The Respondent relied on the case of **Divecon v Samani, Mutinda Anthony Nzioka v TSC and Nicodemus Marani v Timsales Limited [2014] eKLR**.
2. The Claimant was opposed and in his submissions submitted that the Claimant's suit is not time barred as time has not begun to run since the Claimant has not received a letter communicating the decision to terminate. It was submitted that the law which came into effect in 2007 could not have retrospective effect. He relied on the cases of **Philips v Eyre (1870) LR QB 1** and the case of **Godeka v Middle Town Forex Bureau Limited [2014] eKLR**. He thus urged the Court to disallow the objection.
3. The law on preliminary objection is settled. The *locus classicus* is the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696**. The learned judges of appeal held that a preliminary objection is a point of law when if taken would dispose of the suit. Law J.A. succinctly stated a preliminary objection to be thus:- “*So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.*”
4. There is also an erudite holding by Sir Charles Newbold, President who stated in the same judgment as follows:- “*A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.*”
5. The objection taken must fit within these parameters failing which it would be dismissed. The matter before me thus would of necessity require that I ascertain a few facts. The Respondent

avers that the cause of action accrued on the conclusion of the disciplinary hearing on 24th May 2002 when the interdiction was revoked and resignation upheld with effect from 1st October 1995. The Claimant avers the cause of action has not accrued as a letter has not been sent out to the Claimant.

6. Let me disabuse counsel of the notion that cause of action can only accrue after a letter is issued. Desertion of duty and similar acts would precipitate a suit for reliefs such as this Claim. There need not be a letter of dismissal. Constructive dismissal and that class of termination of employment is another case in point.
7. I am in agreement with the reasoning in **Philips v Eyre** (supra) cited with approval by Nyamu J. in **Keroche Industries Ltd. v Kenya Revenue Services & 5 others [2007] eKLR**. The general principle that legislation which regulates the conduct of mankind ought to deal with prospective actions and not change the character of past transactions carried out on the faith of the then existing law. Unless that is the express intention of legislature – and for which good cause must be demonstrated – such laws would not pass muster. In the case before me there is a challenge to the application of the Employment Act 2007. The applicable law would therefore be the Employment Act cap 226 (now repealed).
8. As I held in the case of **Herbert Godeka v Middle Town Forex Bureau Limited [2014] eKLR** it could not have been the intention of Parliament to take away a legal right that had accrued to the Claimant. That cannot be the intended result of legislation. Laws take effect prospectively except where expressly stated to have retrospective effect. This was not done in respect to the Employment Act 2007. It applies prospectively and not retrospectively.
9. The Claimant accrued a right to seek redress after the determination of the disciplinary meeting in May 2002. Taking the date of determination as the starting point, the Claimant herein was entitled to commence his suit within 6 years and the limitation would have set in on 24th May 2008. He filed the suit on 5th July 2013 which is slightly over five years after limitation set in. The suit is barred by limitation and the objection thus succeeds and the suit is dismissed with costs to the Respondent/Objector.

Orders accordingly.

Dated and delivered at Nairobi this 30th day of **September** 2014

Nzioki wa Makau

JUDGE