



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CAUSE NO. 9 OF 2014**

(Before Hon. Justice Hellen S. Wasilwa on 30<sup>th</sup> September, 2014)

ROSE LUNANI LUKORITO ..... CLAIMANT

**-VERSUS-**

TEACHERS SERVICE COMMISSION ..... RESPONDENTS

**R U L I N G**

The application before court is the preliminary objection dated 1.7.2014 filed by the respondents herein. The respondents have raised a preliminary objection on the grounds that the claimant's claim is statute barred by reason of the mandatory and express provision of S. 4 of the Limitation of Actions Act and S. 90 of Employment Act 2007. The respondents contend that the claimant was dismissed on 5.10.2006 and she filed her claim on 13.12.2012, 6 years after the cause of action without explaining the delay nor making a proper application before court. The respondents want the entire claim struck out accordingly.

The claimant filed their statement of grounds of opposition on 11.9.2014. Their grounds of opposition are brought under The Constitution of Kenya, 2010, Articles 47, 50 & 159(2) Civil Procedure Act, Cap 21 Laws of Kenya, Sections 1 & 1A, Civil Procedure Rules 2010, Order 51, Rule 14(1) (a), (c) and 2; Limitation of Actions Act, Cap 22 Laws of Kenya, S. 26(c), Teachers Service Commission Act Cap 212 Laws of Kenya, S. 7, 8, 9 10 & 11. They oppose the preliminary objection on the following grounds:-

- 1. The preliminary objection as filed is irrelevant, vexatious and is an abuse of the court process and the same offends Order 51, Rule 14(1) of the Civil Procedure Rules, 2010 in so far as it purports to challenge the substantive suit.**
- 2. The preliminary objection cleverly and improperly attempts to transform a normal industrial dispute for ordinarily litigation into an application to enable the respondents argue for the defeat of the substantive suit through the objection, and the same is therefore inadmissible and should fail *in limine*, and the suit be heard *ex debito justitiae*.**
- 3. The preliminary objection is fatally defective as it fails to comply with the express provisions of Order 51, Rule 14(1) (a) and (b) which require that a notice of preliminary objection be filed and served not less than three clear days before the date of hearing.**
- 4. This Honourable court is enjoined in ensuring that the interests of justice require that the court should not have undue regard to technicalities and instead hear and determine matters on merit, as provided for in Article 159(2) (d) of the Constitution, as read together with Sections 1A and 1B of the Civil Procedure Act, Chapter 21 Laws of Kenya.**
- 5. The Action by the claimant is for relief from the consequences of a mistake in the decision of the respondent and the same is immunized from challenge by dint of Section 26(c) of the**

**Limitation of Actions Act, Chapter 22 Laws of Kenya.**

6. In any event if the respondent was in fact the forum of the determination of the subject of dispute herein, then it is self-evident that the element of hearing contemplated by Article 50 were depreciated.

(a) At all material times, the claimant was never informed of the identity of the complainant, the nature of the complainant as well as the prejudice suffered by anyone from the matters under dispute, yet Article 50(2) (b) at the very least requires that she be informed of the charge and with sufficient detail to answer it.

(b) Further, to date fundamental questions linger as to whether there was any complaint by any individual/authority the basis upon which the respondent action were founded.

(c) The respondent appeared to have predetermined the fate of the claimant before commencement of the disciplinary process as wanton psychological torture occasioned by being severally summoned to Nairobi coupled with several adjournments conspired to deny the claimant adequate time and facilities to prepare her defence.

(d) Despite the claimant lodging an appeal to the Teachers Service Commission Appeals Tribunal within 28 days as required by Section 10(1) of the TSC Act, there was no response, hearing or determination of the appeal.

(e) The dismissal letter violated Section 10(1) and 10(3) of the TSC Act as it did not state the facts found to have been proved in the proceedings and the reasons for the determination.

7. The delay in instituting this suit was occasioned by slow, even lethargic, administrative actions of the respondent and the same fall short of the requirements of fair administrative action contemplated by Article 47(1) of the Constitution of Kenya, 2010.

(a) The respondent by its conduct delayed the process by not responding to the claimant and is stopped from relying on the provisions of the Limitations of Actions Act to debar the claimant from availing herself the protection of law.

(b) The respondent did not respond to the demand letter from the applicant's advocates dated 21.10.2011 nor the reminder dated 3.02.2012, a clear manifestation of the delaying tactics employed by the respondent.

(c) The respondent was served with the memorandum of claim on 21.12.2012 but never bothered to file their memorandum of defence till 2.10.2013 almost ten (10) months later.

(d) The delay was a mischievous design by the respondent to defeat time within which the claimant could lodge a claim against the unfair and unlawful decision by the respondent.

(e) Prior to transfer of the matter from Nairobi to the Industrial Court in Kisumu, the matter was mentioned in Nairobi with the respondent always being notified in sufficient time and in all those instances the respondent never bothered to make appearance and make any representations before the court. That this preliminary objection should now be brought this late in the day defies all fundamental tenets of fair administration and access to justice.

Upon considering the parties submissions, the issues for determination are:-

1. **Whether the preliminary objection is properly before court.**
2. **Whether the claim is time barred.**

The claimants have submitted that the preliminary objection is fatally defective as it fails to comply with the express provisions of Order 51 Rule 14(1) and (b). Order 51 rule 14(1) reads as follows:-

**“(1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents:-**

- (a) **a notice of preliminary objection and/or**
- (b) **replying affidavit and or**
- (c) **a statement of grounds of opposition**

**(2) The said documents in subrule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing.”**

The respondents filed their notice of preliminary objection on 1.7.2014 and set it for hearing on 8.7.2014. This was within not the period of time contemplated as this was after 7 days. However what is contemplated herein as a preliminary objection in respect of an application and not a substantive claim as herein set.

A preliminary objection is solely based on pure points of law. From the celebrated case of *Mukisa Biscuit Co. Vs West End Distributors Ltd (1969) EA 696*, it was held that:-

**“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 authority.”**

The claimant submitted that what is contended cannot be ascertained without evidence as to the correct time when the cause of action arose and to the time the claimant learnt of the exact reasons as to why she had been terminated by the respondents.

Given the provisions of Article 159(5) of Constitution, the court would be delving into matters of procedural as opposed to substantive justice if the court strikes out the preliminary objection for the reason that it was filed in respect of the entire claim and not in respect of an application and without being pleaded in the memo of response. I therefore hold that the preliminary objection is rightly before court.

Is the matter then time barred? By virtue of S. 26 of Limitation of Actions Act, there are instances where court can extend the period of limitation. This is in case of fraud and mistake.

S. 26 provides that:-

**“Where in the case of an action for which the period of limitation is prescribed either;**

(a) ---

(b) ---

**(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it.”**

The claimant contends that she was dismissed by respondents on a case of mistake without

ascertaining the truth. She seems to discover this mistake after respondents filed their defence and attach a letter dated 11.5.2011 from the claimant's chief way after claimant had been terminated in 2006. It is as if the respondents are going on with other investigations after dismissing the claimant, a pointer that they had not exhaustively done their investigations before terminating her.

The whole claim therefore seems to be based on a mistake which parties should be given an opportunity to unravel so that ends of justice are met. I therefore find the preliminary objection has no merit. I dismiss it and order the substantive case to proceed.

**HELLEN S. WASILWA**

**JUDGE**

**30/9/2014**

**Appearances:-**

N/A for both parties

CC. Wamache