



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 195 of 2008

JOHN KUNGU KIARIEPLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....DEFENDANT

RULING

This matter was set down for hearing for the 15th & 16th of June, 2009. However before the said date on 15th of May, 2009 the Defendant filed a Notice of Preliminary Objection. The Preliminary Objection was to be raised prior to the hearing of the suit.

The same raised 3 grounds:-

1. That the Plaint herein dated 16th May, 2008, and filed on the 20th of May, 2008 in this court is incurably defective as the Industrial Court has exclusive jurisdiction to hear and determine this suit pursuant to Section 87(1) and (2) of the Employment Act (Chapter 11 of 2007).
2. That the Plaint herein dated 16th May, 2008, and file on the 20th of May, 2008 in this court is incurably defective as the Industrial Court has exclusive jurisdiction to hear and determine this suit pursuant to Section 12(1) of the Labour Institutions Act (Chapter 12 of 2007).
3. That the Plaint seeks to ventilate a claim and urges this court to make judicial findings in respect of persons not party to these proceedings.

The Plaintiff vehemently opposed the Preliminary Objection.

I have considered submissions by learned counsel and authorities cited.

For consideration before me is whether this court has jurisdiction to hear and determine the matter before it, the same having been filed before the enactment of the Employment Act Cap 11 & Labour Institutions Act Cap 12 of the Laws of Kenya.

The defendant contends that the suit is incurably defective. The defence relied on the grounds on the face of the notice of preliminary objection and urged the court to dismiss the entire suit.

The plaintiff contended that the objection was misconceived. That the cause of action arose on the 22nd

May, 2003. That the Employment Act, 2007 Chapter 11, of the Laws of Kenya and the Labour Institutions Act Chapter 12 , of the Laws of Kenya were then not in force. The Employment Act Chapter 226, of the Laws of Kenya was the applicable Law at the institution of the suit, and that the said Act has not been repealed and remains in force. Further that all matters prior to the enactment and operationalization of the 2 new Acts were properly filed before the court. Therefore there is no basis upon which to strike out the suit before the court.

It is not disputed that the suit was instituted before the enactment of the 2 statutes referred in the Preliminary Objection. In the case of Kenya Bankers Association & Others vs. Minister for Finance & Another (204) Misc. Civil Application No.908 of 2001 (The Donde Bill Case) the court stated in part :-

“..... The general rule in our jurisdiction is that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure and objection is more strongly felt in respect of the *ex-post facio* imposition of novel penalties, and of arbitrarily creation of new crimes, than in any other form of retroactive legislation, for it shocks the most elementary sense of justice to punish anybody, as an after thought for doing that which was lawful when he did it.”

I am of the view that it would be highly prejudicial , unfair, and a denial of substantial justice to strike out the plaint which was duly filed and within the law. Guided by the authority cited above, minded that courts of justice should at all times dispense with substantive justice, and that striking out pleadings is a draconian measure which the court should be slow in applying, I decline to strike out the pleadings herein and dismiss the Preliminary Objection.

Dated and delivered at Nairobi this 9th day of October, 2009.

ALI-ARONI

JUDGE