



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 61 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**BILHA PAMELA ATIENO.....CLAIMANT**

*Versus*

**COPY CAT LIMITED .....RESPONDENT**

**RULING**

In the Claim herein filed on 3rd March 2016 the Claimant avers that she was employed by the Respondent on 11th July 2006 as an accountant and worked diligently until November 2012 when she was falsely accused of theft by the Respondent. She was subsequently charged in Kisumu Chief Magistrate's Court Criminal Case No. 655 of 2012 with the offence of stealing by servant contrary to section 281 of the Penal Code but was acquitted under section 210 of the Civil Procedure Code the prosecution having failed to establish a prima facie case to warrant placing her on her defence.

The Claimant avers that the Respondent barred her from accessing the workplace immediately after she was arrested and arraigned in court, an act that she considers to be constructive dismissal. The Claimant seeks the following remedies-

- a) Shs. 776,000.00;
- b) Certificate of service;
- c) Costs of this suit;
- d) Interest on (a) and (c) above.

The Respondent entered Appearance on 19th May 2016 and a Notice of Preliminary Objection on 22nd August 2016. The ground of objection is that the cause of action arose in November 2012 and therefore the claim is time barred under the provisions of section 90 of the **Employment Act** (the Act) .

The Preliminary objection was argued in court on 26th January 2017. Mr. Maloba appearing for the Respondent submitted that the court lacks jurisdiction to entertain the claim by virtue of section 90 of the Act. He submitted that at paragraph 4 of the Memorandum of Claim the Claimant avers that she was dismissed in November 2012. That at Paragraph 5 the Claimant avers that the act of the Respondent to bar her from accessing the workplace is constructive dismissal. He submitted that the cause of action therefore arose in November 2012 while the Claim was filed on 3rd March 2016. He submitted that the Claim ought to have been filed in November 2015. He submitted that section 90 provides that no civil action or proceedings in contracts of service shall lie unless commenced within 3 years. He submitted that

this is a mandatory requirement, that the Claimant has not sought leave to file her claim out of time or to extend time. He submitted that section 90 does not grant the court powers of discretion to extend the time. Mr. Maloba submitted the pendency of criminal proceedings does not operate as a stop to the running of time with regard to an action for wrongful dismissal.

Mr. Maloba referred the court to the case of MOSES JUMA OTIENDE V G4S SECURITY SERVICES MISC. APPL NO. 43 OF 2016 (2016)eKLR. He further referred the court to the case of KEVIN OMONDI ODERA V FLAMCO LTD (2014)eKLR. He submitted that in the first authority the judge posed the question - whether the pendency of criminal proceedings operates as a hold to civil proceedings. He submitted that section 90 of the Act is express and quite clear and does not make criminal proceedings a cap to running of time. He further submitted that the Judge stated that this is not a continuing injury or damage.

Mr. Maloba prayed that the suit be dismissed on grounds that it is time barred.

Mr. Omondi appearing for the Claimant submitted that the preliminary objection is inept and bad in law. He submitted that the catch words in section 90 are "continuing wrong". He submitted that in the case of MOSES JUMA OTIENDE V G4S SECURITY SERVICES MISC. APPL NO. 43 OF 2016 (2016)eKLR the Judge did not analyse the law but simply stated that an employee cannot escape the dragnet by waving criminal proceedings. He submitted that in CAUSE 136 OF 2016 DAVID NYAMAI AND 7 OTHERS V DEL MONTE the judge gives a proper analysis of section 90. The judge stated that if the employer decides to go the criminal justice system by instituting criminal charges against the employee by providing witnesses and sometimes delaying the case, then the employer should be bound by the decision in the criminal case. Mr. Omondi submitted that the Judge analysed Article 50 and pointed out the provisions of the relevant statute that defines the scope of criminal proceedings. He submitted that the position is therefore that if an employer elects to go the criminal way then the cause of action starts to run at the conclusion of the criminal proceedings.

He submitted that at paragraph 4 of the Memorandum of claim it is pleaded that the claimant was alleged to have stolen in November 2012 and immediately thereafter the employer preferred criminal charges. He submitted that the Claimant has annexed a copy of the judgment which was read on 30th June 2015. He submitted that there is no letter of termination, that an employer who issues a letter of contract at inception of the employment relationship would ordinarily issue a letter of termination of contract at the end thereof. He submits that in the claim it is pleaded that the claimant was locked out of work due to the pending criminal case. He submitted that there is no pleading in the claim stating the date when the claimant was dismissed.

Mr. Omondi submitted that the Respondent had shown utmost bad faith by failing to state when the claimant's employment ceased and then shifted blame on the employee who is the weaker party. He submitted that the Claimant believed that should she be acquitted the employer would take her back, that she went back and was told that she was considered terminated. He submitted that the claim is properly in court and prayed that the preliminary objection be dismissed.

In a short rejoinder Mr. Maloba submitted that a preliminary objection raises a point of law on the presumption that the facts as pleaded are correct as was held in case of MUKISA BISCUITS by Newbold JA. He submitted that the Claimant has pleaded that she was terminated in November 2012 and it is not the respondent's business to present evidence at this juncture. He submitted that CAUSE 136 OF 2016 DAVID NYAMAI AND 7 OTHERS V DEL MONTE can be distinguished. That the issue that the court must decide is when the cause of action arose. He submits that the claimant stated that right after she was charged she went back to work but was shut out and that the cause of action arose at the time of her dismissal. He further submitted that in the case of DAVID NYAMAI the Claimant went back to work for review of her termination immediately after the acquittal, that a demand letter was thereafter addressed to the Respondent and then the Claimant moved to court immediately. He submitted that in the present case the claimant went to court 6 months later.

Mr. Maloba urged the court to consider the two authorities he submitted to court and dismiss the suit with

costs to the Respondent.

## **Determination**

I have considered the pleadings in the Memorandum of Claim and the submissions of counsel for the parties on the preliminary objection filed by the Respondent. The issue arising for determination is when the cause of action herein arose and if the claim is time barred.

Section 90 of the Act provides as follows-

### **90. Limitations**

*Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.*

According to the Memorandum of Claim filed herein it is pleaded as follows in paragraphs 4 and 5 as follows-

4. *The Claimants served the Respondents with loyalty and diligence until November 2012 when the Respondent without color of right alleged that the claimant had stolen Kshs.780,355.20 and charged the claimant with the offence of stealing by servant contrary to section 281 of the penal code vide KISUMU CHIEF MAGISTRATES COURT CRIMINAL*

*CASE NO.655 OF 2012 and the claimant was acquitted under Section 210 of the Criminal Procedure Code the prosecution having failed to establish a prima facie case to warrant placing the claimant on defense the claimant without following the laid down procedure in the Employment Act. **Appendix 2 is ruling in the criminal case number 655 of 2012.***

5. *The claimant avers that the respondent barred her from accessing the place of work immediately she was arrested and arraigned in court. The act of the respondent to bar claimant from accessing place of work is considered to be constructive dismissal without following the laid down procedure both in the Employment Act and Contract of Employment.*

From the two paragraphs it is clear that the cause of action is alleged to have arisen in November 2012. There is no mention of any other dates or reference to the date of the cause of action in the rest of the memorandum of claim. It is trite law that a party is bound by its pleadings.

The Claimant urged this court to find that the cause of action arose upon her acquittal in KISUMU CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO. 655 OF 2012 30th June 2015. There is no legal basis for such a position. Criminal proceedings are parallel to civil proceedings and can go on concurrently. The Employment Act does not provide for the pendency of criminal proceedings to expand limitation period and there was no reason why the claimant should not have filed suit while the criminal proceedings were pending. In any event the criminal case was concluded on 30th June 2015, before the lapse of the limitation period in November 2015 and therefore is not a valid ground in this case. CAUSE 136 OF 2016 DAVID NYAMAI AND 7 OTHERS V DEL MONTE is therefore not available for the Claimant as it is distinguishable. I must also state that I do not agree with the holding therein, which is not binding on this court, and there being several decisions of the Court of Appeal to the contrary.

In the case of **Divecon v Samani [1995-1998] E.A. 48**, the Court of Appeal held that once the limitation period had lapsed, a court is devoid of jurisdiction, and without jurisdiction, a court must down its tools (**Owners of Vessel Lillian 'S' v Caltex Oil (K) Ltd**). Limitation is a matter of law and not procedure. The effect of limitation is to extinguish a right such that the right can no longer be the subject of a claim.

More recently in the decision of the Court of Appeal in Kisumu in **Civil Appeal No.6 of 2015 Kenya Airports Authority v Shadrack Abraham Kisongochi**, the Court of Appeal overturned the decision of Wasilwa J in Cause No.20 of 2014 wherein she had granted leave to file suit out of time.

There are numerous decisions of this court that have applied the decisions of the Court of Appeal, two of them being MOSES JUMA OTIENDE V G4S SECURITY SERVICES MISC. APPL NO. 43 OF 2016 (2016)eKLR and KEVIN OMONDI ODERA V FLAMCO LTD (2014)eKLR which the Respondent relied on. The foregoing being the case it is obvious that the claim should have been filed in November 2012. Having been filed on 3rd March 2016, it is on the face of it time barred and for striking out.

### **Conclusion**

The upshot is that the preliminary objection of the Respondent succeeds and is upheld with the result that the claim filed by the claimant herein is struck out. Each party will bear its costs.

**Dated, Signed and Delivered this 4th day of May, 2017**

**MAUREEN ONYANGO**

**JUDGE**