



Hart v Schenker Limited (Cause 4 of 2019) [2024] KEELRC 1726 (KLR) (4 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1726 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

CAUSE 4 OF 2019

AK NZEI, J

JULY 4, 2024

BETWEEN

LARISSA MANSON HART CLAIMANT

AND

SCHENKER LIMITED RESPONDENT

RULING

1. The suit herein was instituted by the Claimant against the Respondent vide a memorandum of claim dated 29/1/2019 and filed in Court on 30/1/2019. The Claimant pleaded in detail that she was, on or about 28/2/2013, employed by the Respondent as her Mombasa Branch Manager, earning a starting salary of Kshs 500,000 with an increment to Kshs 509,000 effective September 2016. That on 28/2/2017, the Claimant resigned after being demoted and being subjected to embarrassment humiliation and being belittled and demeaned in front of colleagues by the Respondent’s Managing Director. The Claimant further pleaded that she was entitled to resign, in the light of the manner in which she had been treated by the Respondent; and pleaded unfair dismissal.
2. The Claimant sought the following reliefs:-
 - a. A declaration that the actions of the Respondent amounted to constructive termination.
 - b. 3 months’ salary in lieu of notice.....Kshs 1,527,000
 - c. Compensation for unfair constructive dismissal (12x509,000).....Kshs 6,108,000
 - d. Pending leave (17.50 calendar days)Kshs 296,747
 - e. Exemplary and general damages.
 - f. A certificate of service be issued.
 - g. Interest.



- h. Any other or further relief that the Court may deem just and fit to grant.
3. The suit was defended by the Respondent vide a memorandum of Response dated 13/3/2019 and filed in Court on even date.
4. With the Court's leave, the Claimant filed an Amended Statement of Claim on 5/7/2023, dated 3/7/2023. On 26/7/2023, the Respondent filed an Amended Memorandum of Reply and Counter-Claim, and pleaded as follows in the counter-claim:-
- a. that at all material times, the Claimant was aware of the terms and conditions of her employment contract, which clearly stated that "This agreement may be terminated by either party by giving 3 months' notice in writing or payment in lieu of notice. Employment may be terminated by employer without notice or payment in lieu in the event of gross misconduct or persistent misconduct by the employee.
 - b. that the Claimant, contrary to the terms of her employment, resigned without giving the required three (3) months' notice and further failed to make payment in lieu of notice.
 - c. that the Claimant's immediate resignation amounted to a breach of her contract of employment, and caused financial loss and inconvenience to the Respondent due to the abrupt vacancy of the critical position of Branch Manager and subsequent need for recruitment and training of her replacement.
 - d. that in view of the Claimant's gross salary of Kshs 509,000, the Claimant owes the Respondent payment in lieu of notice amounting to Kshs 1,527,000, representing three month's gross pay.
 - e. that the Claimant's resignation was due to her own personal reasons and choices.
5. Reliefs sought in the Respondent's Counter-Claim are as follows:-
- a. a declaration that the Claimant is in breach of her contract of employment.
 - b. an order for the Claimant to pay the Respondent the sum of Kshs 1,527,000 as payment in lieu of notice.
 - c. an order that the Claimant pays the costs of the suit.
 - d. such further or other reliefs as the Court may deem just and equitable.
6. The Claimant filed a defence to the counter-claim on 25/8/2023, and on 26/9/2023 filed a Notice of Motion dated 25/9/2023 seeking the following orders:-
- a. that the Counter-Claim filed with the Amended Memorandum of Reply on 26/7/2023 be struck out.
 - b. that consequential orders be made as this Court deems appropriate.
 - c. that costs of the application and counter-claim be accorded to the Claimant.
7. The application, expressed to be brought under Sections 3,12,20 and 90 of the *Employment and Labour Relations Court Act*, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Rules 14(5) and 17 of the *Employment and Labour Relations Court (Procedure) Rules*, Order 2 Rules 15(1) (a), (b), (c) & (d) and Order 51 of the *Civil Procedure Rules*, is predicated on the Claimant's (supporting) affidavit sworn on 25/9/2023. It is deponed in the said affidavit that the Respondent's counter-claim was filed in contravention of the provisions of Section 90 of the *Employment Act* which bars claims being made



after three years of the cause of action occurring under employment contracts. That no leave had been sought, and none had been granted for filing of the counter-claim.

8. The Claimant's said application, which is now before me for determination, is opposed by the Respondent vide a replying affidavit of Catherine Muchemi, the Respondent's Chief People Officer, sworn on 2/10/2023. It is deponed in the said affidavit, inter-alia:-

- a. that the counter-claim, as per established legal provisions, takes its commencement date from the original action which in this case was filed on 30/1/2019.
- b. that the counter-claim clearly falls within the three-years limitation period outlined in Section 90 of the Employment Act, and especially given the Claimant's newly introduced claims for the period from September 2016 to February 2017.
- c. that the Claimant has filed defence to the counter-claim dated 24/8/2023, and this constitutes implicit acknowledgement of the counter-claim's validity and standing before the Court.

9. The Claimant states as follows in her defence to counter-claim:-

- “2. The Claimant avers that the Respondent's counter-claim is filed over six years after the alleged cause of action is said to have accrued on 28th February 2017 and is, as such, time barred pursuant to the provisions of Section 90 of the Employment Act. Further, the same is filed without leave of this Honourable Court. It must therefore be struck off.”

10. Section 90 of the Employment Act provides as follows:-

- “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.”

11. The foregoing statutory provision, which is couched in mandatory terms, is unambiguously clear. It is a common ground that the Claimant resigned on 28/2/2017, and that as a result of that act of resignation, a cause of action arose on the part of both parties herein. The Claimant filed her suit against the Respondent on 30/1/2018, which was within the three years limitation period. On the other hand, the Respondent raised a counter-claim vide its Amended Memorandum of Reply dated 5/7/2023, which was over six (6) years from the date the cause of action arose. This was obviously outside the statutory limitation period. Section 90 of the Employment Act does not give jurisdiction to the Courts to extend time for filing of otherwise statute-barred employment claims, and as such no leave was either sought or granted by this Court to the Respondent to file a counter-claim outside the aforesaid statutory period. The leave granted to parties herein was for amendment of their respective pleadings.

12. For record purposes, a counter-claim is a counter-suit, and must always be raised within the time limited by the statute. It was stated as follows in the persuasive case of John Ogutu Rogoma v Elimu Co-operatives Savings & Credit Limited [2013] eKLR:-

- “A counter-claim is a fresh suit where a Claimant should be given a chance to reply. It is an independent action by the respondent as against the Claimant. It is a cross-claim and the principles of pleadings which govern a counter-claim are substantially the same as those,



which would apply to a statement of claim in a cross-action brought by the Respondent against the Claimant...”

13. In yet another persuasive case, the case of *Christone Charo Matesho v Charles Richard Newton* [2022] eKLR, the Court stated as follows:-

“12. In law, a counter-claim is considered a stand alone suit. Therefore, the law on limitation applies to it in much the same way as an ordinary claim. An application to amend a defence to introduce a counter-claim is considered on the same principles as a request to amend any other pleading.

13. In *Kenya Wine Agencies v Yobesh Amoro* [2018] eKLR,

“A counter claim is by definition a suit that can be filed independently and therefore subject to the law of lamination.”

14. The Respondent’s counter-claim was raised outside the set down statutory period of three years, and the Claimant has properly moved the Court to strike it out. Rule 14(5) of the Employment and Labour Relations Court (Procedure) Rules 2016 provides as follows:-

“A party may, by notice, object to a pleading stating grounds of objection; except that no objection may be raised to any pleading on the ground of any want of form.”

15. I find merit in the Claimant’s Notice of Motion dated 25/9/2023, and the same is hereby allowed in the following terms:-

- a. the Respondent’s Counter-Claim dated 5/7/2023 is hereby struck off.
- b. costs of the application and of the Counter-Claim are awarded to the Claimant, and shall be taxed after the event in the suit herein.
- c. the Claimant’s suit shall be set down for hearing.

16. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 4TH JULY 2024

AGNES KITIKU NZEI

JUDGE

Order

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Claimant

.....Respondent

