Kahara v Presbyterian University of Kenya (Cause 954 of 2017) [2024] KEELRC 418 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 418 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 954 OF 2017

MA ONYANGO, J

FEBRUARY 29, 2024

BETWEEN

JANE WAMBUI KAHARA ..... CLAIMANT

AND

PRESBYTERIAN UNIVERSITY OF KENYA ..... RESPONDENT

RULING

1. Before me for determination is the Claimant/Applicant's Notice of Motion Application dated 4th July, 2022, filed under Certificate of Urgency and seeking the following Orders:

   a. That this Application be certified as urgent and heard *ex-parte* in the first instance (Spent)

   b. That the Respondent's Defence dated 5th April, 2022 filed herein be struck out and judgment entered against the Respondent as prayed in the Amended Memorandum of Claim dated 16th December, 2021 together with costs and interests accruing thereon.

   c. That the costs of this Application and the suit be borne by the Respondents.

2. The Application is premised on the grounds on the face of the motion and is further supported by the Affidavit of Jane Wambui Kahara, the Claimant herein, sworn on 29th June, 2022, in which she reiterates the grounds on the face of the motion.

3. In its response to the Application, the Respondent filed a Replying Affidavit sworn by Jason Kiambi Mungania, counsel on record for the Respondent, on 7th October, 2022, in which he states that the Respondent's defence raises triable issues. He points out that the Claim as filed herein is time barred by dint of the provisions of section 90 of the *Employment Act*, 2007.

4. The Respondent argues that the claim herein is statute barred the claim having been filed out of time as the cause of action arose out of work undertaken between July 2013 and December 2013.

5. The affiant maintains that the Memorandum of Claim as filed is an abuse of the Court processes and urged this Honourable Court to strike it out in its entirety instead of the Respondent's defence as prayed.

6. Parties agreed to dispose of the application by way of written submissions.

Submissions by the parties

7. The Claimant/Applicant submits that she has met the threshold for grant of the orders sough in the instant application. To buttress this argument the Claimant cites and relies on the provisions of Order 2 Rule 15 of the *Civil Procedure Rules* and the Court findings in the cases of *Madison Insurance Company Limited v Augustine Kamanda Gitau* [2020] eKLR, *D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & another* [1980] eKLR and *Kenya Commercial Bank v Suntra Investment Bank Limited* [2015] eKLR on the power of the Court to strike out pleadings.

8. The Claimant further submits that her claim against the Respondent is simple and seeks to recover a liquidated sum that is ascertainable and remains due and payable as a contractual obligation. The Claimant further submits that the amount remains outstanding since 2013 to date.

9. The Claimant contends that the delay in settling the sums owed to her is prejudicial and an abuse to the Court process by the Respondent herein. The Claimant further submits that the defence as filed is an abuse to the court process and is only intended on further delaying conclusion of this matter.

10. The Claimant urges this Court to find the defence filed frivolous, vexatious and an abuse to the Court process. For emphasis the Claimant relied on the Court findings in the Court of Appeal decision in the case of *Margaret Njeri Mbugua v Kirk Mweya Nyaga* [2016] eKLR and the case of *Mercy Nduta Mwangi T/A Mwangi Keng'ara & Company Advocates v Invesco Assurance Company Limited* [2019] eKLR.

11. The Claimant further argues that she is entitled to judgment against the Respondent in terms of the reliefs sought in her Amended Memorandum of Claim on the basis that the Statement of Defence as filed does not disclose a reasonable cause of action and that the same is frivolous and an abuse to the Court process. To fortify this argument the claimant relied on the findings in the case of *Ecobank Kenya Limited v Kel Enterprises Limited & 2 Others* [2018] eKLR.

12. The Claimant further contends that she is entitled to costs of the application for reason that the application has a high likelihood of success and that costs follow the event. To emphasis this the Claimant cited and relied on the Court findings in the case of *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* (2016) eKLR where the Court held that costs follow the event unless there are other reasons for the Court to order otherwise.

13. In conclusion the Claimant urged this Honourable Court to find her application with merit and to allow it in terms of the orders sought therein.

Determination

14. I have considered the application and grounds in support thereof. I have further considered the replying affidavit. The issue for consideration is whether the defence filed herein is frivolous and if striking out of the same is merited.

15. The main ground in the Respondent's Defence is that the Claim as filed is statute barred as the cause of action arose more than 3 years before the filing of the same.

16. Section 90 of the *Employment Act* provides:

17. A defence to the effect that a claim is statute barred is a valid and substantive defence as it questions the jurisdiction of the court. As was stated in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd*. [1989]:

> "Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

18. A plea of lack of jurisdiction is therefore a valid defence that ought to be ventilated and determined by the court.

19. I therefore find that the Respondent's Defence raises a valid defence that touched on the jurisdiction of this court to try the suit. It is not therefore suitable for striking out.

20. The result is that the application is without merit and is dismissed with costs in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 29TH DAY OF FEBRUARY 2024

MAUREEN ONYANGO

JUDGE