



Top Deck Travel and Tours Limited v Tutui & another (Cause E011 of 2021) [2024] KEELRC 214 (KLR) (9 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 214 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E011 OF 2021
SC RUTTO, J
FEBRUARY 9, 2024**

BETWEEN

TOP DECK TRAVEL AND TOURS LIMITED CLAIMANT

AND

PATIENCE TUTUI 1ST RESPONDENT

SHEILA YIMBIHA 2ND RESPONDENT

RULING

1. This Ruling is in respect of the Respondents' Notice of Preliminary Objection dated 4th May 2021 in which the following grounds were raised:
 1. The claim is statute-barred, contra statute, fatally defective and the same does not lie and is thus an abuse of the court process as it offends the mandatory provisions of Section 90 of the *Employment Act*, 2007, Laws of Kenya in so far as the Claim has been instituted outside the three year limitation period from the time the case of action allegedly arose.
 2. In the premises, the entire claim against both the 1st and 2nd Respondents should be struck out and dismissed with costs.
2. On 9th October 2023, the Court directed that the Preliminary Objection be canvassed by way of written submissions.

Submissions

3. Submitting in support of the Preliminary Objection, the Respondents posit that the same has satisfied the required threshold for it to stand. The Respondents further submit that the Preliminary Objection is based on pure points of law under Section 90 of the *Employment Act*. In support of this position, the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, was cited.



4. The Respondents further argue that in view of the mandatory provisions of Section 90, the last permissible time within which the Claimant was to file this Claim was 2018 being a period of three years after the cause of action for absconding duty arose. That by the end of 2018, all the claims being sought against the Respondents had lapsed.
5. It is the Respondents' further submission that neither the Constitution nor statute gives this Court jurisdiction to entertain a suit that has been filed after the lapse of the limitation period of three years arguing that Section 90 of the Employment Act takes away that jurisdiction.
6. The Claimant did not file submissions in respect of the Preliminary Objection despite being given a further extension of 14 days to do so, on 22nd November 2023.

Analysis and Determination

7. To my mind, the sole issue for determination at this juncture, is whether the suit is time barred.
8. Revisiting the record, the Claimant avers that the Respondents who were its employees, breached their respective employment contracts and absconded duty on diverse dates during which time they neglected the Claimant's business and undertook their own business.
9. The Claimant further avers that on 11th December 2023, the Respondents in further breach of their respective contractual terms of employment, incorporated a company by the name, Green Bay Travel Limited in which they were sole directors and shareholders and proceeded to engage in business in competition to the Claimant's business.
10. The Claimant has further averred that the Respondents defrauded and misappropriated the sum of Kshs 2,967,493.00 from its business. Indeed, it is that sum of money that the Claimant seeks to recover from the Respondents as well as general damages for breach of contract plus interest at court rates.
11. Relevant to resolution of the issue at hand is Section 90 of the Employment Act which 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.
12. The import of the foregoing statutory provision is that a suit founded on a contract of service as the one herein, cannot be sustained in Court after the lapse of three years from the date the cause of action occurred. That being the case, the logical question to ask, is when did the cause of action arise in this case?
13. In defining what constitutes a cause of action, the Court of Appeal in the case Attorney General & another v Andrew Maina Gitinji & another [2016] eKLR, cited with approval the case of Letang v Cooper [1964] 2 All ER 929 at 934 where it was held as follows;

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”
14. Drawing from the above definition, a cause of action would ordinarily arise at the time the Claimant had a cause to complain and in the instant case, would be the date the Respondents allegedly absconded duty and incorporated a competitor company on 11th December, 2013.



15. In light of the provisions of Section 90 of the *Employment Act*, the time for filing the instant suit started running from 11th December 2013 until 10th December 2016. Thereafter, no action based on the employment contract could be sustained.
16. On this score, I will adopt and reiterate the decision of the Court of Appeal in the case of *Attorney General & another v Andrew Maina Gitbinji (supra)*, thus: -

“The respondents had a clear cause of action against the employer when they received their letters of dismissal on 2nd October, 2010. They had all the facts which had been placed before them in the disciplinary proceedings and they could have filed legal proceedings if they felt aggrieved by that dismissal, but they did not...having found that the cause of action arose on 2nd February, 2010 and that the claim was filed on 16th June, 2014 it follows by simple arithmetic that the limitation period of 3 years was surpassed by a long margin. The claim was barred as at 1st February, 2013, and I so hold.”
17. In the circumstances, I find and hold that the claim herein is time barred having been brought on 7th January 2021, way beyond three years from the date the cause of action arose. As such, and in following with the holding in the case of *Thuranira Karauri v Agnes Nchebe* [1997] eKLR, where it was determined that the issue of limitation goes to the court’s jurisdiction, it is this Court’s finding that it lacks jurisdiction to entertain the instant suit.
18. To this end, the Respondents’ Preliminary Objection dated 4th May 2021, is sustained, with the consequence that the Claim filed on 7th January 2021, is struck out for being time barred.
19. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

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STELLA RUTTO

JUDGE

Appearance:

Ms. Kibore for the Respondents

Ms. Kabaila for the Claimant

Abdimalik Hussein Court Assistant

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the {Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.



STELLA RUTTO
JUDGE

