



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO.1823 OF 2016

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

TIMOTHY OTWANE.....CLAIMANT

VERSUS

BOB MORGAN SERVICE LIMITED.....RESPONDENT

RULING

1. The Claimant had filed a claim dated 19th August, 2016 and a response had been filed dated 8th February, 2018.

The case proceeded to hearing and submissions were filed by the Respondent but the Claimant was yet to file their submissions.

2. On the 7th day of October, 2021 the Respondent filed a notice of preliminary objection to the effect that the Claimant was dismissed from employment on 7th March, 2013 and the memorandum of claim was filed on 7th September, 2016 beyond the three years period provided in Section 90 of the Employment Act.

3. The Respondent in his submissions avers the suit is time barred and the jurisdiction of the court has therefore been ousted.

The Respondent is getting his support from various authorities amongst them **BEATRICE KAHAI ADAGALA VS POSTAL CORPORATION OF KENYA (2015) eKLR** and **MOHAMED SHEIKH ABUBAKAR VS ZAKARIUS M. MBAYA (2019) eKLR**.

In the case of **BEATRICE KAHAI ADAGALA (SUPRA)** the court observed “much as we sympathized with the appellant, if that is true we cannot help her as our hands are tied. Section 90 of the Employment Act which we quoted verbatim herein above is in mandatory terms”

4. The **CASE OF MOHAMED SHEIKH ABUBAKAR (SUPRA)** provided that jurisdiction of the court can be challenged at the submissions stage. The court stated “ideally an objection touching jurisdiction should be raised at the earliest opportunity. Nevertheless, an objection on jurisdiction can be raised at any stage of proceedings even at appellate stage because of the pivotal role that jurisdiction plays.

5. On the other hand the Claimant depended on Order 50 Rule 4 of the Civil Procedure Rules as to computation of time in relation to the courts Christmas recess where judicial time does not run.

6. The same provides that “except where otherwise directed by a Judge for reason to be recorded in writing the period between the twenty first day of December in any year and the thirteenth day of January in the next year following both days included, shall be omitted from any computation of time (whether under these rules or any order of the court) for the amending, delivery or filing of any pleadings or the doing of any other act.

7. The Claimant also relied on the case of **KEZIAH STELLA PYMAN & 2 OTHERS VS PAUL MWOLOLO MUTEVU & OTHERS (2013) eKLR** where court applied Order 50 Rule 4 of the Civil Procedure Rules to exclude court Christmas recess to extend time for filing record of appeal.

The Claimant is therefore praying that further to the above statute and cases that exemption be allowed to cater for Christmas Vacation and find the suit was properly filed within the permitted timeliness.

DECISION

8. The court had critically considered the preliminary objection as well as the submissions by both the Claimant and the Respondent.

Further the referred statute Section 90 of the Employment Act 2007 provided “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 the twelve months next after cessation thereof.

9. The case was filed on 7th September, 2016 which was about 6 months after the termination.

There is unfortunately no room to extend time after the period of filing the same has elapsed.

Section 90 of the Employment Act is mandatory and the court has no room to extend the time. The Claimant received a letter dated 24th May, 2013 re-engaging him. There is no more information given about that re-engagement. The court therefore finds it prudent to go by 7th March, 2013 as the termination date.

10. The cases referred by the Respondent earlier **BEATRICE KAHAI ADAGALA (SUPRA)** the court of appeal observed that their hands were tied as Section 90 of the Employment Act is in mandatory terms.

The other referred case of **MOHAMED SHEIKH ABUBAKAH (SUPRA)** the court held that objection to jurisdiction could be raised at any stage and even at appellate stage all because of the pivotal role that jurisdiction plays.

11. The Claimant is pleading extension under Order 50 Rule 4 of the Civil Procedure Rules. The court with due respect is unable to accept that argument because the deadline did not fall on vacation dates. In any case vacation dates are about one month. The delay in this case is about six months.

12. It is unfortunate the parties wasted court’s time hearing the case upto close of the pleadings and yet the same was time barred.

The court also sympathizes with the Claimant who has obviously lost a lot in terms of time and resources and yet had no hearing (before the court from the time the case was time barred). Yet to retaliate the court’s observations in the **CASE OF BEATRICE KAHAI ADAGALA (SUPRA)** the court’s hands are tied.

13. The suit is struck out forthwith.

14. Considering the Claimant had worked for the Respondent for a good period of time I make order that each party to meet their own costs.

Orders accordingly.

Delivered, dated and signed in Nairobi this 10th day of March, 2022.

ANNA NGIBUINI MWAURE

JUDGE

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 has 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 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE