



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

ELR CAUSE NO. 49 OF 2021

(FORMERLY KSM E019 OF 2021)

FREDRICK CHEBUYI & OTHERS.....CLAIMANTS

VERSUS

FRODACK SERVICES.....1ST RESPONDENT

BUTALI SUGAR MILLS.....2ND RESPONDENT

R U L I N G

1. The Claimants by statement of Claim dated 9th December 2021 sought the following reliefs:-

- a. A declaration that the Claimant's services were procedurally, unlawfully and unfairly terminated and in the circumstance the Claimant is entitled to compensation of his terminal dues as outlined in the claim.
- b. The terminal dues as calculated and annexed herewith as "SCHEDULED a" as stipulated under paragraph 29 of the Claim .
- c. Certificate of service
- d. Cost of this suit and interest at court rates from time of filing suit until payment in full and
- e. Any other further and better relief the Honourable court may deem just and fit to grant.

2. The Respondents filed response and Notices of Preliminary Objection . This ruling is on the Notices of Preliminary Objection.

3. The 2nd Respondent Notice of Preliminary objection dated 31st March 2021 states that the suit is incompetent and defective for reasons that:-

- a. The suit is statutory time barred and therefore this Honourable court lacks jurisdiction to hear and determine the matter and relies on Section 90 of the Employment Act No. 11 of 2007 .

4. The 1st Respondent's Notice of Preliminary Objection is dated 6th August 2021 and seeks to have the suit struck out on the following grounds.

- a. The cause of action in this suit arose on the 2nd May, 2017 as a result of contracts of service between the Respondents and the Claimants as such compensation for damages ought to have been guided by the provisions of the Employment Act No. 11 of 2007.
- b. Pursuant to Section 90 of the Employment Act No. 11 of 2007, this suit is time barred and therefore offends the mandatory provisions of the Employment Act 2007.
- c. The suit falls short of the doctrine of "Res-subjudice". Under Section 6 of the Civil Procedure Act as there other suits on the same subject matter in other courts and between the same parties pending determination under Eldoret E&LR Cause No. 109 of 2018, Eldoret E&LR Cause No. 116 OF 2018, Eldoret E&LR Cause NO. 4/2018 (also similar to Kakamega 210/2019) Kakamega CMCC E&LR Cause No. 145/2020, Kakamega CMCC NO. E&LR Cause No. 64/2020 Kakamega CMCC

d. The suit is an abuse of the court process.

e. The suit is incompetent and ought to be struck out with costs to the Respondent.

5. The two notices of Preliminary Objection are canvassed by way of written submissions. The 2nd Respondents written submissions in support of Notice of Preliminary Objection dated 31st March 2021 and 6th August 2021 are dated 8th February 2022 drawn by L.G Menezes & Company Advocates and filed in court on the 11th February 2022. The 1st Respondent's written submissions to the 2 Notices of Preliminary Objection are dated 18th February 2022 drawn by Okong'o Wandago & Company Advocates and filed in court on 14th February 2022. The Claimant's written submissions in opposition to the 2nd Respondent's Preliminary Objection dated 31st March 2021 dated 17th February 2022 are drawn by V A Shibanda & Company Advocates and filed on the 7th March 2022.

6. The court considers the following as issues for determination in the ruling on the Notice of Preliminary Objection by 1st Respondent dated 6th August 2021 and the Notice of Preliminary Objection by 2nd Respondent dated 31st March, 2021:-

a. Whether the suit dated 9th December, 2022 is statutory time barred.

b. Whether the suit offends the doctrine of "res- subjudice under Section 6 of the Civil Procedure Act.

c. Costs of the suit.

a. Whether the suit dated 9th December 2020 is statutory time barred.

7. The Claimant in paragraph 9 of the Claim states that on the 4th May, 2017 together with other workers of the Respondents they went back to the offices of the Respondents and found the gate had been locked with police on standby.

8. In paragraph 11 of the Claimant it is stated that the Claimants made inquiries as to what was happening and they were informed by the Supervisors of both the 1st and 2nd Respondents that there was no work and that they should vacate the Respondent's office immediately.

9. In paragraph 13 of the Claim it is stated that the workers who included the Claimant's herein were teargassed and chased away by the police hence termination of the Claimant's herein.

10. The Claimants were terminated on 4th May 2017 as per the contents of the suit .

11. The 1st Respondent states that the cause of action arose on 2nd May, 2017. This was the day the Claimants state they made demands concerning conditions of work vide strike the 2nd Respondent in paragraph 36 (u) of its defence statement states it dismissed all the Claimants vide notice dated 3rd May, 2017 (2nd Respondents' document 11) pursuant to letter dated 3rd May, 2017 by County Labour Officer in charge Kakamega County concluding the strike was illegal (2nd respondent's document No. 10)

12. Based on the above documentary evidence by 2nd Respondent, the court concludes that the Claimant's were terminated from service of the Respondents on 3rd May, 2017 and time for purposes of filing suit started on the 4th May 2017.

13. The Respondents rely on the Provisions of Section 90 of the Employment Act which states as follows:-

“ Withstanding the provisions of Section 4 (10) of the Limitation of Actions Act (Cap 22) No Civil Action or proceedings based or arising out of Act, or a contract of service in general shall lie or be instituted unless it is commenced within three year 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”.

14. The Respondents submit the provision is mandatory and there was no application to extend time before filing of instant suit hence the suit is statutory time barred.

15. The 2nd Respondent to buttress its submissions relies on the decision of my brother Justice Abuodha in *Ernest Kibande Alugaya -vs Pearly Developers Ltd. Nairobi ELRC NO. 1354 of 2014* where the Judge held that the working of the Section (90 of Employment Act is couched in mandatory terms and does not seem to give room for extension of the time once it has lapsed.

16. Consequently the Respondents' submit the suit is bad in law and ought to be struck out for being statutory time barred.

17. The Claimant on the other hand admits the termination of the Claimant's employment was on or about 4th May 2017. The court has already found the notice of dismissal is dated 3rd May, 2017.

18. The Claimants' submissions that there was a ruling in Butali SPMCC CAUSE NO. 4/ 2018 where the Magistrate made a ruling directing the suit be filed in the High Court. The said ruling is not attached to the submissions. The court finds that submissions are not pleadings and hence the said submission is misplaced. Further the court cannot be bound by directions of a magistrate and most important if the said directions are contrary to section 90 of the Employment Act.

19. The Claimant submits that authorities relied on by the Respondents relates to fresh suits. The instant suit is a fresh suit. The court having perused the statement of claim did not find any pleading that the instant suit is not a fresh suit. Parties are bound by their pleadings and the court reiterates that submissions are not pleadings.

20. The court finds that, the Claimants' having been dismissed from Employment vide notice dated 3rd May, 2017, the Claim filed on the 2nd March, 2021 was outside 3 years and hence statutory time barred pursuant to Section 90 of the Employment Act. The court upholds the position by Justice Abuodha (supra) that Section 90 of the Employment Act is couched in mandatory terms and adds that the court has no authority to extend time under said provision.

21. The objection by the Respondents to that effect is upheld.

(b) whether the suit offends the doctrine of Res-subjudice under Section 6 of the Civil Procedure Act.

22. Section 6 of the Civil Procedure Act provides as follows:-

“ No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instated suit or proceedings between the same parties under whom they or any of them claims. Litigating under the same title where such suit or proceedings is pending in the same or other court having jurisdiction in Kenya to grant the relief claimed”.

23. The 1st Respondent outlined the cases filed in other courts by some of the Claimants and annexed the filed pleadings.

24. The Claimant in response submits that the claims were erroneously added to the list of Claimants herein and the Respective Claimants have since withdrawn their case against the Respondents herein. The Claimants Counsel refers to Notice of Withdrawal dated 16th February 2022 and filed in court on the 7th March 2022. It is apparent the notice if filed in response to the Notice of preliminary objection by 1st Respondents filed on 19th August 2021. There has been no amendment of the instant suit to reflect the said Notice of withdraw which also does not reflect all existing suits in other courts.

25. That ground of the notice of objection thus remains valid and is upheld.

26. Consequently, the court having found that the suit is statutory time barred and some of the claimants offend the provisions of Section 6 of the Civil procedure Act upholds the notices of preliminary objection by the Respondents dated 6th August, 2021 and 31st March, 2021 respectively and strikes out the claim dated 9th December 2020 of being statutory time barred and for offending the provisions of Section 6 of the Civil procedure Act (Cap 21) with costs to the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 21ST DAY OF APRIL, 2022

J. W KELI,

JUDGE.

In the Presence of :-

Court Assistant : Brenda Wesonga

Claimant:-

Respondent:-