



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1922 OF 2016

JULIUS PETER MAINACLAIMANT

VERSUS

STANDARD GROUP LIMITED.....RESPONDENT

(Before Hon. Justice Kebira Ocharo on 4th April 2022)

RULING

1. Through a statement of claim dated 19th September 2016, the Claimant sued the Respondent herein seeking for the following reliefs and orders, thus;

- a. Kshs. 3,928,032.
- b. Costs.
- c. Interest.

2. The Respondent filed a response to the claim on the 17th October 2017 and subsequently on the 29th September 2019, a Notice of Preliminary objection. Through the Notice of Preliminary Objection, it contends that the Claimant's suit herein was filed out of time and therefore the court has no jurisdiction to entertain it.

3. The court directed that the objection be canvassed by way of written submissions. The parties have filed their respective submissions.

The Respondent's submissions.

4. Counsel for the Respondent states that section 90 of the Employment Act regulates limitation of time in employment contracts to three years. He places reliance on the decision in **Attorney General & another -vs- Andrew Maina Githinji & another [2016] eKLR**, where the court expressed itself;

“Section 90 of the Act now regulates limitation of time in employment contracts to three years section 4[1] of the Limitation of Actions Act is not applicable and therefore the Claimant cannot be heard to argue that the limitation was 6 years.”

And on **Ndirangu -vs- Henkel Chemicals E.A. Limited [2013] eKLR**, where the court rendered itself thus;

“The fact of the matter is that employment contracts like other commercial contracts were subject to the provisions of the limitation of Actions Act Cap 22 of the Laws of Kenya at the time with regard to Limitations but presently the limitation period is governed by section 90 of the Employment Act 2007 which has reduced the limitation period in employment matters to three [3] years.”

5. According to counsel, the cause of action and when it accrued can clearly be discerned from paragraph 7 and 8 of the Claimant's statement of claim, thus;

“7. On or about 30th May 2013 9 months or so after promoting the Claimant to managing Editor-Daily Standard, the Respondent without informing and/or consulting the Claimant, unlawfully reduced the Claimant's basic salary by Kshs. 200,000 from Kshs. 550,000 per month to Kshs. 350,000 per month. The same reduced salary applied the following month June 2013 pay slip.”

Further on 18th July 2013 the Respondent unilaterally and without informing and or consulting the Claimant unlawfully amended the Claimant's basic salary from Kshs. 550,000 per month to Kshs. 450,000 per month with effect from 1st July 2013. The new terms presented as a purported increase.

6. The Claimant's suit herein ought to have been filed within 3 years from July, 2013. A cause of action does not occur upon separation from employment. Nothing barred him from instituting a suit even during the pendency of his employment.

7. By dint of the provisions of section 90 of the Employment Act, the court should find that the suit was filed out of time.

8. It was submitted that even if one were to attempt to rely on the continuing injury or damage doctrine, still nothing would turn in favour of the Claimant. The suit ought to have been filed in the month of July 2015.

9. The Claimant took an early retirement in July 2015 and therefore, he ought to have filed his claim within 12 months from the time of retirement, even if he was relying on the doctrine.

10. The preliminary objection raises a jurisdictional issue, one that goes to the root of the matter. The holding in **Matthew Kamau Mwaura -vs- Permanent Secretary Office of the President Provincial Administration & 2 others [2018] eKLR** was cited to buttress this submission, thus;

“The Petitioner's employment was terminated in 2012. Any action related to that termination was supposed to be filed within a period of three years. That is to say by 1/4/2015. No claim was filed within that period. The claim was therefore statute barred. The petitioner has not given any explanation as to why he did not file the claim within time. Failure to file the claim within the time limited for filing is not a mere technicality as it touches on substantive matter on the claim and a fundamental flaw if not dealt with before filing the claim.

.....

where a party has not come to court within time the issue of court's jurisdiction arises as the court is supposed to deal with claims which are filed in compliance with the law. The labour and Employment Court has held that section 90 of the Employment Act is the law that regulates limitations in employment contracts to 3 years.”

The Claimant's submissions.

11. The Claimant's counsel states that there is no doubt that section 90 of the Employment Act regulates, and has imposed a limitation of time on the filing of suits in connection with contracts of employment. However, as to whether a suit is time barred in the context of the provision is dependent on whether or not three years have expired since the act complained of or in case of continuing injury or damage, whether twelve months have expired since the cessation of the injury or damage.

12. The Claimant contends that the suit herein was filed on the 19th September 2016. According to him section 90 of the Employment Act allows a party to file a suit within twelve months of the date of cessation of injury or damage complained of.

13. That by reason of the premises foregoing the limitation of time against the Claimant's case would only set in on the 27th October 2016. However, the claim herein was filed on the 19th September 2016 which was more than a month before the expiry of the statutory period.

14. The Claimant contended that the Respondent's preliminary objection is a product of a misapprehension of the facts, the backbone of the claim herein. Contrary to the Respondent's contention that the deductions were done in the month of May 2013, his pleadings and documents filed are clear and demonstrative that the deductions continued until 2nd October 2015.

15. The Claimant is of the view that the objection stands on loose ground, as the Respondent has totally misapprehended the principle of continuous injury and / or damage as provided for under section 90 of the Employment Act.

Determination.

16. Two issues emerge for determination on the Respondent's preliminary objection herein, thus;

- a. Whether the Preliminary Objection is properly taken.
- b. Whether the Claimant's claim herein is time barred by dint of the provisions of section 90 of the Employment Act.

17. As to what constitutes a properly taken out Preliminary Objection Law J.A. in the case of **Mukisa Biscuit Manufacturing Company Limited -vs- West End Distributors [1960] E.A. 696** expressed himself thus;

“..... A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Sir Charles Newbord P. in same matter expressed:

“A preliminary objection is in the nature of what used to be a demur. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any facts have to be ascertained or if what is sought is an exercise of judicial discretion.

18. I have considered the contentions by the rival parties herein, there is the issue of the deductions raised, as to how and when it was done, is in serious contention. The Claimant clearly indicates that his case is anchored on the continuous injury or damage doctrine, when it comes to matters limitation of time regarding his case. What is in contention here can only be ascertained after taking evidence from the parties on these aspects.

19. In my view what is being raised as a preliminary objection is not purely on a point of law. It is a mixture of facts and law in the peculiar circumstances of this matter.

20. By reason of the premises foregoing, I hold that this matter cannot be disposed of by way of a preliminary objection. As to whether the same is time barred or not needs to be determined upon taking of evidence.

21. Having found as I have hereinabove, I will not delve into considering and making a determination on the 2nd issue.

22. In the upshot, I decline to uphold the preliminary objection and direct that the matter proceeds to be heard on merit.

23. The Respondent to bear the costs of the preliminary objection, which shall be in the cause.

READ AND DELIVERED THIS 4TH DAY OF APRIL 2022.

OCHARO KEBIRA

JUDGE

In presence of;

Mr. Chege for the Claimant.

Mr. Webo for the Respondent.

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.

OCHARO KEBIRA

JUDGE