



Kathimba v Aviation & General Security Consultants Ltd (Cause 653 of 2017) [2022] KEELRC 12911 (KLR) (14 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12911 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 653 OF 2017
SC RUTTO, J
OCTOBER 14, 2022**

BETWEEN

DOMINIC KATHIMBA CLAIMANT

AND

AVIATION & GENERAL SECURITY CONSULTANTS LTD RESPONDENT

JUDGMENT

1. The claimant avers through his memorandum of claim that he was employed by the respondent as a security agent with effect from May 1, 1999. That his contract was reduced into writing on April 23, 2009. The claimant avers that he was summarily dismissed *vide* a letter dated February 17, 2011, without being given notice and an opportunity to be heard. He further avers that throughout his employment, he exhibited the highest level of discipline, diligence and duty of care expected of him as a security agent. It is for this reason that the claimant seeks against the respondent, one month's salary in lieu of notice, unpaid house allowance, service pay for 11 years, 9 months and compensatory damages.
2. The respondent neither entered appearance nor filed a response in answer to the memorandum of claim. The claim was therefore undefended. The claimant produced an affidavit of service sworn by one Pius Kioko on September 16, 2019 wherein he deponed that he effected service of the memorandum of claim and summons to enter appearance upon the respondent.
3. The matter was scheduled for hearing on June 8, 2022 and the respondent was not present in court. To this end, the claimant produced an affidavit of service sworn by one Tobias Onyango on May 31, 2022, wherein he depones that he effected service of the day's hearing notice upon the respondent.
4. It is against this background, that the matter proceeded for hearing, the respondent's absence notwithstanding.



Claimant's Case

5. It was the claimant's testimony that he worked for the respondent for 11 years and 9 months. He testified that the respondent terminated his employment for no reason. That the respondent asked him to go for an interview so as to be given a fresh contract of employment. That since he was a permanent employee, he did not wish to be placed on contract. That thereafter, his employment was terminated and the respondent's director notified the accountant to pay his terminal dues on condition that he withdraws the instant suit. He further denied being negligent in his work. That in the course of his employment, he had only received one warning letter which was issued to him sometimes in 2010, when he delayed picking clients due to a traffic snarl-up.
6. After close of the trial, the claimant filed submissions in support of his claim.

Determination

7. The trial notwithstanding, it has not escaped the court's attention, that the claimant avers that his termination was effected on February 17, 2011. What this means is that the cause of action arose on that day. Accordingly, this issue takes me to section 90 of the *Employment Act* which is couched as follows: -

“ [90] 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”
8. The effect of the foregoing provision, is that a mandatory time bar of three (3) years is placed on matters arising out of the *Employment Act* or on a contract of service, as the one herein.
9. In essence, a matter becomes time barred if it is not filed within three (3) years from the date the cause of action arose. From the claimant's own admission and as per his letter of termination, his termination was effected on February 17, 2011. This is the date the cause of action arose.
10. As per the determination of the Court of Appeal in *Attorney General & another vs Andrew Maina Gitthinji & another* [2016] eKLR, 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. It is the date when a person becomes entitled to complain against another person. In this case, that date was February 17, 2011 as it is the date the claimant became aware of his termination and had all the right to move the court as appropriate and seek a remedy.
11. From the record, the instant cause was brought on April 5, 2017, which was almost six (6) years after the cause of action had arisen. Applying the provisions of section 90 of the *Employment Act* to the case, it is no doubt that by then, the claim was time barred and the claimant had lost the right to bring the claim against the respondent by operation of law. The doors to litigation over that issue had been shut.
12. As regards the effect of time bar on the court's jurisdiction, Court of Appeal found in the case of *Thuranira Karauri vs Agnes Ncheche* [1997] eKLR, that the issue of limitation goes to jurisdiction.
13. It therefore follows that the issue of limitation ultimately determines whether the court has jurisdiction to deal with the matter.



14. On the issue of jurisdiction, I am guided by the finding in the celebrated case of *Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd* [1989] eKLR, where Nyarangi JA (as he then was) rendered himself thus:

“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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

15. In view of the determination above which I am bound to follow, and having found that the matter herein is time barred, I cannot help but down my tools as this court lacks the jurisdiction to proceed further and determine this matter. Much as I sympathize with the claimant, I am bound to follow the law and apply it correctly.

16. Accordingly, the claim is dismissed in its entirety for being time barred.

17. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant In person

For the Respondent No appearance

Court Assistant Abdimalik Hussein

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

