



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 886 OF 2019

INNOCENT GATERIA WAMBUGU.....CLAIMANT

VERSUS

SAFARICOM KENYA LIMITED.....RESPONDENT

RULING

1. The respondent filed a notice of Preliminary Objection dated 9/7/2020 that the suit is time barred by dint of Section 90 of the Employment Act 2007.

2. This suit was filed on 24th December, 2019 and the cause of action as seen from paragraph 5 of the Statement of Claim is that the claimant was employed on 7th November, 2011 and he worked diligently until “**31st January, 2014 when the respondent wrongfully and unlawfully, terminated the claimant’s employment.**”

3. The claimant prays for various reliefs including Payment in lieu of Notice, Service pay for the period served, unpaid salary for one month, sales incentives and compensation for unlawful dismissal.

4. Section 90 of the Employment Act, 2007 provides:-

“[90] Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act, 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.”

5. Therefore, a suit based “**on employment contract**” must be filed within three (3) years from the date the cause of action arose. Three years period from 31st January, 2014, when the cause of action arose, ended on 31/1/2018.

6. The claimant did not seek leave from the Court for enlargement of time within which the suit could be filed. Therefore, the question of enlargement of time does not arise at all in this matter.

7. The Employment and Labour Relations Court and the Court of Appeal have affirmed the position variously that claims based on employment contract must be filed within the 3 year limitation period and that enlargement of time shall not be granted in claims based on contract.

8. In **Attorney General and Another –vs- Andrew Maina Githinji and Another [2016] eKLR**, the Court of Appeal stated whilst upholding a preliminary objection based on Section 90 of the Employment Act:-

“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 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 large long margin. The claim was time barred as at 1st February, 2013, and I also hold.”

9. This Court is bound by the decision of the Court of Appeal above. We find that the cause of action in this suit arose on 31st January, 2014 and was filed on 27th December, 2019 more than five (5) years from the date the cause of action arose. Accordingly, the suit is time barred

by a long margin of time and this Court lacks jurisdiction to entertain the same. The suit is therefore struck out for want of jurisdiction to hear and determine it.

10. We deem this an appropriate case for each party to bear their own costs of the suit the same having been determined at the outset as guided by the Lilian 'S' Case.

Dated and delivered at Nairobi this 27th day of May, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. M'ringu for the Respondent/Objector

Omondi Odagi & Co. Advocate for the claimant

Ekale – Court Assistant