



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE 781 OF 2019

KEPHA OMBASA & 54 OTHERS.....CLAIMANTS

VERSUS

STANDARD CHARTERED BANK LIMITED.....RESPONDENT

RULING

1. Before me is the Respondent/Applicant's Preliminary Objection dated 15<sup>th</sup> June 2020 against the entire suit on the ground that the Claim by the 1<sup>st</sup> – 29<sup>th</sup> Claimants is time barred by virtue of Section 90 of the Employment Act No. 11 of 2007 while the Claim by the 30<sup>th</sup> – 55<sup>th</sup> Claimants discloses no reasonable cause of action against the Respondent. A further ground is that the entire suit is an abuse of the process of the Honourable Court and ought to be struck out with costs.

2. The Respondent/Applicant submits that the basis of its objection is Section 90 of the Employment Act, 2007 which states:

*"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"*

3. The Respondent/Applicant's submits that a cause of action in an employment dispute accrues on the date on which termination is communicated to the individual employee and that this position was affirmed in the case of **Benjamin Wachira Ndiithi v Public Service Commission & Another [2014] eKLR** where the Court further stated that the date when the cause of action accrued was as communicated in the claimant's termination letter and became the date when time began to run against the claimant's claim. The Respondent submits that the claim by the Claimants clearly sets out that the employment of the 1<sup>st</sup> to 29<sup>th</sup> Claimants with the Respondent Bank terminated on various dates in 2015 with the last being on or about December 2015. The Respondent asserts that the letters of termination annexed in the Claimants' List of Documents are particular evidence that the 1<sup>st</sup> to 29<sup>th</sup> Claimants were terminated in 2015 and that the claim by the 1<sup>st</sup> to 29<sup>th</sup> Claimants ought to have been filed between February and December 2018 but was filed on 20<sup>th</sup> November 2019 therefore had become time barred three years from the dates of termination of their employment.

4. The Respondent/Applicant submits that the attempt by the Claimants to allege that there is a continuous redundancy programme is legal craftiness which cannot in any case breathe any life into the cases presented by and on behalf of the 1<sup>st</sup> to 29<sup>th</sup> Claimants. The Respondent relies on the case of **Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye & Another [2016] eKLR** in which the Court of Appeal held that the provisions of Section 90 of the Employment Act, 2007 are mandatory and no craft or innovation of any kind is permissible in attempting to extend this limitation. Further, that the claims presented by the 1<sup>st</sup> to 29<sup>th</sup> Claimants are completely dead on arrival and are for striking out as was held in **Fredrick Mwiti v Chairman and Management Committee Meru Central Dairy Co-operative Union Limited [2018] eKLR**. The Applicant further submits that the definitions of 'contract of service' and 'redundancy' at Section 2 of the Employment Act, 2007 as well as the requirements at Section 40 do not envisage single redundancy programmes of the nature suggested by the Claimants. That an employment contract is a personal contract between the employee and the employer, and a single termination or redundancy programme as suggested by the Claimants herein is farfetched since every individual employee is in a separate contract with their employer and at liberty to deal with their employer on their own terms. The Respondent/Applicant also submits that the 30<sup>th</sup> to 55<sup>th</sup> Claimants have no claim against the Respondent and are only parties in the suit to provide some basis for the claims by the 1<sup>st</sup> - 29<sup>th</sup> Claimants. It urges the Court to look at the monetary claims in orders (d) – (g) in the Claim which are in reference to the 1<sup>st</sup> to 29<sup>th</sup> Claimants only. The Respondent also urged the Court to examine the Claimants' witness statements and the demand letter issued by the Claimants' Counsel all of which reiterate that the dispute is that the employees declared redundant in the year 2017 (30<sup>th</sup> to 55<sup>th</sup> Claimants) were allegedly given better packages compared to their colleagues declared redundant in 2015 (1<sup>st</sup> to 29<sup>th</sup> Claimants). The Applicant relies on the case of **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another [1980] eKLR** in which the Court of Appeal set out the test for a reasonable cause of action and opined that reasonable cause of action means a cause of action with some chance of success when only the allegations in the plaint are considered. The Respondent/Applicant submits that the allegations in the Statement of Claim do not reveal any complaint as regards the employment termination of the 30<sup>th</sup> - 55<sup>th</sup> Claimants and that there is therefore nothing left to litigate once this Court finds that the 1<sup>st</sup> to 29<sup>th</sup> Claimants' claims are time barred as the 30<sup>th</sup> to 55<sup>th</sup> Claimants do not disclose any reasonable cause of action.

5. The Claimants were opposed and submit that a single perpetual and continuing redundancy notice in which claimants are paid different discriminatory packages within the same redundancy programme cannot be time barred within the meaning of Section 90 of the Employment Act No.11 of 2007, and that this is a triable issue. They submit that simply put, the crux of their case is that they are subject of a single perpetual and continuing redundancy notice running for several years contrary to Section 43 as read with section 45(2)(c) of the Employment Act. They cite Article 50(1) of the Constitution on the right to a fair and public hearing of any dispute and submit that the Supreme Court in **SC Petition No. 36 of 2019 – Hon. Christopher Odhiambo Karan v David Ouma Ochieng & 2 Others [2018] eKLR** affirmed that

Article 25(c) places a bar on limitation of the right to a fair trial in civil and criminal matters. The Claimants/Respondents submit that the Applicant's averment that some of them do not disclose any reasonable cause of action is a fact that must be ascertained after consideration of the evidence by the Court and not at a preliminary stage. The Claimants submit that the issue does not therefore constitute a preliminary objection as set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**. They also cited the case of **Jane Ngonyo Ngige (Suing as the administrator of the estate of Boniface Ngige Waweru - deceased) v John Ntimeri & 7 Others [2020] eKLR** where the Court dismissed a similar preliminary objection while referring to the case of **Ramji Megji Gudka Ltd v Alfred Morfat Omundi Michira & 2 Others [2005] eKLR** where the Court held that:

*"The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court..."*

6. They also submit that the issue whether the suit is an abuse of the process of Court can only be determined at a full fair hearing and not at a preliminary stage. They submit that further, the Respondent/Applicant has not demonstrated that the claim falls in any of the standards constituting an abuse of the court process and for this proposition rely on **Satya Bhama Gandhi v Director of Public Prosecutions & 3 Others [2018] eKLR** where the Court discussed what constitutes an abuse of the court process and stated that the situation that may give rise to an abuse of court process is inexhaustive. The Claimants/Respondents relied on the case of **Job Kiloch v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio [2015] eKLR** where the Court declined to dismiss a suit after satisfying itself that there were triable issues that would require further interrogation by the court during a full trial. The Claimants urge the Court to find the Respondent's Preliminary Objection dated 15<sup>th</sup> June 2020 to be unmerited and disallow it with costs and further order the claim to proceed to full trial.

7. A preliminary objection can be raised at any stage but must meet the parameters in the **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd**. case. Sir Charles Newbold P, stated as follows in the said case:

*A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.*

8. There is limitation in terms of Section 90 of the Employment Act for the 1<sup>st</sup> to 29<sup>th</sup> Claimants whose claim is hereby struck out with costs as their causes of action accrued in 2015 and they had 3 years to file a claim which time expired in November 2018. The suit was filed a year later in November 2019 and thus fails the limitation test. The 30<sup>th</sup> to 55<sup>th</sup> Claimants have not sought any relief from Court and as such they do not have any cause of action expressed in the prayers or in the claim thus rendering their inclusion in the suit cosmetic. In the premises the claim is struck out with costs as indicated in this paragraph.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2021**

**NZIOKI WA MAKAU**

**JUDGE**