



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC CAUSE NO. 115 OF 2015

ANNE NYAWEKA MUCHIRA.....CLAIMANT

VERSUS

SAMBURU SACCO LIMITED.....RESPONDENT

RULING

1. The Claimant instituted this claim on the 27th April, 2015 based on an alleged unfair and unlawful withholding of her employment dues. She stated that she was employed by the Respondent on 10th February, 1992 as a manager and interdicted on the 26th November, 2006 on account of a complaint made by a member. The letter of interdiction, indicated that her fate would be determined after the determination of the complaint. She was later acquitted of the charges on 12th August, 2008 and he took the liberty of informing the Respondent of the acquittal so that her employment status could be determined.

2. The Respondent on the other hand remained mum without officially terminating the services of the claimant and/or communicating the status of the interdiction of 26th November, 2006. She then contended that she is legally still an employee of the Respondent and prayed for this Court to hold as such and pay her back wages.

3. The Respondent entered Appearance on the 19th June, 2015 and filed a response to the claim on the 29th July, 2015 denying all the averment in the claim and in particular denied ever interdicting the claimant and averred that the letter of interdiction is a forgery as all the Respondent's communication are done in a letter head.

4. On 25th June, 2021, the Respondent raised a preliminary objection dated 24th June, 2021 based on the following grounds;

That the suit is statutory time barred by virtue of section 4 of the Limitation of Actions Act as read together with section 90 of the Employment Act and should be dismissed and or struck out with costs to the Respondent.

5. This Court directed the parties to dispose of the Preliminary objection first. This ruling therefore is in respect to the Preliminary objection.

Respondent's Submissions.

6. The Respondent submitted in support of its Preliminary Objection that, the claimant's suit is statute barred by dint of section 4 of the Limitation of Actions Act as read with section 90 of the Employment Act, which provides for employment dispute to be filed within three years from the time the cause of action arose. It was argued that the claimant was interdicted on the 26th November, 2006 on account of criminal charges instituted against her which charges she was acquitted of on the 12th August, 2008 and the Appeal lodged was dismissed in the year 2009 therefore the cause of action came to life in the year 2009 and the claimant ought to have filed this claim before the end of 2012. The Respondent in support of their argument cited the case of **Longonot Horticulture Limited V James Wakaba Maina [2019] eKlr.**

7. Accordingly, it was submitted that since the claim is time barred this Court lack jurisdiction to entertain the same and cited the case of **Justine S. Sunyai V Judicial Service Commission & Another [2017] Eklr.**

Claimant's submissions.

8. The claimant on the other hand submitted that she was interdicted by the respondent on the basis of criminal charges that she was acquitted of in the year 2008. After the acquittal, an appeal was lodged which was also dismissed.

9. The Claimant argued that the Respondent has never reinstated her after the criminal charges were determined as per her letter of

interdiction despite several requests. She thus argued that legally she is still the Respondent' employee as the interdiction still subsist. She therefore argued that she has not prayed for unfair termination as such the issue for determination in this claim is the status of her contract and payment of back wages which issues as still alive.

10. It was further submitted that as much as the Respondent argued that the claimant absconded work, the Respondent was tasked under section 44(4)(a) of the Employment Act to adduce evidence to effect that it contacted the claimant on the issue of absconding work or even reinstating the claimant after the suspension. In this she cited the case of **Mary Chemweno Kiptui V Kenya Pipeline Company Limited [2014] eKlr** where the Court held that; -

“A suspension therefore is ultimately a right due to an employer who on reasonable grounds suspects an employee to have been involved in misconduct, of poor performance or physical incapacity and wishes to remove such an employee from the work place to enable further investigation without subjecting the employee to further commission of more acts of misconduct, underperformance or the conditions leading to incapacity. The suspension period is a time available to an employer to control as the employee can be summoned back to work any time to undertake disciplinary proceedings or upon terms and given by an employer”

11. Accordingly, it was submitted that when the Respondent suspended the claimant, it was the Respondent who was to follow up on the fate of its employee, and the fact that the claimant was not issued with any termination means the claimant is still an employee of the Respondent. The Claimant further cited the case of **Jacqueline M Mutiso V Kenya Revenue Authority[2021] Eklr** where the court held that;-

“The explanation given for the delay in finalizing the disciplinary process, to say the least, is hollow. The claimant did not require the outcome of a multi-agency investigations to conclude the disciplinary case against the claimant. It is now trite law that criminal process and internal disciplinary process are parallel and their respective outcomes do not necessarily bind the other. Therefore I reiterate that the delay in concluding the claimant's disciplinary process for over 4 years was without proper basis and it rendered the termination unfair and unlawful within the meaning of section 45 of the Employment which bars employer from terminating the services of his employee unfairly. The matters were even made worse by the failure to give the claimant the right to call a fellow employee to accompany her to the disciplinary hearing as required under section 41 of the Act.”

12. The claimant also cited the case of **David Wekesa Nambafu V Bob Morgan services Limited [2020] eKlr** where the Court held that;-

“Applying the foregoing provision to the facts of this case I am of the view that the suit is not time barred because as at the time when the Rw1 testified, the claimant's services had not been terminated nor had the suspension been lifted by the employer. Although Rw1 disputed that the claimant reported back to work and gave copy of the judgment to the two HR officers, he admitted that the claimant did in fact serve the letter dated 4.3.2012 to report about his acquittal and the suspension was not lifted and instead he was served with another letter requesting for copy of the judgment and proceedings. Instead it continued until the suit was filed on 27.11.2014 to claim accrued benefits under the contract of service. I therefore return that the claimant had the right to bring suit to challenge the lawfulness of the suspension at any time from the day it was communicated up to 12 months from the day when it ceased or sue for any benefit accruing during the suspension period within 3 years next after the date when the criminal case ended. In this the suit was filed before the suspension was lifted and within 3 years after the acquittal and therefore it is not statute barred”

13. It was then submitted that the suspension is still on therefore the claim by the Respondent that the claim is statute barred is without any legal basis.

14. I have examined the averments of the parties herein. The respondent applicant contend that this claim is time barred because the claimant was interdicted on 26th November, 2006 on account of criminal charges instituted against her. She was acquitted on 12th August 2008.

15. The appeal lodged was dismissed in 2009. The respondents aver that the claim ought to have been filed in 2012 as the cause of action arose in 2009.

16. The claimant contends that she was interdicted but was never reinstated after several reminders. She argues that she is still in the respondent's employ as the interdiction still subsists.

17. From the records submitted by the claimant she was interdicted by a letter dated 26th November, 2006. It was indicated that her fate would be decided after the Judgment of the case. Vide a Judgment of the court on 12/8/08, the claimant was acquitted under Section 210 of the CPC.

18. On 12th November 2013, she wrote to the respondent about her interdiction and asked to be reinstated but the respondents didn't reinstate her.

19. There is no indication that the respondents lifted the interdiction nor wrote to her a letter of termination.

20. In the circumstances of the case then, the cause of action arose when the claimant decided that the respondent may have terminated her and filed this cause on 27/4/2015.

21. The contention that this claim is time barred is not correct.

22. I find the preliminary objection without merit and I dismiss it accordingly.

23. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 18TH DAY OF NOVEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Mukonyi holding brief for Elkington for Claimant - present

Miss Bett for respondent – present

Court Assistant - Fred