

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA

AT NAIROBI

CAUSE 266 OF 2021

SERAH WAIRIMU KIHARA.....CLAIMANT

VERSUS

NOKIA SOLUTIONS BRANCH OPERATIONS.....RESPONDENT

RULING

1. The Respondent raises objection to the Claimant's suit asserting that the claim by the Claimant is barred by virtue of Section 90 of the Employment Act, 2007, Laws of Kenya and that the entire claim/suit as against the Respondent is therefore bad in law, untenable and consequently this claim/suit ought to be dismissed with costs to the Respondent. The notice of preliminary objection is dated 29th June 2021

2. The objection was to be disposed of by way of written submissions and as of the date the Learned Registrar was to confirm compliance only the Claimant had filed her submissions. The Claimant's submissions in opposition of the Preliminary Objection dated 29th June 2021 sought to rely on the Witness statement and list and bundles of documents annexed in the Claimant's Witness Statement dated 30th March 2021 as well as the law as set out in the Constitution, Employment and Labour Relations Act and judicial precedents. The Claimant submitted that she was an employee of the Respondent having been employed by the Respondent as a Core Solution Manager, and that her duties entailed travelling all over the world subject to the Respondent's instructions. The travelling expenses were paid either upfront or reimbursed to the Claimant upon usage of her own monies. The Claimant submitted that she voluntarily resigned from the Respondent on or about 6th July 2017 and upon her resignation, she was paid her terminal dues, the Respondent however, failed to reimburse her the monies she used while undertaking her duties. Subsequently, around 27th June 2019, there were ongoing negotiations and consultations, but nothing fruitful resulted from the negotiation hence the dispute was unconcluded resulting in the suit herein. The Claimant submits that under Section 90 of the Act, for continuing injuries, the time of limitation is twelve months next after the cessation thereof. She submitted that the parties herein commenced negotiations on or about 27th June 2019, however no fruitful outcome resulted from the negotiations and consultations thereon hence the injury still continues. She cited the case of **George Hiram Ndirangu v Equity Bank Limited [2015] eKLR** where the court held that "the logical meaning of continuing injury or damage would therefore be violation of rights under an employment contract such as salary underpayment or failure to pay accrued dues.... In the instant case the court returns that the continuing injury includes the acknowledgment of the claim and failure to reimburse the Claimant the monies used while undertaking her duty with the Respondent till today. The Blacks' Law Dictionary defines continuing injury as an injury that is still in the process of being committed. See para 23 of **Samuel Otiende Lukoko v Shiners Girls High School [2015] eKLR.**" The Claimant submitted that the failure by the Respondent to settle the Claim by the Claimant is a continuing injury within the purview of Section 90 of the Employment Act and which injury has so far not ceased. No evidence is before this Honourable Court to show that the continuing injury has ceased by the payment of the said monies to the Claimant by the Respondent. The Claimant submits that the undergoing negotiations between the parties in 2019 occasioned a delay in the Claimant filing this suit, as she awaited the outcome of the negotiations with the Respondent promising to pay. Since the negotiations were ongoing, the time of limitation stopped. In any event, since this is a continuing injury the Respondent lacks basis to plead any limitation of actions. She submits that it would be unfair and unjust if an employee in good faith pursues out of court settlement in order to save precious judicial time, engages the employer in negotiations with a view of amicable settlement yet the employer is only dragging the negotiations to waste time till the limitations kicks in. If this is allowed, then employee-employee negotiations will be shunned by employees leading to filing of many court cases thus overburdening the judiciary which is already overworked. The Claimant submitted that by disallowing the Preliminary objection herein, the court would strengthen out of court negotiations with effect of reducing the filing of cases. If a matter can be settled by negotiations, why go to court? She submitted that in light of the facts herein, the claim by the Claimant constitutes a continuing injury as contemplated under the proviso to Section 90 of the Employment Act. The totality of the Claimant's submissions herein is that the Claim was filed within the required timelines and as such, the Claimant prays that the preliminary objection be dismissed and the Suit allowed to proceed.

3. As observed earlier there was no compliance on the part of the Respondent in filing submissions as ordered by the Court. The objection by the Respondent is that the claim is barred by limitation of time in terms of Section 90 of the Employment Act. Section 90 of the Employment Act provides that;

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.

4. The Claimant's cause of action accrued on her resignation on 6th July 2017 and despite the negotiations that were ongoing the limitation of her claim which was on wages was 12 months in terms of Section 90. She ought to have filed her suit by the 5th July 2018 and in respect of any other claim by 5th July 2020. It does not show diligence to negotiate a matter of allowances for over one year with an employer who seems as reluctant to pay as the Respondent herein. Some of the claims in respect of which she seeks recompense were incurred in 2009,

2010, 2011, 2012 and 2013. As such her claim is stale and is therefore unfit to be entertained by Court. As the Respondent did not file submissions on time as directed by the Court the suit is dismissed but with no orders as to costs i.e. each party to bear their own costs.

It is so ordered.

Dated and delivered at Nairobi this 15th day of November 2021

Nzioki wa Makau

JUDGE