



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 154 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

JOHN MWANGI NGUGI.....CLAIMANT

VERSUS

ORIENT SACCO SOCIETY LIMITED..... RESPONDENT

RULING

1. By notice of Preliminary Objection dated 19th January, 2021 the Respondent objects to the Claimant's Memorandum of Claim filed on 13th March, 2020 on grounds that the same is statute barred pursuant to the provisions of Section 90 of the Employment Act and therefore this Court lacks the requisite jurisdiction to hear and determine the same. That the claim should therefore be struck out or dismissed with costs to the Respondent.
2. In its submissions in support of the Preliminary Objection the Respondent averred that the instant case falls within the ambits of a proper Preliminary Objection as it exhibits ingredients of a Preliminary Objection as highlighted in the celebrated case of **Mukhisa Biscuits Manufacturing Co. Ltd v West End Distributors Company Limited (1969) E.A. 696**.
3. The Respondent contends that the Claimant in his Memorandum of Claim and Witness statement filed in this matter averred that he was summarily dismissed by the Respondent on 13th March, 2017.
4. The Respondent further contends that the instant cause of action is statute barred the same having been filed more than 3 years after the cause of action arose contrary to the mandatory provisions of Section 90 of the Employment Act, 2007, the same having been filed after 12th March, 2020.
5. The Respondent urged this Court to strike out the suit relying on the decisions in **Attorney General & Another v Andrew Maina Githinji and Another (2016) eKLR**, **Lydia Pamela Nyangala v Royal Media Services Ltd (2016) eKLR** and **Justine S. Sunyai v Judicial Service Commission (2017) eKLR** where the Courts dismissed the suits for being filed after the mandatory statutory period of 3 years in accordance with the provisions of Section 90 of the Employment Act, 2007.
6. The Respondent further submitted that this Court has no jurisdiction to extend or allow for extension of limitation period in an employment matter as the Employment Act does not provide for the same. The Respondent relied on the Court of Appeal decision in **Divecon v Samani (1995-1998) E.A. 48** and the cases of **Peter Nyamai & Another v M.J Clarke Limited (2013) eKLR** **Charles Musa Kweyu v Wananchi Marine Products (2014) eKLR** and **Augustine Odhiambo Abiero v K.K Security Ltd (2014) eKLR** to buttress the position that the Court has no choice but to strike out this suit for being time barred.
7. The Respondent posited that this Court lacks the requisite jurisdiction to hear and determine this matter and should therefore down its tools. To buttress this argument the Respondent cited the cases of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) 1 KLR**, **Re the matter of the Interim Independent Electoral Commission S.C Constitutional Application No. 2 of 2011 (2011) eKLR** and **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited (2012) eKLR**.
8. On the issue of costs the Respondent submitted that it had spent a lot of resources on this matter and should therefore be awarded costs.
9. The Claimant on the other hand in his submissions maintained that his suit is not time barred as contended by the Respondent Applicant by dint of the provisions of Section 57 of the Interpretation and general Provisions Act, which provides that the day an event happens is usually excluded from computation of days.

10. He further contended that the date of termination being 13th March, 2017 ought to be excluded while computing time. For emphasis the Claimant relied on the case of **Kenya Power & Lighting Co. Ltd v Brookfield Academy Ltd & Another [2007] eKLR**.

11. It was further submitted that in accordance with the provisions of Order 50 rule 4 of the Civil Procedure Rules time does not run between 21st December and 13th January of every year and therefore ought to be excluded in the computation of time. He maintained that a total of sixty nine days ought not to be included in the computation and therefore the claim is not time barred.

12. He further argued that his claim is in the nature of a continuing injury and is therefore not time barred. To buttress this argument the Claimant relied on the Authority of **George Hiram Ndirangu v Equity Bank Limited (2014) eKLR**.

13. In conclusion the Claimant urged this Court to dismiss the Preliminary Objection raised by the Respondent herein with costs.

Analysis and Determination

14. I have considered the pleadings, the notice of preliminary objection and the submissions in respect thereto by both the Respondent and the Claimant herein. It is not in dispute that the Claimant's employment with the Respondent terminated on 13th March, 2017. It is further not disputed that the claim was filed on 13th March, 2020.

15. Section 90 of the Employment Act 2007 provides as follows -

90. Limitations

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.

16. Section 57 of the Interpretation and General Provisions Act provides as follows –

57. Computation of time

In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

17. Order 50 Rule 4 of the Civil Procedure Rules provides as follows –

[Order 50, Rule 4.] When time does not run.

4. Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction.

18. In my view Order 50 rule 4 makes it clear that the rule applies

specifically to computing time under the Civil Procedure Rules, or in accordance with an order of the court. Nothing in the rule shows that it was intended to be applied to the time limits fixed by the Limitation of Actions Act or the Employment Act, which are substantive law as opposed to the Civil Procedure Act and Rules which is procedural law.

19. I find that the said provision cannot therefore be applied in the instant case. See the Court of Appeal decision in the case of **Maersk Kenya Limited v Murabu Chaka Tsuma (2017) eKLR**.

20. Section 57(a) of the Interpretation and General Provisions Act is explicit that in computing time, the date of the happening of an event is excluded.

21. In the instant case, the Claimant's employment terminated on 13th March 2017 while this suit was filed on 13th March 2020.

22. Time therefore started running on 14th March 2017 and would therefore lapse on 14th March 2020.

23. I thus find that the claim herein is not statute barred as it was filed just before the lapse of the limitation period.

24. For this reason I find no merit in the preliminary objection and dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH DAY OF NOVEMBER 2021

MAUREEN ONYANGO

JUDGE

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 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 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.

MAUREEN ONYANGO

JUDGE