



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1220 OF 2017

PAUL MWANGI KIIRUCLAIMANT

VERSUS

TUSKER MATTRESSES LIMITED.....RESPONDENT

(Before Hon. Justice Hellen S. Wasilwa 27th February, 2020)

RULING

1. The Respondent, Tusker Mattresses Limited filed a Notice of Preliminary Objection dated 23rd September 2019 against the Claimant, Paul Mwangi Kiiru on the grounds that:-

- 1. The suit is time barred and offends the mandatory provisions of Section 90 of the Employment Act.***
- 2. The suit is an abuse of the Court process.***
- 3. The suit is incompetent and ought to be struck out with costs.***

2. In response, the Claimant filed a Replying Affidavit dated 16th October 2019 averring that he is a former employee of the Applicant/Respondent herein having been employed from 1st February 2005 to 5th June 2014 when his employment was unlawfully terminated.

3. That upon termination of his employment, the Applicant failed to pay him his full terminal dues and admits that he filed a Claim 24 days late of the limitation of time.

4. That before instructing his current advocate, his previous advocate had sat on the case for over one year without filing the matter in Court and he contends he should not be punished by the misdeeds of an advocate who is an officer of the Court.

5. He avers that the delay in filing the claim is inordinate and was an oversight and that the Preliminary Objection by the Respondent is an attempt to frustrate and delay hearing of this case and further defeat justice. That Article 159 of the Constitution and the overriding objectives of the Civil Procedure Act and Civil Procedure Rules (2010) encourage that justice should be served devoid of procedural technicalities.

6. He seeks the indulgence of this Court to hear his case to its merits irrespective of the slight procedural technicality.

Respondent/Applicant's Submissions

7. The Respondent submits that the **Limitation of Actions Act, Chapter 22 of the Laws of Kenya, the Public Authorities Limitation Act, Chapter 39 of the Laws of Kenya** and the **Employment Act, 2007** all provide for specific timelines within which claims such as the present one ought to be instituted as follows:-

Section 3(2) of the Public Authorities Limitation Act provides that:-

(2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.

Section 4(1) of the Limitation of Actions Act provides as follows:-

(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued:-

- a) actions founded on contract;**
- b) actions to enforce a recognizance;**
- c) actions to enforce an award;**
- d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;**
- e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.**

8. Section 90 of the Employment Act, 2007 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 the Act or a contract of service in general shall lie or be instituted unless it commences within three years next after the act.

9. It submits that the only question this Court ought to determine is when the cause of action arose and it cites the case of Drummond Jackson vs. Britain Medical Association (1970) 2 WLR 688, cited with approval in Jane Njeri Mbugua v Teachers Service Commission where the Court defined 'cause of action' as an act on the part of the defendant, which gives the plaintiff his cause of complaint. That this definition has been upheld by the Court of Appeal in Attorney General & Another v Andrew Maina Githinji & Another [2016] eKLR.

10. That in this matter, the Claimant's cause of action arose on the date he was dismissed from his employment which is 6th June, 2014 and that this is the date when time began to run as against the Claimant's claim. The Respondent submits that the claim before Court has thus been brought 5 years after the cause of action arose and there is no basis for such inordinate delay.

11. The Respondent further submits that the Claimant's claim cannot be saved under the provisions of Section 27 of the Limitation of Actions Act, which provides for extension of limitation periods in certain cases. That the relevant provisions of the law dealing with extension of time do not apply to actions based on contracts and that the Court has no such power with regards to claims arising from employment contracts.

12. That as was held by the Court of Appeal in the case of Thuranira MKarauri v Agnes Ncheche [1997] eKLR, that the issue of limitation goes to jurisdiction and whenever it is raised, the Court must deal with it before proceeding any further.

13. The Respondent further submits that the issue of limitation cannot be a matter of technicality to be addressed under Article 159 of the Constitution and that the Claimant has not given any reasonable cause why the suit was never instituted on time. That the Claimant has also not given any evidence that his former advocate sat on his case for over a year.

14. It urges the Court that in allowing its application and dismissing the suit with costs it should be guided by the following authorities: Justine S. Sunyai v Judicial Service Commission & another [2017] eKLR, Fred Mudave Gogo v G4S Security Services (K) Ltd [2014] eKLR and Mellen Moraa Maiko v Board of Management, Marani Secondary School [2018] eKLR. It concludes that it is worth noting that the Employment Act which is a recent legislation does not give room for discretion to extend time in employment matters and that consequently once this Court finds that a matter based on contract is filed out of time, it must terminate the proceedings forthwith.

15. I have considered the averments of both Parties. The Claimant has admitted that he filed this Claim 24 days late of the limitation time.

16. That being the case, the claim was filed contrary to the mandatory provisions of Section 90 of the Employment Act 2007.

17. The claim must therefore fail for want of time. I therefore dismiss this Claim accordingly.

Dated and delivered in open Court this 27th day of February, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mbugua holding brief Arati for Claimant – Present

Respondent – Absent