



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 413 OF 2019

GEORGE NG'ANG'A NJIHIA.....CLAIMANT

v

EAST AFRICAN BOTANICALS EPZ (ADVANCED BIO-EXTRACT) LTD.....RESPONDENT

RULING

1. George Nganga Njihia (Claimant) instituted these legal proceedings against East African Botanicals EPZ (Advanced Bio-Extract) Ltd (Respondent) on 26 January 2019 and he stated the Issues in Dispute as Unfair termination, suspension, refusal by the Respondent to reinstate the Claimant and/or pay his terminal benefits and non-payment and/or remittance of other dues and/or contributions.
2. In paragraph 13 of the *Memorandum of Claim*, the Claimant pleaded that he was dismissed on 29 September 2010.
3. Despite pleading that he was dismissed on 29 September 2010, the Claimant also pleaded at paragraph 19 that he was suspended, on the same date.
4. At paragraph 20, the Claimant pleaded that he was not paid his salary for September 2010.
5. Upon service of Notice of Summons and the Memorandum of Claim, the Respondent filed a Notice of Preliminary Objection on 8 October 2019 contending that
 1. The suit herein is defective, bad in law and an abuse of the court process.
 2. The suit herein was filed in violation of section 90 of the Employment Act, 2007.
 3. The suit herein should be dismissed with costs to the Respondent.
6. The Claimant filed Grounds of Opposition to the Preliminary Objection on 22 October 2019 and List of Authorities on 13 December 2019.
7. The Respondent filed its submissions in support of the Preliminary Objection on 13 December 2019.
8. The Court has considered the Preliminary Objection, the submissions and the authorities cited.
9. In sum, the Claimant was advancing cause(s) of action for unfair termination of employment/constructive dismissal, and breach of contract which accrued in September 2010.
10. The Claimant appeared to suggest that the cause(s) of action presented to the Court were the same facts which were considered by the Magistrates Court on 7 December 2017 before acquittal and therefore accrual of the cause of action was upon the acquittal.
11. It is not in dispute that the cause(s) of action arose within the context of an employment relationship.
12. In terms of section 90 of the Employment Act, 2007, the Claimant should have instituted the claim within 3 years but he did not.
13. The Court of Appeal addressed the question of accrual of a cause of action during the pendency of a criminal trial in *Attorney General & another v Andrew Maina Githinji & Ar* (2016) eKLR.

14. The Court of Appeal endorsed the view that that the institution of criminal proceedings is not a bar to civil proceedings based on similar facts and,

concluded that that the cause of action, in this case, did not arise after the conclusion of the criminal case against the respondents. The respondents had a clear cause of action against the employer when they received their letters of dismissal on 2nd October 2010. They had all the facts which had been placed before them in the disciplinary proceedings and they could have filed legal proceedings if they felt aggrieved by that dismissal, but they did not.

15. It follows from the legal principle set out by the Court of Appeal that the Claimant's contractual cause of action accrued when he suffered a legal wrong/injury on 29 September 2010. He moved the Court after about 9 years, outside the prescribed time limit.

16. It is of no moment that the Claimant faced criminal charges on the same set of facts which led to the separation with the Respondent.

17. The result of the foregoing is that the Court finds and holds that the claims brought by the Claimant were caught up by section 90 of the Employment Act, 2007.

18. The Memorandum of Claim is struck out with no order on costs.

Delivered, dated and signed in Nairobi on this 14th day of February 2020.

Radido Stephen

Judge

Appearances

For Claimant Carolyn K. Muumbo & Co. Advocates

For Respondent Wekesa & Simiyu Advocates

Court Assistant Judy Maina