



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1666 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

PAUL MUTUA MANG'ENG'E.....CLAIMANT

VERSUS

NEW KIMUTWA BUTCHERY LIMITED.....RESPONDENT

RULING

The suit herein has been instituted by Paul Mutua Mang'eng'e, the claimant, by memorandum of claim dated 30th July 2015 and filed on 21st September 2015. In the suit he states inter alia, that in 2009 when coming back from leave he was told by the Director of the Respondent Mr. Joseph Mutuku that he should proceed on unpaid leave since business was low and the Director would call him back when business picked up.

The Claimant avers that he had been attacked by thugs in December 1999, that he had problems with his left hand and he then proceeded for medical check and clinic which ran from 25th August 2009 to 30th June 2010.

The respondent filed a defence to the memorandum of claim in which it pleads at paragraph 7 that the claim is time barred since the alleged contract of employment is alleged to have been breached in 2009 and this contravenes the provisions of Section 90 of the Employment Act, since from 2009 to 2015 is a period of 6 years.

By a notice of preliminary objection dated 20th September 2018 and filed on 21st September 2018, the respondent prays that this court dismisses the instant suit in its entirety and with costs to the respondent on grounds that –

“The Claimant’s suit against the Respondent should be dismissed in its entirety for it is time barred.

Section 90 of the Employment Act, 2007 provides that-

Notwithstanding the provision of section 4(1) of the Limitations of Actions Act (Cap 22), no civil action or proceeding based or arising out of this Act or a contract of service in general shall lie or be instituted unless it 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

The cause of action arose in August 2009 when the Claimant alleges to have been terminated from his employment. The suit was however not instituted until September 2015 which is a period of six years. Further, the suit was commenced without leave of court to file suit out of time.”

In its submissions in support of the preliminary objection the respondent submits that the claimant was employed by the respondent on 10th August 1988 as is borne by the claimant’s NSSF statements. That the claimant left employment in August 2009 when his employment was terminated as reflected in appendix 3 of claimant’s bundle which is a letter written by the claimant on 13th August 2014. It is further submitted by the respondent that at appendix 5 the County Labour Officer stated that the case had been reported to him in August 2012, two years after termination of the claimant’s employment. That in his statement the claimant states he reported the matter to the Labour Office in August 2014. That therefore he could not have been terminated on 17th April 2015 as he would be contradicting himself.

The respondent cites many authorities in support of the preliminary objection among them **Rift Valley Railways (Kenya) Limited v Hawkins Wagunza Musunye and Another (2016) eKLR**, **G4S Security Services (K) Limited v Joseph Kamau and 468 Others (2018) eKLR**, **Civil Appeal No. 57 of 2013, Peterson Waweru Thinwa v Judicial Service Commission, Timothy M. Mukalo v Reuben Alubale Shiramba and 3 others (2005) eKLR**, **Attorney General and Another v Andrew Maina Githinji and Another (2016) eKLR**.

In all these decisions, the court decided that the cause of action accrues on the date of termination of employment.

The claimant filed submissions in response to the notice of preliminary objection. It submits that there is no proper preliminary objection before the court. He relies on decision in **Kenya Union of Commercial, Food and Allied Workers Union v Water Resource Management Authority and Another (2015) eKLR** where the court stated –

*“This court traversed this ground in the recent authority of **Kenya Council of Employment Migration Agencies v Nyamira County Government & 10 others [2015] eKLR** where the court made observations generously cited as hereunder;*

*“The ingredients of a preliminary objection are well established in the celebrated authority of **Mukhisa Biscuit Manufacturing Company Limited Vs. West End Distributors Company Limited, (1969) E.A. 696** as follows;*

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Further,

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of the judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

...

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

Again,

“It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of the judicial discretion.”

The claimant further relies on the decision in **Dickson Munene Nkanata v Bunham Limited (2018)** in which the court observed –

“8. In determining this Application, I note from the pleadings that the Claimant was terminated on 12th June 2014. That he was served with a letter dated 29th May 2014 stating that his termination was effective on 30th June 2014.

9. The Claimant avers that he received the termination letter on 29th June 2014. It is a matter that is contested as to the exact time of termination and when the letter of termination was received by the Claimant.

10. The claim was filed on 30th June 2017 as per the Court stamp.

11. In the circumstances, this is a matter that can only be resolved with facts and evidence and falls outside strict point of law and therefore not a matter that can be determined as a Preliminary Objection.

12. In the circumstances, I dismiss this Preliminary Objection and direct that the issues raised herein be canvassed within the main claim.”

It is submitted that the claimant avers that he was terminated while the respondent alleges he absconded work. That this is an issue of fact, not law. That when served with a demand letter the respondent did not state when the claimant was dismissed and/or why the matter was before the Labour Office. It is further submitted that the respondent has not demonstrated what he did when the claimant allegedly absconded in 2009 as no show cause letter or termination letter was written to the claimant.

Further that at the Labour Office during conciliation there was no clear time frame for employment and exit from employment and that the claimant in his witness statement indicated that he erroneously stated that his employment was terminated in August 2009.

The claimant prays that the preliminary objection be dismissed with costs.

Determination

I have considered the notice of preliminary objection and the submissions for and against the same by the respondent and the claimant. The issues for determination are two – whether or not the preliminary objection is valid and whether the claim is statute barred.

A preliminary objection was defined in the case of **Mukhisa Biscuit Manufacturing Company Limited v West End Distributors Company Limited (1969) E. A 696** as follows–

“The ingredients of a preliminary objection are well established in the celebrated authority of Mukhisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Company Limited, (1969) E.A. 696 as follows;

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Further,

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of the judicial discretion.

The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

In the present case the claimant states that there are factual issues to be interrogated by the court thus this case is not a proper one for preliminary objection. The claimant states that the fact whether the claimant absconded duty or was terminated is one of the issues to be ascertained and also the fact that the claimant indicated in his letter dated 13th August 2014 that he had erroneously referred to August 2009 as the date of termination.

I do not agree with the claimant. In paragraph 8 of the memorandum of claim he unequivocally pleads –

“In 2009 when coming back from leave he was told by the Director of the Respondent Mr. Joseph Mutuku that he should proceed on unpaid leave since business was low and would call him back when business picked up.”

At paragraph 11 he pleads that –

“On 13th August 2014 the Claimant caused a letter to be written to the Respondent and also copied the same to the District Labour Office – Machakos though it was by mistake indicated he had been terminated on 5th February 2012.”

He again pleads at paragraph 12 that –

“There was no response from the Respondent and/or the said Labour Office prompting the Claimant to seek legal advice and a demand letter was written to the Respondent on 9th March 2015.”

From the three paragraphs it is clear that the claimant pleads that he was *“told by the Director of the respondent, Mr Joseph Mutuku that he should proceed on unpaid leave since business was low and would call him back when business picked up.”*

He has not pleaded anywhere in the memorandum of claim that he went back to work after that date. What he pleads is that he sent a demand letter on 9th March 2015 after seeking legal advice. A demand letter cannot found a cause of action. Even in the report of the Labour Officer at the claimant’s appendix 6, the Labour Officer observed that –

“4. CONCLUSION

The complainants were supposed to have reported their cases within 3 months per sections 47 and 71 of the Employment Act 2007.

They had no believable reasons for not acting within time limit.

It is quite unbelievable that somebody can be terminated from employment and disappear for 2-3 years and then reappear to report his criminal case after that long period.

The conciliator declares that these cases were time barred and there is no legitimate claim to be demanded by the complainants from the employer.”

The claimant has further filed a statement of NSSF contributions form which it is evident that his last contribution to NSSF was made in May 2009.

From the foregoing, I find that the claimant unequivocally pleaded in the memorandum of claim that he was last in the employment of the respondent in 2009, when he alleges he was told to proceed on unpaid leave because business was low and to wait until he was called back when business picked up.

Having found that the cause of action arose in 2009, the next issue is whether the claim is statute barred.

Section 90 of the Employment Act provides that –

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 of or in the case of continuing injury or damage within twelve months next after the cessation thereof.

There are numerous authorities of this court and the Court of Appeal on the issue of limitation of action in employment matters, among them those cited by the respondent as set out herein above. They all make one finding, that any suit filed after 3 years is statute barred and this court has no jurisdiction to entertain the same.

The preliminary objection therefore succeeds and I accordingly find that this suit is statute barred and is for striking out which I accordingly proceed to do. The suit is thus struck out with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF FEBRUARY 2020

MAUREEN ONYANGO

JUDGE