



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

NAKURU

CAUSE NO.244 OF 2018

KENYA UNION OF COMMERCIAL, FOOD

AND ALLIED WORKERSCLAIMANT

VERSUS

AGRICULTURAL SOCIETY OF KENYA.....RESPONDENT

RULING

The ruling herein is with regard to objections filed by the respondent, Agricultural Society of Kenya vide Notices of Preliminary Objections on 22nd February, 2019 and 24th April, 2019 on the grounds that the claim filed on 19th September, 2019;

... Is not properly instituted before the court noting that Legal Notice No.6024

... dated 10th June, 2018 in which the chief justice appointed all magistrates of the rank of Senior Resident Magistrates and above as special magistrates designated to hear and determine all disputes arising from contracts of employment where the employees' gross monthly pay does not exceed Ksh.80,000.

That the claim is fatally defective noting that the Verifying Affidavit and the memorandum of Claim have been endorsed by different officers of the claimant.

In the other notice the grounds are that;

The suit herein is statutorily [statutory] time barred in view of section 90 of the Employment Act, 2007.

The respondent as the applicant submitted that the Notice of Objections dated 18th February 2019 and file don 22nd February, 2019 stands abandoned.

With regard to the question of application of section 90 of the Employment Act, 2007 the claimant's case is that there was termination of employment on 11th May, 2013 and then parties went for negotiations until September, 2016 and the claim was filed on 19th September, 2018 outside the 3 years' time limitation set in law.

The claimant submitted that the issue in dispute is the question of the redeployment and non-payment of the grievant. There is no letter terminating employment and the last communication on the matter was on 16th June, 2017 with regard to the termination of employment and the filing of the claim is within time.

Is the claim herein time barred?

The rationale for preliminary objections is set out in the case of **Mukisa Biscuits Manufacturing Ltd versus West End Distributors (1969) EA 696** where it was held that;

... 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 a contract giving rise to the suit to refer the dispute to arbitration.

On the basis of the pleadings filed, the court is able to determine an issue of law and which if argued can dispose of the suit.

The respondent herein has relied on the provisions of section 90 of the Employment Act, 2007 which give a mandatory time limitation for the filing of claims within 3 years from the date the cause of action arose.

In the Memorandum of Claim the issue in dispute is *failure to deploy Mr John Kanyiri after criminal case lodged against him was withdrawn*.

The claimant has then pleaded that the grievant was on 10th April, 2013 on night duty when unknown people broke into the branch manager's office and stole a computer. He was arrested on 11th May, 2013 and charged in court. On 8th December, 2015 the prosecution withdrew the case under section 87(a) of the CPC.

The claim is also that on 19th September, 2016 the claimant wrote to the respondent seeking the reinstatement of the grievant. In March 2017 the matter was referred to the Minister and a conciliator appointed and who issued certificate of unresolved issues on 16th January, 2018.

The claim is that there was unfair termination of employment and the claimant is seeking the reinstatement of the grievant and in the alternative the payment of terminal dues.

Effectively, the last day at work for the grievant was 11th May, 2013 when he was arrested and charged in court. His reinstatement was then addressed by the claimant on 19th September, 2016 after the criminal charges he was facing were addressed under the provisions of section 87(a) of the CPC.

In **Attorney General & another versus Andrew Maina Githinji & another [2016] eKLR** the Court of Appeal has held that the time limitation under section 90 of the Employment Act, 2007 is not extended by the parties undertaking negotiations. In **Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers versus Comboni Polytechnic [2019] eKLR** the court held that;

*... the claims premised on arrears due and owing from the years 2006 to 2009 addressed under section 90 of the Employment Act, 2007 are time barred. Under such legal provisions, the court is denied the power and discretion to extend time as held in **Maria Machocho versus Total (K) Cause No. 2 of 2012** and in the case of **Josephat Ndirangu versus Henkel Chemicals (EA) Limited, [2013] eKLR**, where the court held that;*

*... the limitation period is never extended in matters based on contract. The period can only be extended in claims founded on tort and only when the applicant satisfies the requirements of **Sections 27 and 28** of the Limitation of Actions Act.*

In **Solomon Asenaka versus Chairman, Board of Governors Senende High School [2019] eKLR** the court while replying on the case of **Rift Valley Railways (Kenya) Ltd Versus Hawkins Wagonza Musonye and another [2016] eKLR** held that;

While there is no doubt that section 15 of the Employment and Labour Relations Act encourages alternative dispute resolution, it must be court-based and conducted within the law. Time does not stop running merely because parties are engaged in an out of court negotiations. It was incumbent upon the respondents to bear in mind the provisions of Section 90 of the Employment Act even as they engaged in the negotiations. The claim went stale three years from the date of the termination of the respondents' contracts of service.

Accordingly, where employment of the grievant ceased as of 11th May, 2013 to file the Memorandum of claim as at 19th September, 2018 to urge for reinstatement or payment of terminal dues owing as of such date is a period of over 3 years which lapsed as at 10th May, 2016 and cannot be revived by any other process known in law.

The objections filed are found with merit. The claim herein is barred in time and is hereby struck out. Each party to bear own costs.

Delivered at Nakuru this 6th day of February, 2020.

M. MBARU

JUDGE

In the presence of:

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