



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 2010 OF 2017

(Before Hon. Justice Hellen S. Wasilwa 4th February, 2020)

DEBORAH WAMUYU RIITHO.....CLAIMANT

VERSUS

JAMBO SQUARE ENTERPRISES TRADING

AS JAMBO GRILL HERISQUIRE LIMITED.....RESPONDENT

RULING

1. Pending for determination before this Court is the Notice of Motion Application dated 8th April, 2019. The Application is filed by the Respondents/Applicants under Certificate of Urgency seeking the following Orders:-

1. ***THAT this Statement of Claim filed by the Claimant/Respondent herein dated the 7th October, 2017 be struck out in its entirety with costs to the Respondents.***

2. ***THAT the 2nd Respondent be struck out of these proceedings.***

3. ***THAT the costs of this Application be provided for.***

2. The Application is premised on the grounds that:-

1. ***The Claimant/Respondent was employed by the 1st Respondent at the premises known as Jambo Grill located along Thika Road in December 2002 and quit employment in 2013, was paid all her terminal dues and proceeded to seek employment with the 2nd Respondent.***

2. ***No claim has been brought as against the 1st Respondent from 2013 until this suit was filed 7th October 2017. The Claimant/Respondent filed a claim against the 1st Respondent 4 years after leaving the employment of the 1st Respondent.***

3. ***Having failed to bring the Claim within 3 years of separation from the 1st Respondent, the Claimant is out of time and this Honourable Court does not have jurisdiction to entertain a claim against the 1st Respondent.***

4. ***The two Respondents were at all times separate legal entities and never shared management at any instance and no transfer could be effected from one Respondent to the other.***

5. ***The 2nd Respondent employed the Claimant/Respondent in 2013 but sometime in July 2016, business at Herisquare restaurant became untenable and the 2nd Respondent closed shop.***

6. ***The Claimant by her own admission states that she was paid all dues owed to her by the 2nd Respondent hence she does not have any claim against the 2nd Respondent. There is no claim against the 2nd Respondent hence it is not a necessary party in these proceedings and ought to be struck out of the suit.***

7. ***It is just and mete to allow this Application.***

3. The Application is further supported by the Affidavit of **PETER WAIHUMBU MUIGAI**, the Managing Director of the 1st Respondent

herein sworn on 8th April, 2019 in which he reiterates the grounds on the face of the Motion.

4. In opposition to the instant Application the 1st Claimant filed Grounds of Opposition dated 11th April, 2019.

5. Parties thereafter agreed to canvass the Application by way of written submissions.

Submissions by the Parties

6. It is submitted by the Applicant herein that this suit being time barred this Court lacks the Jurisdiction to hear the same by dint of Section 90 of the Employment Act, 2007. To buttress this argument the Applicant cited and relied on the Court findings in the cases of **Josephat Ndirangu vs Henkel Chemicals (EA) Limited (2013) eKLR** and **Bosire Ogero Vs Royal Media Services (2015) eKLR**.

7. It is further submitted by the Applicant that 1st and 2nd Respondents/Applicants being separate legal entities, the Claimant's assertion that she was transferred from the 1st Respondent's employment to the 2nd Respondent is not true and is made in bad faith.

8. It is further submitted that the 2 Applicants being distinct legal entities one cannot impose one company's responsibility on the other. For emphasis the Applicants cited the Authorities of **Victor Mbachii & Another Vs Nurtun Bates Limited (2013) eKLR** and **Shaneebal Limited Vs County Government of Machakos (2013) eKLR**.

9. In conclusion, the Applicants urged this Honourable Court to allow this Application as prayed with costs.

Claimant/Respondent's Submissions

10. The Claimant/Respondent on the other hand submitted that her Claim as against the Respondents/Applicants herein is not statute barred as she was employed by the 1st Respondent for a period of 11 years and that she was subsequently transferred unlawfully and unfairly to the 2nd Respondent as the two Respondents shared management.

11. It is further submitted that the Claimant left her employment with the Respondents on September 2016 and the instant suit brought before this Court on 9th October, 2017 and is therefore not statute barred under Section 90 of the Employment Act, 2007.

12. She (the Claimant) further submitted that the grounds raised by the Respondents are delay tactics only meant to delay her from pursuing her rights. To buttress this argument the Claimant cited the case of **Transworld Safaris Kenya Limited Vs Somak Travel Limited, Appeal No. 261 of 1996**.

13. The Claimant further submitted that her rights as envisaged under Sections 35 and 41 of the Employment Act, 2007 have been violated by the Respondents and therefore contended that she deserves to be heard and the matter be determined by this Honourable Court.

14. She further contended that the Application dated 8th April, 2019 is made in good faith, is a sham and only intended on delaying her from realizing her claim as against the Respondents herein.

15. She further contended that the same is an abuse to the Court process therefore urging this Court to proceed and strike it out.

16. In conclusion, the Claimant submitted that the instant Application raises no objection in law and therefore urged this Honourable Court to dismiss the same with costs. She further prayed that the Court directs that this matter proceeds to hearing and final determination of the Claim filed herein.

17. I have considered all the averments of both Parties.

18. The issue of when the Claimant was employed by the Respondent and when she left the job is a triable issue and factual having been disputed. It is therefore an issue that cannot be resolved through this application as a Preliminary Objection. I therefore dismiss this application accordingly.

19. Costs in the cause.

Dated and delivered in open Court this 4th day of February, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Njoroge holding brief Waithaka for 1st and 2nd Respondents/Applicants – Present

No appearance for Claimant