



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO 1989 OF 2014

MARK GORI ADOO.....CLAIMANT

VERSUS

PAN AFRICAN TRUCKS &

EQUIPMENT (K) LTD.....RESPONDENT

RULING

1. The claimant brought this suit on 7.11.2014 seeking payment of commission on sales earned in 2008 and 2009 under his contract of employment that ended on 31.12.2011 when he retired from the respondent. In response, the respondent filed defence on 14.10.2019 denying liability. Subsequently, she filed Notice of preliminary objection on 30.10.2019 seeking on the following grounds: -

- a) The suit is statute barred by dint of section 90 of Employment Act
- b) The court lacks jurisdiction to hear and determine the suit.

Respondents submissions

2. The respondent submitted that the suit is statute barred and should be dismissed with costs because it was filed after the lapse of the 3 years' limitation period provided under Section 90 of the Employment Act. She contended that the claimant pleaded in paragraph 7 of the Claim that he sold 33 machines on diverse dates between 2008 and 2009 to various companies and earned and became entitled to JPY 4,091,928.45 as commission from the sales. She urged that filing the suit on 7.11.2014 was out of time. She contended that the suit is an afterthought because since 2008, the claimant did not any claim for commission and only waited until he retired in December 2011.

3. She relied on **Attorney General & another v Andrew Maina Githinji & another [2016] e KLR** where the Court of Appeal held that a cause of action arises from the time a person becomes entitled to sue the other for a remedy. She also relied on Halsbury's Laws (4th Edition) paragraph 20 (page 21) which reiterates that a cause of action is factual situation the existence of which entitles one person to obtain from the court a remedy against another person.

4. On the other hand, the respondent submitted that a preliminary objection stands on the pleadings and as such urged the court to disregard the claimant's replying affidavit filed in response to the objection because it seeks to adduce evidence. For emphasis, she relied on **Kalpna Rawal & another v Judicial Service Commission & another [2016] eKLR** where the Court held that the practice of filing replying affidavits in support of preliminary objections is against the law and amounts to abuse of the court process.

Claimant's Submissions

5. The claimant opposed the preliminary objection and denied that his suit is statute barred. He submitted that under his contract of service, he was entitled to the commission earned and that as at 31.12.2011 when he retired, he was entitled to all his accrued benefits including salary arrears, unpaid commission. He contended that his cause of action crystallized on 23.1.2012 when the respondent unequivocally indicated that she will not pay the said commission. According to him the time taken to bring the suit herein since was less than 3 years and urged that the suit is not time barred within the meaning of section 90 of the Employment Act. He also relied **Attorney General & another v Andrew Maina Githinji & another [2016] e KLR** to urge that a cause of action arises from the time when the aggrieved party becomes entitle to seek redress from the court.

Analysis and Determination

6. There is no dispute that the claimant was employed by the respondent until 31.12. 2011 when he retired from service. there is also no dispute that he brought this suit on 7.11.2014 claiming commission on sales earned in between 2008 and 2009. The issues for determination raised by the preliminary objection are:

- a) Whether the suit is statute barred.
- b) Whether the court lacks jurisdiction.

Whether the suit is statute barred.

7. The claim herein is founded on a contract of employment dated 17.7.2000 signed in favour of the claimant. The suit is therefore governed by the provisions of section 90 of the Employment Act which states that: -

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

8. The question that arises is, what is the meaning of a cause of action and when did it arise herein? In **Letang v Cooper [1964] 2 All ER 929 at 934**, Lord Diplock defined cause of action as follows: -

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

9. Again in **Drummond Jackson v Britain Medical Association [1970] 2 WLR 688**, Pearson J defined a cause of action as follow: -

“A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.”

10. As regards when a cause of action arises, **Halsbury’s Laws (4th Edition) Vol 28 paragraph 662 (page 298)** states that: -

“A cause of action arises in instances of breach of contract, upon the breach, and ... if a contract is to do something at a particular time or upon the happening of a contingency and the thing contracted for is not done, the cause of action arises at the time specified, or upon the contingency happening...”

11. After careful consideration of the foregoing authorities, it is my opinion that a cause of action is a factual occurrence that gives right of an aggrieved person to seek remedy in court against another person. It is also my opinion, based on the cited authorities, that a cause of action arises from the moment the aggrieved person becomes entitled to seek remedy in court.

12. In employment contracts, however, it is my considered view that a cause action arises from the time the employer or the employee breaches the contract and it continues to be alive as long as the contract remains in place. It means that the aggrieved party can seek remedy from court at any time during the subsistence of the contract. I am also of the opinion that after the termination of the contract, and I think that is what any reasonable employee would do to avoid problems at the workplace, the employee can sue for all accrued benefits under the contract of service and the employer can also counterclaim for any liabilities owed by the employee.

13. The question that arises is whether the suit herein was filed after the lapse of 3 years next after the date of retirement of the claimant. The answer is no because the claimant retired on 31.12.2011 and filed the suit on 7.11.2014, about two (2) years and ten (10) months. Consequently, I find and hold that the suit herein is not statute barred by dint of section 90 of the Employment Act.

Whether the court lacks jurisdiction.

14. The basis of the objection to this suit on ground of jurisdiction was that the suit is statute barred. In view of the foregoing finding that the suit is not statute barred, I return that the court has the jurisdiction to determine the same.

15. For the observations, findings and reasons stated above, I dismiss the preliminary objection dated 30.10.2019 with costs.

Dated, signed and delivered in open court at Nairobi this 29th day of April, 2020.

ONESMUS N. MAKAU

JUDGE