



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1373 OF 2016

FRANCIS ASEYO BULUKU.....CLAIMANT

-VERSUS-

MANJIT SINGH DHADIALLA.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 9th April, 2020)

RULING

The Court delivered the judgment in the suit on 12.07.2019 and dismissed the suit on 12.07.2019. In dismissing the suit the Court found as follows, **“The Court considers that the claimant voluntarily resigned from employment and the allegations of unfair termination are unfounded. The termination or separation of the parties was by agreement in view of the claimant’s resignation.**

The Court further returns that the prayers on underpayment, house allowance, NSSF dues, holiday pay, untaken and unpaid leave, and leave travelling allowances were all continuing injuries whose cause of action accrued on 01.08.2014 when the claimant resigned and the continuing injuries ceased. Accordingly the cause of action was time barred as the suit was filed on 14.07.2016 long after the lapsing of the 12 months of limitation of action under section 90 of the Employment Act, 2007.

In conclusion, the claimant’s suit is hereby dismissed with no orders on costs.”

The claimant has filed an application on 09.08.2019 through Majimbo A.G & Company Advocates. The application was by the notice of motion under order 45 of the Civil Procedure Rules 2010; Article 41(1), (2) (a) and (b) of the Constitution of Kenya 2010; rule 33(1) (2) and (3) of the Employment and Labour Relations Court (Procedure) Rules, 2016; section 48(1) and (2) and (3) of the Labour Institutions Act, 2007; section 17(11) of the Employment Act, 2017 and all enabling provisions of the law. The claimant prayed that the judgment be reviewed; the orders dismissing the suit be set aside; and the costs of the application be provided for.

The application was based on the attached supporting affidavit by the claimant and upon the following grounds:

- a) The judgment was delivered on 12.07.2019 in favour of the respondent and the memorandum of claim was undefended.
- b) The claimant resigned on 01.08.2014 in writing on account the respondent had failed to comply with the general wage orders since 1994 to 2014.
- c) The claimant had filed suit against Protector's Limited on 14.01.2015 and the suit was dismissed on 27.05.2015 on account that the company was not the employer. The dismissed suit was ELRC Cause No.33 of 2015 at Nairobi.
- d) The claimant filed the present suit on 14.07.2016 against the respondent as the proper employer. The resignation was on 01.08.2014. The 3 years of limitation under section 90 of the Employment Act, 2007 were lapsing on 01.08.2017. Thus the court erred in finding that the suit was time barred and the judgment should be reviewed on that account.
- e) It is in the interest of justice that the judgment is reviewed as prayed for.

The application was served together with the hearing notice but the respondent did not file replying affidavit or attend at the hearing.

The Court has considered the application, the supporting affidavit and the submissions on record.

The ground for review is that the 3 years of limitation had not lapsed as per section 90 of the Act and therefore there is an error on record. The Court finds that for a claim that the separation was unfair the time of limitation would be 3 years under the section but the claim not

being time barred, the Court nevertheless returned in the judgment that there had been no unfair termination because the claimant had voluntarily resigned from employment. For the claims based on continuing injury, the Court found that as at the time of filing of the suit, 12 months had lapsed from the date of cessation of the continuing injuries in issue. Accordingly, the prayers were declined as time barred. The Court finds that the applicant has not established an error on the face of the record in that regard. Accordingly, the application will fail.

In conclusion the application filed on 09.08.2019 for review of the judgment is hereby dismissed with no orders on costs.

Signed, dated and delivered in court at Nairobi this Thursday, 9th April, 2020.

BYRAM ONGAYA

JUDGE