



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 90 OF 2016

BETWEEN

THOMAS THIONG'O KANYI.....CLAIMANT

VERSUS

MOMBASA CLUB LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Hezron Onuong'a Industrial Relations Officer, KUDHEIHA, for the Claimant

Nzamba Kitonga & Company, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 9th October 2017. He states, he was employed by the Respondent in 1995, up to 6th August 2013, when the Respondent summarily dismissed him. He left while working as the Accounts Clerk- Debtors. It was alleged by the Respondent, that Kshs. 920,553 was lost by the Respondent, on account of fraudulent entries made by the Claimant. He was asked by Respondent's Club Manager to tender his resignation, or be forwarded to the Police for criminal prosecution. The Claimant refused to resign and on being taken before the Police, was released for lack of evidence.
2. He was summarily dismissed. He appealed internally without success. It is his position that he was not afforded any opportunity to be heard before dismissal. He states, he worked for 18 years and 9 months. He was denied house allowance, salary and service charge for the month of July 2013. He reported the existence of a dispute to the Minister of Labour through his Trade Union KUDHEIHA under Section 62 of the Labour Relations Act. Appointed Conciliator was unable to resolve the dispute and issued Certificate of Unresolved Dispute on 15th July 2016, paving way for adjudication.
3. The Respondent filed its Statement of Response on 6th April 2017. It agrees to have employed the Claimant from 1995 to August 2013. The Claim is time-barred, having been filed on 2nd February 2017. Throughout, the Claimant failed to discharge his duties diligently and honestly. He had 5 warnings issued between 2004 and 2012. In 2012 he was engaged in criminal activities, which are still under police investigation. He was taken through a proper disciplinary hearing. He was paid lawful dues upon termination. His Claim has no merit. The Respondent prays it is dismissed with costs.
4. The Claimant gave evidence, as did Respondent's Operations Manager Luke Muiruri Maina, on 7th February 2020 when hearing closed. The Cause was last mentioned on 27th February 2020, when Parties confirmed filing of their submissions.
5. Is the Claim time-barred?
6. The Respondent submits that the Claimant pleads he was summarily dismissed on 6th August 2013. He filed the Claim on 13th February

2017. Section 90 of the Employment Act 2007 requires Claims based on contracts of employment are brought within 3 years from the date the cause of action arises. The Claim was brought after 3 years and is therefore time-barred. Section 90 is mandatory, and does not make exceptions. The Court has no jurisdiction. The Respondent relies on the notorious decision on jurisdiction, **Owners of Lilian S v. Caltex Oil [K] Limited [1986-1989] E.A. 305 [CAK]**.

7. The Claimant said nothing at all, in his pleadings and submissions, on time-bar. He confirmed in his evidence that he was summarily dismissed on 6th August 2013, and filed his Claim on 2nd February 2017 [not 13th February 2017 as submitted by the Respondent]. He does not dispute that filing was done, more than 3 years after the cause of action arose. He does not attempt to justify late filing at all. He said nothing at all, in his pleadings and submissions, on time-bar. The response on time-bar was raised at paragraph 4 of the Statement of Response. The Claimant filed Amended Statement of Claim, on 9th October 2017, after the Statement of Response was already on record, and did not mention time-bar. There was adequate opportunity for the Claimant to explain delay, through his pleadings, evidence and submissions, whatever the explanation's worth. He did not do so.

8. The Hon. the Chief Justice has directed that all pending decisions are released to the Parties by 30th May 2020. This explains the changed date of delivery. It must also be recorded here that the Trial Judge has been compelled to release this Judgment from the confines of his home at Chaka, Nyeri County, owing to covid-19 pandemic. Other modes of delivery are neither failsafe, nor safe to the participants in the proceedings. The place of trial, Mombasa City, has been identified as a hotbed of the pandemic, and whereas Rule 28 of the Court Procedure Rules requires the Court to deliver its decisions in Open Court, this cannot be achieved in the present global circumstances, without risking lives. The Court must resort to Rule 38 which allows it to take control of its proceedings. Parties shall access the Judgment from the Registry and as soon as practicable, through the Kenya Law Reports web portal.

9. The Court is persuaded the Claim is time-barred, under Section 90 the Employment Act 2007. IT IS ORDERED:-

a. The Claim is declined under Section 90 of the Employment Act 2007 for want of jurisdiction.

b. No order on the costs.

Dated, signed and released at Chaka, Nyeri for dispersal to the Parties, this 29th day of May 2020.

James Rika

Judge