



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1711 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 28th May, 2020)

FREDRICK OMONDI BUOGA.....CLAIMANT

VERSUS

CROWN BERGER KENYA LIMITED.....RESPONDENT

RULING

1. Before this Court is the Respondent's preliminary objection dated 22/10/2015. The objection has been raised on the ground that this suit is incompetent because it has been filed out of time contrary to section 90 of the Employment Act, hence should be struck out in its entirety.
2. The Claimant has opposed the preliminary objection through his Response filed on 6th February 2020. He contends that the institution of this claim was delayed as criminal proceedings were instituted against him in 2008, in Madaraka CRC 2938 of 2008.
3. As such, he could not file the claim until the case had been heard and determined. The criminal case against him was withdrawn on 27/9/2012 and he filed the claim herein on 25/9/2015. He urged this court to set the matter for hearing.
4. The preliminary objection was disposed of by way of written submissions, with the Respondent filing their submissions on 20/2/2020. The Claimant did not file submissions.

Submissions

5. The Respondent submits that the preliminary objection herein meets the threshold set out in the case of **Mukisa Biscuits Manufacturing Limited vs. West End Distributors [1969] EA 696**. They submit that the issue of time limit is a point of law and that no facts have to be ascertained in this matter.
6. It is submitted that the claim was filed 4 years after the statutory limit of 3 years, hence the suit should be dismissed for being time barred. The Respondent contends that the cause of action arose from the time the Claimant's employment was terminated and not when the criminal case was withdrawn.
7. They rely on the Court of Appeal case of **Attorney General & Another vs. Andrew Maina Githinji & Another [2016] eKLR** where the Court of Appeal held that the cause of action in an employment matter arises upon the dismissal of the Claimant and not upon his subsequent acquittal in a criminal matter.
8. It is their position that institution of criminal proceedings is not a bar to civil proceedings based on similar facts as the two are distinct from each other. They rely on the case of **Attorney General & Another vs. Andrew Maina Githinji & Another [Supra]** to buttress this position. They urge this court to allow the preliminary objection and strike out the claim in its entirety.
9. I have examined the averments of both Parties herein.
10. Section 90 of the Employment Act 2007 states as follows:-

“Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted un less 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".

11. Indeed a Claim of such nature should be filed within 3 years from the time the cause of action arose. The filing is not dependent upon the day the criminal proceedings terminated.

12. In the circumstances, I find the Claim is time barred. The Preliminary Objection is merited. I therefore dismiss this Claim in its entirety for want of time. There will be no order of costs.

Dated and delivered in Chambers via zoom this **28th day of May, 2020.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Kihenchio for the Respondent

J. L. Onyango for Claimant – Present