



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 118 OF 2020

(Before Hon. Justice Hellen S. Wasilwa on 16th September, 2020)

PAUL MUCHIRI MATHENGE.....CLAIMANT

VERSUS

KCB BANK (K) LIMITED.....RESPONDENT

RULING

1. Pending for determination before me is the Notice of Preliminary Objection dated 10th March, 2020 brought on grounds that:-

1. The Honourable Court lacks Jurisdiction to entertain the Claim as the same is time barred under the provisions of Section 90 of the Employment Act, the cause of action allegedly occurred in 2014.

2. The Claimant suit is bad in law, an abuse of the Court process and should be struck out with costs to the Respondent.

2. In response to the Application the Claimant swore a Replying Affidavit filed in Court on 8th May, 2020, in which he avers that he was employed by the Respondent in the capacity of Regional Supervisor station at its industrial area branch as from 3rd March, 2014 earning a monthly salary of Kshs. 100,000/-.

3. He further avers that he was arrested while on duty at the Respondent's Gateway Branch by officers from the Forensic Audit on allegations of stealing. He further contended that following his arrest and detention he was issued with a suspension letter dated 25th July, 2014 pending investigations.

4. He posits that on 28th July, 2014 he was arraigned in Court in Milimani Criminal Case No. 1078 of 2014 and was charged with four counts among them conspiracy to commit a felony contrary to Section 393 of the Penal Code.

5. The Claimant averred that the Criminal proceedings against him proceeded and that the prosecution lined up a total of five witnesses among them the Respondent's employee to support the charges levelled against him and on 5th September, 2019 the Criminal Court made a ruling in the matter and was acquitted under Section 210 of the Criminal Procedure Code.

6. The Claimant further averred that subsequent to his acquittal, it became known to him on 19th November, 2019 of his termination when he visited the Respondent's officers and was by a member of the Respondent's staff that his file contained a letter of dismissal.

7. He further averred that on perusal of the dismissal letter he noted that the same was dated 18th August, 2014 during which time he was in custody pending his arraignment in Court on 28th July, 2014.

8. The Claimant maintained that the instant Notice of Preliminary Objection in the circumstances is misconceived, malicious and an abuse to the Court process therefore urging the Court to dismiss the same with costs to the Claimant.

9. Parties thereafter agreed to dispose of the Application by way of written submissions.

Submissions by the Parties

10. The Respondent submitted that the instant suit is time barred by dint of Section 90 of the Employment Act, 2007 as the Claimant admits

in his pleadings that his termination was effected on 25th July, 2014 and the suit was filed on 3rd March, 2020, 6 years from the date of termination.

11. The Respondent further submitted that the instant suit was filed out of time and thus offends the mandatory provisions of Section 90 of the Employment Act, 2007 and is therefore incompetent and an abuse to the Court process. To buttress this argument the Respondent cited and relied on the case of **G4S Security Services (K) Limited Joseph Kamau & 468 Others (2018) eKLR** where the Court dismissed claims with respect of 646 respondents on account of being time barred by dint of Section 90 of the Employment Act, 2007.

12. The Respondent/Applicant further submitted that the Claimant's contention that he was awaiting conclusion of the criminal proceedings for him to pursue his employment status is not founded on law and can therefore not be relied on. For emphasis the Respondent cited the Court of Appeal decision in the case of **Attorney General & Another Vs Andrew Githinji & Another (2016) eKLR** where it was held that a dismissed employee needs not to wait for the outcome of criminal process that may culminate in the impugned dismissal. If he chooses to do so, it is at his own peril should the statute bar him.

13. In conclusion the Respondent/Applicant maintained that the Claim as filed is time barred and thus urged this Court to find its Preliminary Objection with merit and strike out the Claim with costs to the Respondent/Applicant.

Claimant's Submissions

14. The Claimant on the other hand submitted that his suit is not statute barred as pleaded by the Respondent/Applicant as the Respondent failed to serve him with the dismissal letter dated 18th August, 2014 and that he only became aware of its existence when he visited the Respondent's offices on 19th November, 2019. He further submitted that the Respondent did not deny having failed to serve him with the dismissal letter thereby making his evidence on this issue uncontroverted.

15. He further submitted that failure to serve him with the dismissal letter was unfair and that the same would only take effect upon service and therefore his cause of action is not time barred. For emphasis, the Claimant cited and relied on the cases of **Justine Nguma Kitonyo Vs Teachers Service Commission (2018) eKLR** and **Dr. Ezekiel Nyangoya Okemwa Vs Kenya Marine & Research Institute (2016) eKLR** where the Courts held that a termination is not effective until the letter of dismissal is effectively served upon the employee.

16. The Claimant further contended that the Preliminary Objection filed fails to meet the threshold as enumerated in the case of **Mukisa Biscuits Manufacturing Company Limited Vs West End Distributors Limited (1969) EA 696** and therefore urged this Court to dismiss the same with costs. For emphasis the Claimant cited the case of **Attorney General & Another Vs Andrew Maina Githinji & Another (2016) eKLR**.

17. The Claimant further submitted that the Respondent having failed to plead the defence of limitation in its defence cannot raise it at this point. For emphasis, the Claimant relied on the cases of **Stephen Onyango Achola & Another Vs Edward Hongo Sule & Another (2004) eKLR** and **Fredrick Idiama Emojong Vs Seferio Mageni Manyuru & 2 Others (2017) eKLR**.

18. In conclusion, the Claimant submitted that the Preliminary Objection as filed is devoid of merit and that it raises matters that require taking of evidence and therefore urged this Honourable Court to dismiss it with costs to the Claimant.

19. I have considered the averments and submissions of both Parties. The Respondents have submitted that they terminated the Claimant on 25th July 2014 but they have not demonstrated that this termination was brought to the attention of the Claimant.

20. The issue of whether the Claimant was served with the termination letter or not becomes a triable issue to be determined vide evidence and which oversteps the provisions of **Mukhisa Biscuits** case for determination of a Preliminary Objection.

21. The Claimant having contended that he was never served with any termination letter, the Preliminary Objection remains undetermined and the issues raised therein can only be determined in the main claim.

22. I therefore find the Preliminary Objection without merit. I dismiss it and direct the Parties to proceed with the main claim.

23. Costs in the cause.

Dated and delivered in Chambers via zoom this 16th day of September, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mwangi for Respondent – Present

Ogutu holding brief Linda Musuba for Claimant – Present