



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1413 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

PETER NDAKA MUTAVI.....CLAIMANT

VERSUS

PEMBE FLOUR MILLS LIMITED.....RESPONDENT

RULING

The claim, herein was filed by the Claimant on 13th August 2015. At paragraph 4 and 5 of the Memorandum of Claim he pleads as follows –

4. *The claimant avers that on or about the 11th October, 2011 he was issued with a with a memorandum of dismissal from the Administration Manager. The said memorandum stated that he had been interdicted from duty with effect from 21st September, 2011 for wrongful allegations of theft of motor vehicle registration number KAZ 553B. The letter also confirmed that he it will be mandatory for him to be paid half salary until the case is finalized.*

5. *The Claimant avers that he was only paid half of his salary*

during the first four months with effect from October 2011 to January 2011 (sic) and up to date he has received no terminal benefits from the Respondent despite being acquitted of the alleged offence.

He prays for the following remedies –

(a) A declaration that the Respondent's refusal and/or inordinate delay in recalling the claimant back to work amounts to constructive dismissal of the claimant's employment, which dismissal unfair and inhumane.

(b) A declaration that the claimant is entitled to payment of terminal dues and damages as prayed.

(c) An order for the Respondent to pay the claimant his due terminal benefits and compensatory damages totalling to Kshs.969,035.50 plus interest thereon.

(i) Service pay for 7 years

Kshs.26,337 x 7 years Kshs.184,359.00

(ii) Arrears of half salary from February 2012 – March 2015

Kshs.13,168.5 x 12 x 2.5 years Kshs.395,040.00

(iii) Damages for illegal and unfair dismissal from employment calculated at 12 months' gross salary being

Kshs.26,337 x 12 months Kshs.316,044.00

(iv) House Allowance

Kshs.3,100 x 2.5 years Kshs.7,750.00

(v) Leave allowance

Kshs.26,337 x 2.5 years Kshs.65,842.50

Total claim Kshs.969,035.50

(d) Cost of this suit plus interest thereon.

In the defence to the claim, the Respondent states the Claimant's employment was terminated after he refused to subject himself to disciplinary action following the conclusion of the criminal case against him. The Respondent attached to the defence a copy of the claimant's letter of termination dated 29th February 2012 and a letter forwarding the claimant's terminal benefits to Co-operative Bank of Kenya Limited dated 17th April 2012.

By a notice of preliminary objection dated 30th January 2020 and filed on 31st January 2020, the Respondent prays for dismissal of the claim on grounds that the same is statute barred under Section 90 of the Employment Act. The Respondent relies on the Court of Appeal ruling in **CA Civil Application Nairobi 100 Of 2015 (Ur 81/2014)** between **Mr. S Mrs. Justice E. Torgbor v Ladislaus Odongo Ojuok** (Coram: G. B. M Kariuki, J. Mohammed and Otieno-Odek JJA), the Court of Appeal pronounced;

"...on our part, we reaffirm the dicta that jurisdiction is everything and whenever a jurisdictional issue is raised, it is important for the court to pause and determine the issue before proceeding with the case.

*The Supreme Court of Kenya in the cases of **In Re The Matter of the Interim Independent Electoral Commission S.C., Constitutional Application No. 2 of 2011; [2011] eKLR** and in **Samuel Kamau Macharia and Another v Kenya Commercial Bank Limited & 2 Others S. C. Application No. 2 of 2012; (2012) eKLR**, held that the assumption of jurisdiction by Courts in Kenya, is a subject regulated by the Constitution, statute law, and judicial precedent, it stated:*

"A Court's jurisdiction flows from either the Constitution or legislation or both. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is dear and there is no ambiguity."

The respondent also relied on the case of **Gathoni v Kenya Co-operative Creameries Ltd Civil Application No. 122 of 1981**, Potter, J. observed in *obiter* that;

"The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest"

The Respondent also relied on **Fred Mudave Gogo v G4S Security Services (K) Ltd [2014] eKLR** where the preliminary objection was upheld on a time bar basis. The court observed as follows;

"It cannot be denied that the cause of action herein is based on a contract of employment. The Claimant's employment was terminated on 8th August 2008, a period over 3 years from the date of filing this claim in the Industrial Court on the 5th June 2013 and therefore by operation of the law, the claim had already lapsed. There are no good grounds advanced for the delay in causing the claimant/applicant from filing the claim in good time."

The Respondent relied on the case of **Nicodemus Marani v Timsales Limited, Industrial Cause No. 204 of 2013**, where Ongaya J. held that no power of the court has been established empowering the court to extend the time of 3 years prescribed in Section 90 of the Employment Act to justify the court's entertainment of the suit outside the three year limitation period; that Section 90 of the Employment Act provides a time of limitation of 3 years and in an appropriate case, exceptions may exist like is envisaged in Section 39 of the Limitation of Actions Act.

The Respondent also relied on the case of **Joyce Wanjiku Muchiko & Another v Telkom (K) Limited Industrial Cause No. 1299 of 2011** where Rika J. held that claims outside three (3) years are statute barred under Section 90 of the Employment Act.

The Respondent submitted that this Court has no jurisdiction to extend time and relied on the case **Maria Machocho v Total (K) Industrial Cause No. 2 of 2012**, where Radido J. expressed as follows:

"Before the coming into operation of Section 90 of the Employment Act, the statutory limitation period for causes of action based on breach of employment contract or contract of service was that provided for contracts in general, in Section 4(1) of the Limitation of Actions Act, and it was 6 years. Section 90 of the Employment Act has now amended the Limitation of Actions Act to specifically provide for a limitation period of three years in actions based on breach of contract of service or arising out of the Employment Act."

For the Claimant it is submitted that the preliminary objection is an abuse of court process, scandalous and vexatious and ought to be dismissed with costs. That raising a preliminary objection after the suit has been set down for hearing raises an issue of bad faith. That the bar of limitation must be raised by a party to a suit as a defence to a claim.

It is further the claimant's submissions that time does not run until the date of acquittal in a criminal trial. That the claimant filed the instant

suit without delay after the criminal court's judgment acquitting the claimant. That Section 4 of the Limitations of Actions Act provides that an order of acquittal in a criminal case is 12 years.

The claimant relied on the case of **Mbowa v East Mengo District Administration and ELRC No. 2129 of 2014 David Wekesa Nambafu v Bob Morgan Services Limited** where the court held that –

“Applying the foregoing provision to the facts of this case, I am of the view that the suit is not time barred because as at the time when the RW1 testified, the claimant's services had not been terminated nor had the suspension been lifted by the employer. Although RW1 disputed that the claimant reported back to work and gave copy of the judgment to the two HR officers, he admitted that the claimant did in fact serve the letter dated 4.3.2012 to report about his acquittal and the suspension was not lifted and instead he was served with another letter requesting for copy of the judgment and proceedings. Instead it continued until the suit was filed on 27.11.2014 to claim accrued benefits under the contract of service. I therefore return that the claimant had the right to bring suit to challenge the lawfulness of the suspension at any time from the day it was communicated up to 12 months from the day when it ceased or sue for any benefit accruing during the suspension period within 3 years next after the date when the criminal case ended. In this the suit was filed before the suspension was lifted and within 3 years after the acquittal and therefore it is not statute barred.”

He prayed that the preliminary objection be dismissed for being misconceived and scandalous.

Determination

Section 90 of the Employment Act provides that –

90. Limitations 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 a 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.

The letter of termination of the Claimant's employment exhibited by the Respondent in the Defence is dated 29th February 2012. The payment of his final dues was made on 17th April 2012. Taking 17th April 2012 as the date on which the cause of action arose, the limitation period of three (3) years lapsed on 16th April 2015, some four 4 months before the date on which this suit was filed on 13th August 2015.

There is no provision in law that time stops running during the period when an employee is awaiting conclusion of a criminal case. In the case of **Kenya Electrical Trades and Allied Workers Union v Kenya Power and Lighting Company Ltd (2015 eKLR)**, the court held that time does not stop running while an employee is facing criminal charges.

The courts have held in innumerable cases that once limitation period lapses, the courts are divested of jurisdiction to handle the case. In the case **Divecon Ltd v Samani (1995-1998) 1 EA 48** the Court was categorical that: -

“to us, the meaning of the wording of section 4(1) that: ... is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action ... A perusal of Part III shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that “the wording of section 4(1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked.”

The claim herein having been filed some four (4) months after the limitation period lapsed, this court has no jurisdiction to hear and determine the same. The Employment Act and the Limitation of Actions Act do not provide for extension of time in employment contracts.

The Claimant submitted that preliminary objections must be raised in the defence. I agree that this is the ideal situation and would be the recommended practice. However, jurisdiction is a fundamental issue that is not tied to pleadings by the parties. It is a matter that can be raised by the court *suo moto* as any action taken or decision made by the court without jurisdiction would be a nullity. As was stated in **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited**, jurisdiction is everything and without it, a court must down its tools.

For the foregoing reasons, the preliminary objection succeeds. I accordingly strike out the suit herein on grounds that it is statute barred. There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF NOVEMBER 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His

Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE