



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 884 OF 2013

ANNAH FRIDAH KARANI NYABOGA.....CLAIMANT

VERSUS

NJIWA SAVINGS AND CREDIT CO-OPERATIVE

SOCIETY LIMITED.....1ST RESPONDENT

DAVID MUTISYA.....2ND RESPONDENT

JUDGMENT

Introduction

1. The claimant filed the claim herein on 10.6.2013 alleging that his employment contract was unfairly terminated by the respondent on 6.4.2010 and his terminal dues withheld. She therefore prayed for the following reliefs:-

- (i) THAT the Respondents are in breach of the contract of employment dated November 2002
- (ii) General Damages as outlined in paragraph 22 herein for inter alia
 - a. Breach of Contract
 - c. Loss of expectation
 - d. Service
- (iii) The sum of **Kshs.8,848,738.00** to the Claimant as particularized in paragraph 22 of the claim.
- (iv) Damages for unfair dismissal in the sum of **Kshs.357,324.00** being equivalent to the claimant's 12 months salary.
- (v) Costs of this suit
- (vi) Interest in (i), (ii) and (iii) above.
- (vii) Any other relief as the Court may deem just.

2. The respondent filed defence on 13.3.2014 denying the alleged unfair termination and averred that the termination was for a valid reasons and a fair procedure was followed.

3. The suit was heard on 15.10.2018 when the claimant testified as Cw1 while the 2nd respondent testified as Rw1 for the defence. Thereafter both parties filed written submissions.

Claimant's Case

4. Cw1 testified that she was suspended from work on 29.1.2010 pending investigations into a fraud. That on 12.2.2010 she was invited to a hearing but the Audit Report did not feature in the hearing. Thereafter her employment was terminated by the letter dated 6.4.2010 which referred to the Audit Report and some investigations as the reason for the termination.

5. On cross examination Cw1 admitted that she was dismissed on 6.4.2010 and filed the suit on 11.6.2013. She further admitted that the 2nd Respondent was her junior and not a signatory of the termination letter. She however accused the 2nd Respondent for participating in publishing the Newspaper photo advert that allegedly portrayed her negatively. She admitted that she worked for the SACCO for 8 years and many people knew that she was working for the SACCO. She further admitted that the Newspaper advert contained true information that she was no longer an employee of the SACCO.

6. She admitted that she was also a member of the SACCO and there was another case before Cooperative Tribunal Case No. 74 of 2013 where the SACCO was seeking to recover over Ksh.6 million in form of loan plus defrauded money.

7. Cw1 further admitted that she was employed but Nyamira County from November 2013 where she is earning more than what she was earning from the SACCO.

8. Cw1 also admitted that she was invited to a disciplinary hearing and asked questions about manipulation of accounting figures and she answered. She further admitted that after the termination, she appealed by the letter dated 26.4.2010 but the appeal was never heard.

Defence Case

9. Rw1 testified that he is the Manager of the SACCO. He denied ever engineering the termination of the claimant's employment. He stated that the claimant issues were raised by the Board's letter dated 11.2.2010 at a time when he was not sitting in the Board. That the claimant was suspended with his Deputy and later they were invited to a hearing by a committee appointed by the Board. Thereafter the claimant was terminated.

10. On cross examination, Rw1 stated that the claimant was paid all her terminal dues. He admitted that the claimant appealed against the summary dismissal but the appeal was declined. He further contended that the Newspaper advert of the termination of the claimant was meant to alert the stakeholders who transact with the Sacco. He denied ever participating in the decision-making by the Board that dismissed the claimant and contended that he was not a member of the Board. He however admitted that he executed the decision of the Board as the acting SACCO Manager.

Analysis and Determination

11. Upon perusal and consideration of the pleadings and the evidence presented by both parties, there is no dispute that the claimant was employed by the respondent until 6.4.2010 when she was dismissed from service. There is also no dispute that the suit herein was filed on 11.6.2013. The issues for determination are:-

- (a) Whether the suit herein is time barred.
- (b) Whether the dismissal of the claimant was unfair/wrongful.
- (c) Whether the relief sought should be granted.

Time barred suit

12. The respondents submitted that the suit herein was filed out of time and it is therefore incompetent by

dint of section 90 of the Employment Act. They contended that the issue of limitation is not a procedural issue but a substantive one and that section 90 of the Act had ousted the jurisdiction of the court to extend the limitation period. They therefore urged the court to dismiss the suit because the claimant was dismissed on 6.4.2010 and brought the suit on 11.6.2013, more than the 3 years limitation period provided by section 90 of the Act. They relied on ***Charles Onganya & 3 Others Vs Sweety sweets Limited [2013]eKLR*** where Ndolo J held that limitation is substantive matter of law and not merely technicality.

13. The claimant submitted that the limitation time did not start until the negotiation for settlement between the parties collapsed on 23.8.2010 when the respondent's counsel wrote to the claimant's counsel declining the offer made and indicated with finality that they were not going to continue with the negotiations any more. The claimant relied on ***Hawkins Wagunza Musomye Vs Rift Valley Railway Kenya Limited [2015]e KLR*** where Rika J held that where the 3 years limitation period expires while parties are engaged in conciliation, negotiation and other non adjudicatory dispute settlement mechanism before coming to court, the clock stops because the said alternative dispute resolution mechanisms are common place in Labour disputes and are anchored on Article 159 of the constitution.

14. I have carefully considered the rival submissions, section 90 of the Act and the precedents cited. There is no dispute that the suit herein was filed outside the limitation period of 3 years provided by section 90 of the Act. The section provides that:

“90 Notwithstanding the provisions of section

4(1) of the Limitation of Actions Act, no civil action or proceedings based on or arising out of this Act or a contract of service in general shall be instituted unless it is commenced within three years next after the act, neglect or default complained of or in the case of a continuing injury or damage within twelve months next after the cessation thereof.”

15. I agree with Ndolo J in her opinion in the ***Sweety Sweets Limited*** that the time bar on limitation is not a mere procedural technicality but a substantive matter of law. It is now trite law that the issue of limitation of time goes to the jurisdiction of the court to determine a suit. It means that the jurisdiction of the court to determine the dispute in the suit is extinguished by the lapse of statutory limitation period. On that ground I will not follow the decision in ***Hawkins Wagunza Case*** because it was *per incurium*.

16. Out of abundance of caution, I have considered the factual explanation given by the claimant to justify the delay. With due respect, the claimant was not prevented from filing her suit by any ADR proceedings, as confirmed by her pleading in paragraph 24 of the claim that the ADR collapsed on 23.8.2010 when the respondents counsel notified the claimant's counsel that they were no longer willing to continue with the negotiations.

17. As at the time when the ADR collapsed, the cause of action was only 4 months old, and 2 years 8 months before the expire date. The claimant went to slumber and only woke up to file the suit on 11.6.2013, 2 months after the lapse of the limitation period. The said delay was deliberate and not adequately explained. It is therefore not true that the filing of the suit was delayed by ADR proceedings. I therefore return that the suit herein is time barred by dint of section 90 of the Employment Act and proceed to down my tools because the court lacks jurisdiction to determine the substantive dispute herein.

Conclusion and Disposition

18. I have found that the cause of action herein arose on 6.4.2010 and the suit was filed on 11.6.2013, 2 months outside the 3 years limitation period provided by section 90 of the Employment Act. I have further found that the issue of limitation period is not a mere procedural technicality but a substantive matter of law that goes to the jurisdiction of the court. Consequently, I strike out the suit for being time barred. The claimant will pay the 2nd respondent costs of the suit plus interest for dragging him to her employment proceedings unnecessarily.

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of January 2019

ONESMUS N. MAKAU

JUDGE