



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

NAKURU

CAUSE NO.428 OF 2017

CHARLES M. KIGETCLAIMANT

VERSUS

MAJANI MINGI GROUP OF COMPANIES LIMITED.....RESPONDENT

RULING

The respondent, Majani Mingi Group of Companies Ltd filed Notice of Preliminary Objections dated 17th May, 2018 on the grounds that;

1. *The suit is statute barred for non-compliance with section 4(1) of the Limitation of Actions Act Cap 22;*
2. *The claim is statute barred pursuant to section 90 of the Employment Act, 2007;*
3. *Failure to comply with the aforesaid law makes the entire claim fatally defective; and*
4. *Instant claim is a non-starter, devoid of any merit and a gross abuse of the court process and ought to be dismissed with costs.*

Both parties filed written submissions and the claimant highlighted the same.

The respondent submits that the claim was filed on 19th October, 2017 and amended on 19th February, 2018 with the claimant seeking the payment of salary arrears and exemplary damages. A response was filed on 31st January, 2018 and amended on 17th May, 2018.

The claim is premised on the facts that the claimant resigned from his employment with the respondent on 21st October, 2014 and filed suit on 19th October, 2017.

The claims for salary arrears are aid to accrue from the year 1997 and 2007 for various months therein and tabulated under paragraph 7 of the memorandum of claim and where employment terminated on 21st October, 2014 such claims are statute barred as claimed after 6 years contrary to the provisions of section 90 of the Employment Act, 2007 and section 4(1) of the Limitation of actions Act as held by the Court of Appeal in the case of **G4S Security Services (K) Ltd versus Joseph Kamau & 468 others [2018] eKLR** the cessation date of the injury and the lapse of 12 months since such date is material. The employee cannot be shielded from the time bar in respect of all claims just because suit is filed within 3 years or 12 months.

Even where time started running after cessation of employment, time bar is 21st October, 2015 and suit was filed over 2 years alter.

The claimant submits that objections filed are not purely on points of law and the law provides disputes arising from a contract should be filed in court within 6 years from the date when the cause of action arose as held in **Diverson versus Samani [1995-1998] 1 EA**. Claims from employment disputes, The accrual date takes effect from the date of termination of employment stated in the letter of termination as held in **Attorney General & another versus Andrew Maina Githinji & another [2015] eKLR**. where the employment relationship ends and there are benefits which accrue and including salary arrears, the same become due with the end of employment where such employment was continuous as held in **David Manjau Mohoro versus ol Pejeta Ranching Limited [2014] eKLR**.

The claimant also submits that he resigned on 21st October, 2014 and filed the memorandum of claim on 19th October, 2017 within 3 years' time period.

Section 90 of the Employment Act, 2007 stipulates that all employment and labour relations claims premised on the provisions of the Act

must be filed with the court within 3 years from the date the cause of action arose.

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*

These provisions are mandatory in that the court is not given discretion to extend time with regard to claim arising out of a contract of service unless the matter relates to continuing injury or damage which must be filed within 12 months after the date of cessation of such injury or damage.

The claimant filed the Memorandum of Claim on 19th October, 2017 premised on facts that the claimant was employed by the respondent in April, 1979 and resigned on 21st October, 2014 due to unfavourable work conditions. At the time the claimant was owed salary arrears amounting to ksh.1, 002,407.00 going back to salaries from 1997 to 2003, 2004, 2005, 2006 and 2007. The respondent had been sued by **Kenya Plantation and Agricultural Workers Union versus Majani Mingi Group of Companies Cause No.76 of 2013** for pending salary arrears and a consent was filed in settlement. The claimant was not unionised and thus did not benefit from the consent judgement.

The claim was amended and filed on 20th February, 2018 and that he had signed a discharge voucher with the respondent on 21st October, 2014 and that the respondent had promised to pay the salary arrears after Case No.76 of 2013 between by **Kenya Plantation and Agricultural Workers Union versus Majani Mingi Group of Companies** had been determined. That the respondent had promised to pay terminal dues owed to his house savant and his retirement benefits. The discharge voucher and the subsequent payment did not include the salary arrears.

The claims with regard to salary arrears and accrued for the period of 1997 to June, 2007 where assessed on their merits fall under the provisions of the repealed Employment Act Cap 226 as the Employment Act, 2007 only came into force on 2nd June, 2008.

This issue was gone into by the Court of Appeal in the case of **E.Torgbor versus Ladislaus Odongo Ojuok [2015] eKLR** which held that;

*... at the core of the intended appeal is interpretation of the provisions of Section 4 (1) of the Limitation of Actions Act and Section 90 of the Employment Act in so far as they affect the jurisdictional competence of the Employment and Labour Relations Court. We have examined recent decisions from the Employment and Labour Relations Court to enable us determine if there is an arguable point of law that requires determination by this Court. In **Maria Machocho -v- Total (K) Industrial Cause No. 2 of 2012** ... **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 the 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.***

In this regard, the claims with regard to the time period and outside the provisions of the Employment Act, 2007 and based on a period outside the period outside 3 years in terms of section 90 were challenged. Claims premised under the repealed Employment Act Cap 226 should have been filed with the court on or before June, 2013 a period of 6 years and claims premised on the Employment Act, 2007 should be filed within 3 years from the date the cause of action arose.

In this case, the claimant filed his claim on 19th October, 2017 a few days before the lapse of 3 years and has since been allowed to amend his memorandum of claim and introduced other claims with regard to matters not previously in issue. The right to amend a memorandum of claim is allowed save that this cannot be for the extension of time period to file and urge claims which are otherwise time barred.

In this regard therefore, save for claims barred by application of the law and relating to claims arising for the period of 1997 to June, 2007 the claimant shall urge his cause.

Accordingly, the objections made by the respondent are hereby allowed to the extent that claims made and due by June, 2007 and not filed with the court as at June, 2013 are hereby found time barred. The claimant shall be at liberty to address the claims not time barred.

Delivered at Nakuru this 7th day of March, 2019.

M. MBARU JUDGE

In the presence of: