



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAKURU**

**CAUSE NO.137 OF 2013**

**WAMBUA MUTUNGE.....CLAIMANT**

**VERSUS**

**ROCKYARD HOTEL LIMITED.....1<sup>ST</sup> RESPONDENT**

**DAVID MAINA NGUGI.....2<sup>ND</sup> RESPONDENT**

**RULING**

The respondents, Rockyard Hotel Limited and David Maina Ngugi filed notice of preliminary objections dated 18<sup>th</sup> September, 2018 on the grounds that; *the claim violates the provisions of section 90 of the Employment Act, 2007*

*The suit be dismissed with costs.*

The parties addressed the objections by written submissions.

The respondent's case is that the Memorandum of Claim was filed on 29<sup>th</sup> May, 2013 seeking notice pay, underpayments, payment of annual leave, salary for May, 2009 and payment of gratuity. Objections filed by the respondents are premised on the provisions of section 90 of the Employment Act, 2007 as such claims are time barred.

The claimant was terminated in his employment on 16<sup>th</sup> March, 2009. Any claims arising from such termination of employment should have been addressed in accordance with the Employment Act, 2007 and section 90 therefrom requires suit be filed within 3 years. In this case suit was not filed until 4 years later, on 29<sup>th</sup> May, 2013. The suit is time barred as held in the case of **Maria Machocho versus Total Kenya Limited [2013] eKLR.**

the claimant submits that upon termination of employment on 16<sup>th</sup> March, 2009 he was in hospital unwell. Such condition had led to the termination of employment. The delay in filing suit is explained by the illness and hospitalisation and inability to file claim in time. Such delay cannot be blamed on the litigant with a good case.

The claimant also submits that Article 2(1) and 159(2) (d) of the Constitution, 2010 provides that judicial authority should be exercised and guided without undue regard to procedural technicalities

The objections made should be dismissed and the claimant allowed to urge his claims.

As correctly submitted by both parties, employment terminated on 16<sup>th</sup> March, 2009 and the Memorandum of Claim was filed on 29<sup>th</sup> May, 2009.

Such is a period of over 3 years from the time the cause of action arose.

Section 90 of the Employment Act, 2007 is couched in mandatory terms and the court is not left with any iota of discretion to extend the time to file suit outside of the 3 years statutory period.

On the case submitted by the claimant that he fell ill and this caused the termination of employment, I associate with findings by the Court of

Appeal in **Beatrice Kahai Adagala versus Postal Corporation of Kenya [2015] eKLR** held as follows;

*Much as we sympathize with the appellant if that is true, we cannot help her as the law ties our hands. Section 90 of the Employment Act 2007 which we have quoted verbatim herein above, is in mandatory terms. A claim based on a contract of employment must be filed within 3 years. As this Court stated in the case of Divecon Limited -vs- Samani [1995-1998] 1 EA P.48, ... in Josephat Ndirangu - vs = Henkel Chemicals (EA) Limited, [2013] eKLR, the limitation period is never extended in matters based on contract. The period can only be extended in claims founded on tort and only when the applicant satisfies the requirements of Sections 27 and 28 of the Limitation of Actions Act.*

Without the leeway to extend time, whatever reason(s) leading to the claimant not filing his suit in accordance with the stipulated time period under Section 90 of the Employment Act, 2007 is lost.

The suit was filed cannot be sustained.

**Accordingly, the objections by the respondents are found with merit and are hereby allowed. The claim as filed is hereby struck out. No orders to costs.**

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

**M. MBARU**

**JUDGE**

In the presence of: .....

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