



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1656 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 30th April, 2019)

JAMES KIMANI KARUME.....CLAIMANT

VERSUS

NAIROBI POWER ENGINEERS LIMITED.....RESPONDENT

RULING

1. The Applicant, Nairobi Power Engineers Limited, filed a Notice of Motion Application dated 12th October, 2018 on 29/01/2019 brought under *Section 1A, 1B and 3A of the Civil Procedure Act Cap 21, Section 90 of the Employment Act and all other enabling laws* against the Respondent, James Kimani Karume seeking dismissal of this suit for being filed without leave of Court and/or outside the statutory period under the Employment Act and costs of the suit. The Application is based on the grounds that:-

- a) *This present suit was filed on 24/08/2017 against the Applicant by the Respondent after the Respondent had retired from the Applicant's company on 24th April 2006.*
- b) *The Respondent's main contention in the statement of claim was that he was never paid his terminal dues being severance pay for the 18 years that he worked at the company.*
- c) *From the statement of claim, the same is founded under the provisions of the Employment Act and the said claim was filed more than 11 years from the date the Respondent left employment at the Applicant's company.*
- d) *The Plaintiff's suit against the Applicant/ Respondent is statute barred by the provisions of the Limitations of Actions Act.*
- e) *The suit is fatally and incurably defective and cannot stand in law.*
- f) *The entire Claim herewith is an abuse of the process of this Court and ought to be dismissed with costs.*
- g) *It is clear the Respondent left employment at the Applicant's company at the end of May 2006 and was paid all his statutory dues. Further to the fact that the Respondent voluntarily applied for retirement at the Applicant's company and then filed this present suit 11 years later without any leave granted by court and in fundamental breach of the Employment Act, the laws of contract and all the enabling provisions of the law.*
- h) *This present claim filed is not properly before this court and lacks any merit and should hence be dismissed with costs.*

2. The Application was accompanied by a Supporting Affidavit sworn by the Managing Director of the Applicant Company, Alphonse Mwangi Gitonga who avers that the Respondent's employment came to an end in May 2006 upon his own request for an early retirement which the Applicant granted to him.

3. That as per the company's policy, the Respondent had been admitted to the Pension Scheme managed by Madison Insurance Company Limited and upon his retirement, the Applicant instructed Madison Insurance to pay him all his entitlements that had accumulated under the Scheme.

4. That Madison Insurance responded and forwarded to the Applicant a cheque for Kshs. 138,900/= which they banked on 11/07/2006 and which was payment for the Respondent's individual contribution to the pension scheme. That the Applicant then paid the Respondent the

said pension contributions of Kshs. 138,900/= and further, the employer's contribution amounting to Kshs. 182,741/= was paid out to the Respondent by the scheme after he attained the age of retirement of 55 years and that the difference in the amounts is due to the accrued interest over the additional period.

5. That he was shocked on 04/09/2017 when he was served with a Notice of Summons for this Claim in which the Respondent claims severance pay or terminal dues for the years he worked at the Applicant's company and that they nevertheless filed their defence together with exhibits.

6. That this claim was filed outside the statutory period of 3 years from the time the Respondent left employment and as such, it is not properly before this Court. Further, that the claim does not have any merit as the amount being claimed by the Respondent was paid to him in full and he is seeking a double benefit from the Applicant as an afterthought. That this Application is made in the interest of justice and if allowed, no prejudice will be caused to the other parties to the suit.

Respondent's Case

7. The Respondent filed a Replying Affidavit dated 12/02/2018 averring that this Honourable Court ought to give primacy to substantive justice as opposed to technicalities of the law which triumphs over the Limitations of Actions Act as read with the Employment Act which were enacted before the Bill of Rights came into being as the mother law. He avers that he was employed by the Applicant on 04/01/1988 as an artisan with a monthly net salary of Kshs. 17,000/= on permanent and pensionable basis and that he retired from his job on 02/07/2006.

8. That he voluntarily retired after he had notified the Applicant through a notice of early retirement dated 24/04/2006 with effect from 02/06/2006 and that the Applicant acknowledged receipt of the notice through its response dated 12/06/2006 which also notified him that all his dues will be paid at the expiry of the notice.

9. That the Applicant however failed to remit his terminal dues amounting to Kshs. 153,000/= being severance pay for the 18 years despite his persistent requests for the same and that the same has never been paid to him to date.

10. That the receipts annexed by the Applicant/Respondent are not for severance pay but rather for pension pay and that time should in essence start running from 2016 when the talks collapsed and it became apparent the Applicant had no intention of settling his dues despite the good faith correspondences between them.

11. Further, that time ought not to run once the out of Court dispute resolution has commenced but should start running once the process is exhausted as the same is meant to save on judicial time. He thus prays that the Applicant/Respondent's application seeking dismissal of the suit be dismissed with costs.

Applicant's Submissions

12. The Applicant submits that the main issue for determination is whether the suit filed on 24/08/2017 was filed within the stipulated time under the law. That **Section 90 of the Employment Act** states that:-

“Notwithstanding the provisions of section 4(1) of the Limitations 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.”

13. That it has perused the Respondent's Replying Affidavit and contends that it contains falsehoods in terms of alleged correspondences since the Respondent left employment and that if the same was true, the Respondent should have attached the letters proving communication from July 2006 to the alleged time of 2016.

14. That the Respondent is being mischievous by alleging there were negotiations and that nevertheless, the said negotiations could only act as a mitigating factor for this application but should not defeat the law.

15. That it has demonstrated to this Court that the suit is time barred and ought to be dismissed and that it is very meticulous in record keeping and administration of staff matters given the issues of pension, copies of letters and cheques communication annexed to the Defence to the claim and this application. The Applicant urges the Court to be guided by the following authorities in allowing its application.

16. In **Justine S. Sunyai v Judicial Service Commission & another [2017] eKLR**, a Preliminary Objection had been raised and the Court ruled that the Claim had been filed outside the Statutory Period under Section 90 and proceeded to dismiss the matter. In **Fred Mudave Gogo v G4S Security Services (K) Ltd [2014] eKLR**, the Applicant had similarly filed a Notice of Preliminary Objection under Section 90 of the Employment Act as the suit was time barred and the suit was allowed.

17. In **Mellen Moraa Maiko v Board of Management, Marani Secondary School [2018] eKLR**, the Court stated that Section 90 is explicit that no claim may be instituted after the lapse of three years from the date the cause of action accrued and went on to dismiss the suit for being time barred.

Respondent's Submissions

18. The Respondent submits that Alternative Dispute Resolution (ADR) is constitutionally guaranteed and statutorily grounded pursuant to

Article 159(2) (d) of the Constitution, which provides for promotion of ADR by Courts and tribunals. That the **Limitations of Actions Act** and **Section 90 of the Employment Act** did not envisage out of Court settlements nor did they anticipate the procedural steps in dispute resolution and that the Court is the final arbiter in the labour dispute resolution mechanisms after the pre-court attempts have failed.

19. He implores this Honourable Court to invoke **Article 159(2) (d) of the Constitution** and consider substantive justice as opposed to procedural technicalities being relied on by the Applicant. It relies on **Miscellaneous Civil Application 12/2014 Republic –v- General Manager, Moi International Airport & another Exparte Jared Adimo Odhiambo & another [2014] eKLR** where the Court emphasised the need for procedural rules to be consistent with Article 159 of the Constitution principle that justice should be administered without due regard to procedural technicalities and that the Court should thus invoke its inherent powers to extend time to achieve substantive justice.

20. The Respondent submits that this Honourable Court has jurisdiction to hear and determine this dispute and that the Court should find that the claims expressed in the Application and the orders sought are brought in bad faith, misconceived and bad in law and should be dismissed with costs to the Respondent to obviate the prejudice to the Respondent/Claimant.

21. I have examined all the averments of both Parties. The cause of action having arisen in 2006, the claim falls under the repealed Trade Disputes Act which envisages that a Claim of such a nature be filed within 6 years from the time the cause of action arose.

22. This in essence would come to year 2012. This claim having been filed on 24.8.2017 was indeed filed outside the limited period and the same cannot be sustained.

23. Other than that, the claim before Court is for severance pay. Severance pay is payable in a redundancy situation. The Claimant has already indicated that he took early retirement from work. The issue of severance pay does not therefore arise and the claim must be terminated forthwith.

24. I therefore allow the application and I dismiss this claim accordingly. There will be no order as to costs.

Dated and delivered in open Court this **30th day of April, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties