



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1260 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

KENYA HOTELS AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

ST. JULIAN'S CENTRE ACK.....RESPONDENT

RULING

The Respondent/Applicant, St. Julian's Centre ACK filed a Notice of Motion Application dated 27th November 2018 brought under *Section 90 of the Employment Act and Rule 17 of the Employment & Labour Relations Court (Procedure) Rules 2016* against the Claimant, Kenya Hotels and Allied Workers Union. It seeks orders that this Court strikes out the Memorandum of Claim dated 25th July 2018 and dismisses the said Claim and further, for costs of this Application and of the cause to be borne by the Claimant. The Application is based on the grounds that:-

- i. As admitted at paragraph 2.1 of the Memorandum of Claim, the Claimant's employment was terminated by the Respondent on 16th August 2013.
- ii. The Claim is time barred in view of the express provision of section 90 of the Employment Act No. 11 of 2007 and the binding Court of Appeal decision in *Attorney General and Another -V- Andrew Maina Githinji and Another, Civil Appeal No. 21 of 2015*.

The Application is supported by the Affidavit sworn by the Respondent's Advocate, Isaac Kiche who avers that the Claimant filed a claim for unfair termination against the Respondent for having terminated the employment of one Mr. Simon Mungai, the grievant. That the said grievant signed a witness statement stating he was employed by the Respondent as a Cook on 1st December 2010 and was allegedly terminated on 16th August 2013. He continues to aver that this suit is statute barred as it was instituted on 27th July 2018 which is close to 5 years after the alleged date of termination and should therefore be struck out with costs to the Respondent.

Claimant's Case

The Claimant filed a Replying Affidavit dated 28th December 2018 sworn by the grievant, Simon Mungai who avers that the Claimant commenced legal proceedings against the Respondent on his behalf when it invoked section 62 of the Labour Relations Act in its letter dated 18th March 2014 which was responded to by the Chief Industrial Relations Officer, Ministry of Labour through the appointment of the conciliator. That the legal proceedings therefore commenced barely 7 months from the date of dismissal and that it was mandatory for the Claimant union to exhaust the labour relations machinery before instituting a termination claim in this court if the dispute remained unresolved. That if this Court grants the prayers sought by the Respondent, his constitutional right to fair labour practice shall be prejudiced and he thus prays to this Honourable Court to dismiss the Respondent's Notice of Motion with costs.

Respondent/Applicant's Submissions

The Applicant submits that the Court of Appeal in *Thuranira Karauri -v- Agnes Ncheche [1997] eKLR* held that whenever the issue of limitation of action is raised, it goes to jurisdiction and that the court should not proceed further without determining the important point of jurisdiction. The Applicant contends that this court should not entertain this suit any further by dint of Section 90 of the Employment Act which states that:

"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.”

That the Court of Appeal in **G4S Security Services (K) Limited –v- Joseph Kamau & 468 Others [2018] eKLR** faulted the Employment & Labour Relations Court for entertaining a claim that had been filed outside the three-year limitation period and held that the ELRC erred in holding that it had jurisdiction to hear and determine claims filed outside the statutory limitation period.

It submits that this court has previously addressed the argument that time stops running when parties have initiated the conciliatory process in the case of **Peter Nyamai & 7 others –v- M.J. Clarke Limited [2013] eKLR** where Radido J held that he could not concede to such an interpretation there being no precedent or work on statutory interpretation supporting the same. That time does not therefore stop running when a party seeks conciliation as held by Mbaru J in **Kenya Union of Employees of voluntary and charitable organisations (KUEVACO) –v- Redeemed Gospel Church [2017] eKLR** that:-

“The context of sections 62 and 73 of the Labour Relations Act, 2007 and section 87 of the Employment Act, 2007 must take into account the provisions of section 90 of the Employment Act, 2007. All disputes arising out of an employment relationship and premised on the rights under the Employment Act, whether filed by the employee or by a trade union as a claimant or by the employer or as the case may be, such must be lodged with the court in accordance with section 90. The time limitation therein is set in mandatory terms.”

The Respondent/Applicant submits that this court has no jurisdiction to extend the period of limitation with regards to claims arising from employment contracts as was held in the case of **Benjamin Wachira Ndethi –v- Public Service Commission and Another [2014] eKLR**. That the period can only be extended in claims founded on tort and only when the applicant satisfies the requirements of section 27 and 28 of the Limitation of Actions Act as was held in **Divecon Limited –v- Samani [1995-1998] 1 EA page 48** and which case was relied upon by Radido J in **Josephat Ndirangu v Henkel Chemicals (EA) Limited [2013] eKLR**.

Claimant/Respondent’s Submissions

The Claimant submits that pursuant to the conciliator’s letter dated 14th May 2015, it visited the conciliator’s office but that the Applicant deliberately failed to attend so as to frustrate the mandatory exercise. It cites **Civil Appeal No. 44 of 2014, Office Restaurant –v- Kenya Hotels & Allied Workers Union** wherein the appellate judges relied on the repealed Trade Disputes Act. That although the **Office Restaurant case** above had been filed within the provisions of the repealed Trade Dispute Act, the suit herein was initiated within the provisions of the Labour Relations Act, 2007 and that time similarly stopped running when labour relations mechanisms under the Labour Relations Act was initiated. That Section 87 of the Employment Act expressly provides that complaints by an aggrieved party may be made to the Ministry of Labour or in the alternative, be lodged to the employment court and that time stops running once the complaint is made whether to the ministry or in court.

It submits that this Application/preliminary objection is unmerited as the cause of action was not statute barred and that the same should be dismissed with costs for being misconceived and misleading.

Analysis and Determination

The main issue for determination is whether the Claim instituted by the Claimant/Respondent dated 25th July 2018 is statutory or time barred and should thus be struck out as prayed by the Respondent/Applicant.

The Claimant/Respondent has relied upon case law where the court considered the repealed Trade Dispute Act which allowed time to stop running but which was repealed and replaced by the current Labour Relations Act of 2007. The case herein concerns termination of employment on 16th August 2013, long after the repeal of the Trade Disputes Act. The Labour Relations Act provides clear timelines for conciliation at Section 65(1), 67(1) and 69 as follows –

65. Minister to appoint conciliators

(1) Within twenty-one days of a trade dispute being reported to the Minister as specified under section 62, the Minister shall appoint a conciliator to attempt to resolve the trade dispute unless?

(a) the conciliation procedures in an applicable collective agreement binding on the parties to the dispute have not been exhausted; or

(b) a law or collective agreement binding upon the parties prohibits negotiation on the issue in dispute.

67. Conciliator’s powers to resolve dispute.

(1) The conciliator or conciliation committee appointed under section 66 shall attempt to resolve the trade dispute referred to in section 65 (1) within-

(a) thirty days of the appointment; or

(b) any extended period agreed to by parties to the trade dispute.

69. Dispute unresolved after conciliation.

A trade dispute is deemed to be unresolved after conciliation if the?

- (a) conciliator issues a certificate that the dispute has not been resolved by conciliation; or
- (b) thirty day period from the appointment of the conciliator, or any longer period agreed to by the parties, expires.

The process of conciliation is supposed to take only about 30 days from the date of appointment of a Conciliator unless extended by Conciliator. That process cannot therefore be interpreted to extend the period of limitation of 3 years under Section 90 of the Employment Act, which is binding in all employment disputes.

For the foregoing reason the application dated 27th November 2018 succeeds. The suit herein is accordingly struck out for being statute barred as this court does not have jurisdiction to hear the same as was stated by the Court of Appeal in the case of Divecon Limited -V- Samani.

Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE