



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 750 OF 2018

(Formerly Civil Case No. 4140 of 2011 at the Chief Magistrates' Court at Milimani, Nairobi)

CHARLES MAKORI NYANG'ACHA.....PLAINTIFF

-VERSUS-

AFRICAN REINSURANCE CORPORATION....DEFENDANT

(Before Hon. Justice Byram Ongaya on Thursday 19th December, 2019)

JUDGMENT

The plaintiff filed the plaint on 13.09.2011 through Simon N. Kimondolo Advocate of Kituo Cha Sheria. The plaintiff prayed for judgment against the defendant for:

- a) Kshs.345, 905.11 being balance of staff provident fund contribution Kshs.200, 387.96; service benefits Kshs.141, 828.00; and Kshs.3,689.00 money withheld by the defendant since 14.12.2005.
- b) Interest since 14.12.2005 till full payment.
- c) Costs of the suit.
- d) Any other relief as the Court deems just under the circumstances.

The plaintiff's case is that the defendant employed him from 02.02.1998 to 09.09.2005 when he was summarily dismissed from employment. Prior to dismissal he was not given a notice, a warning or a hearing. He claims for his terminal dues as prayed for being his outstanding benefits and entitlements per the agreement of service. His case is that the termination was unfair as it was in breach of the respondent's regulations and rules.

The defendant filed the defence on 11.11.2011 through Waruhiu K'owade & Ng'ang'a Advocates. The defendant admits that it employed the plaintiff from 02.02.1998 to 09.09.2005 when the claimant was summarily dismissed. Further the defendant admits that the reason for termination was that the plaintiff was dismissed upon the allegation that he had been involved in fraudulent manipulation of documents in support of his claim for educational policy. The defendant avers that the plaintiff was not entitled to the defendant's share of the provident contributions in terms of Rule 13(a) of the defendant's Staff Provident Rules. The defendant denied the jurisdiction of the Court and prayed that the plaintiff's suit be dismissed with costs.

In the reply to the defence the plaintiff stated that the suit was not time barred because the time of limitation was 6 years under the previous regime of law governing a cause of action in contracts of service.

The plaintiff has pleaded and correctly so that the time of limitation for the present cause of action was 6 years under the Limitation of Actions Act, Cap 22 of the Laws of Kenya. The dismissal was on 09.09.2005 and the plaint was filed on 12.09.2011 after lapsing of the 6 years of limitation. The suit was late by about 2 days. Accordingly the Court returns that the suit was time barred and the Court will not get into the merits of the claims and prayers.

Similarly, the Court will not address the issue of the diplomatic immunity raised for the defendant in detail as the suit has been found to be time barred. The defendant urges that the Court lacks jurisdiction to entertain the suit because the respondent enjoyed immunity from suits by virtue of the Privileges and Immunities (Africa Reinsurance Organisation) Order, 1989 Legal Notice No. 407 of 1989 which at paragraph (3) (b) provides that the Corporation shall have the privileges and immunities specified in paragraphs 1, 4 and 5 of Part 1 of the Fourth Schedule to the Act (and which Part 1 of the Fourth Schedule provides for immunities including from suits and legal process, exemption from taxes on the importation of goods, and exemption from prohibitions and restrictions on the importation or exportation.) The Court considers that its

opinion in the ruling in Mercy Muhandia –Versus- Razor Tara [2018]eKLR, would apply thus,

“3). It is urged for the applicant that the plea of diplomatic immunity would amount to a legitimate limitation or qualification to the claimant’s right of access to justice as provided for in Article 48 of the Constitution of Kenya 2010 as read with Article 24 on the limitation of rights and fundamental freedoms. The Court has carefully weighed that submission against the claimant’s submission that even if the applicant enjoyed diplomatic immunity as urged, he should not be allowed to have enjoyed the claimant’s services under the contract of service and be left to go without paying the claimant’s dues under the contract. The Court has considered the opinion in Lucy Muingo Kusewa & Another –Versus- Embassy of Sweeden, Nairobi (2017) eKLR, (Wasilwa J) where it was held that the doctrine of absolute immunity is no longer viable and further considered the cited cases on whether the diplomatic immunity affords the party invoking it absolute or restricted immunity. The Court has revisited the Constitution and the submission as made for the claimant on work without benefits or pay. The Court has particularly considered Article 25 of the Constitution which provides that despite any other provision in the Constitution, the following rights and fundamental freedoms shall not be limited, thus, freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial; and the right to an order of habeas corpus. The Court considers that the listed rights as they obtain in employment situations based on individual cases would automatically render unnecessary the discussion of whether the diplomatic immunity under the Privileges and Immunities Act (Cap. 179 of the Laws of Kenya) as read with the Vienna Convention on Diplomatic Relations, 1961 absolutely or restrictively limited the right of an employee to work and thereafter any of such unqualified or unlimited rights or rights that cannot be derogated from are shown or established to have been violated. Such is an issue as raised for the claimant that needs to be investigated at the full hearing in cases such as the present case and therefore, the preliminary objection would fail.”

As the defendant did not urge the point on time barring, the Court returns that each party shall bear own costs of the suit.

In conclusion judgment is hereby entered for the defendant against the plaintiff for:

- a) Dismissal of the suit as it was time barred.
- b) Each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Thursday, 19th December, 2019.

BYRAM ONGAYA

JUDGE