



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 258 OF 2016

JOHNSON SHIJENJE.....CLAIMANT

VERSUS

MUTULA KILONZO JUNIOR.....1ST RESPONDENT

KETHI DIANA KILONZO.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Monday, 6th December, 2019)

RULING

The claimant filed the statement of claim on 20.02.2016 through Diro and Company Advocates. The claimant alleged respondents' refusal to pay claimant's dues and refusal to issue a certificate of service. The claimant's case is that he was employed by the respondents as an advocate from March 2010 to August 2014 when the claimant left the employment. At the material time he earned Kshs.70, 000.00 per month. The claimant prayed for:

- a) A certificate of service.
- b) Two months' salary in lieu of two years' leave Kshs.140, 000.00.
- c) Unpaid house allowance at 15% of Kshs.70,000.00 x 53 months worked making Kshs.556, 500.00.
- d) Costs of the suit.
- e) Interest at court rates.

The respondents filed a response to the claim on 12.04.2016 through Kilonzo & Company Advocates. The respondents prayed that the suit is dismissed with costs.

The respondents raised a preliminary objection dated 29.06.2018 that the suit was time barred in view of section 90 of the Employment Act, 2007 prescribing 12 months of limitation from the date of cessation of a continuing injury. It is submitted that the claim for house allowance and annual leave pay were both continuing injuries. The cause of action accrued in August when the contract of service terminated by the claimant's leaving the employment but, the suit was filed on 23.02.2016 long after the lapsing of the 12 months of limitation.

The claimant submits that the time of limitation was not pleaded and it is an afterthought. Further parties were in negotiations and therefore the delay in filing the suit. The claimant further alleges that the respondents acknowledged the claims as prayed.

The Court has considered the parties' respective submissions. It is true that the suit was filed after lapsing of the 12 months and there is no dispute that the leave pay and house allowance as claimed and prayed for were both continuing injuries under section 90 of the Act. The claimant says that the respondents acknowledged to pay the amount claimed when on 11.10.2014 the 1st respondent wrote an email advising the claimant to sort the claims with the respondents' accountant. The court has perused the correspondence. The Court observes that it was about the claimant's demand for approved pay in lieu of leave and certificate of service and no claim for house allowance had been made at that point. Further the correspondence shows that the respondents advised the claimant that accounts would sort the issue. The Court finds that such did not amount to an acknowledgement. Further the claim for house allowance was not included. The Court further finds that in paragraph 4(a) of the amended response it is pleaded that the suit was filed after lapsing of 1.5 years.

As submitted for the respondents, the time of limitation under section 90 of the Act is mandatory and not amenable to extension. The claimant is guilty of irreparable delay as the suit is time barred. The Court considers that the claimant was entitled to the certificate of service per section 51 of the Act and to balance justice for the parties the preliminary objection is upheld with orders that parties to bear own costs of

the suit.

In conclusion the preliminary objection is hereby upheld with orders:

- a) The prayers for pay in lieu of annual leave and house allowance throughout employment are time barred and the prayers will fail accordingly.
- b) The respondents to deliver a certificate of service to the claimant by 20.12.2019.
- c) Each party to bear own costs of the suit which is hereby determined in terms of the orders herein.

Signed, dated and delivered in court at **Nairobi** this **Friday, 6th December, 2019**.

BYRAM ONGAYA

JUDGE