



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2478 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 21st March, 2018)

SUSAN MWIKALI MBINYA..... CLAIMANT

-VERSUS-

KALPANA SHETH RESPONDENT

RULING

1. The application before this court is dated 20th December 2017 brought under Oder 37, Rule 6, Order 51 of the Civil Procedure Act, Section 27 and 28 of the Limitation of Actions Acts, Rule 1 of the Civil Procedure Rules, Section 2 of the Industrial Court act 2011, Section 12 of the Labour Institution Act 2007, CAP 22 Laws of Kenya and under all other enabling provisions of the law seeking orders that:

- a) This Honourable court do certify that the application herein is urgent, service of the same upon the Respondent be dispensed with in the first instance due to reasons of urgency and the same be heard ex-parte.*
- b) That this Honourable court be pleased to grant the Claimant/Applicant leave to file her statement of claim out of time from item (a) to (f) on the statement of Claim a total of Kshs. 212,405.95.*
- c) That annexed draft of statement of claim be deemed as duly filed in court upon payment of the filling fees.*
- d) That the Respondent is hereby ordered to deposit in court a bank guarantee of Kshs. 10,212,405.95 until the determination of this application and main suit, being amount for underpayments, house allowance, notice and compensation for malicious prosecution.*
- e) That the Respondent is hereby restrained against travelling out of the country and is hereby ordered to deposit both her Indian and Kenyan passport before this Honourable court until this matter is heard and determined interparty.*
- f) That the Immigration department to ensure compliance with Prayer (e) to make sure the Respondent has complied with before she leaves the country on 28th December 2017.*
- g) The costs of this application be in the cause.*

2. The Application is premised on the grounds that:

- 1. The Applicant was an employee of the Respondent from 3rd August 2013 to 20th April 2014 for a period of eight (8) months twenty days (20) at a salary of Kshs. 5000 only.**
- 2. The Applicant's services were dismissed on 20th April 2014 on allegations and malicious prosecutions.**
- 3. The Applicant/Claimant was detained on 20th April 2014 at around 6.30pm to 23rd April 2014 when she was arraigned before the magistrate court in Kibera.**
- 4. The Applicant/Claimant was detained a few days in Lang'ata Women Prison then was released on a cash bail of Kshs. 50,000.**
- 5. That on 4th June 2014 the Claimant/Applicant served the Respondent with a demand notice requesting for salary arrears for 20 days she had worked in the months of April, 2014 underpayments for eight (8) months and house allowance for eight (8) months totaling to Kshs. 66,169.25 and it was without 1 month salary in lieu of notice and 12 months' stealing by servant in the Law Court at Kibera.**
- 6. The Respondent defied to honour the letter but through the mobile phone referred to the Claimant as the culprit and was not entitled to the dues sought.**
- 7. On 1st September 2017 the applicant was acquitted due to lack of evidence and certified copy of the Judgement is on record.**
- 8. On 17th November 2017, the Claimant/applicant through the Advocate on record served the Respondent with a demand notice to settle the Claim for severance pay together with one months' salary in lieu notice, underpayments and House allowance and it is from point in time when the Respondent replied the letter through A. THUO KANAI ADVOCATES and referred the Claim as an afterthought baseless and time barred by limitation of actions act and the Respondent became hostile and still referred the Claimant/Applicant as a culprit even after she was acquitted by the trial Court.**
- 9. From the foregoing, the delay in filing this claim within stipulated period was not deliberate on the part of the Applicant save for the charges Claimant was facing at lower court and the Respondent failed to honour/neglected the demand letter served to her on 4th June 2014 for negotiations above pleaded.**
- 10. The Applicant is apprehensive of the fact that the Respondent who is a dual citizen of Kenya and India may be travelling out of the country from 28th December 2017 for several years. This will default the cause of justice.**
- 11. It is fair in the interest of justice that the applicant be allowed to file her claim out of time to enable her pursue her salary arrears among other reliefs totaling to Kshs. 212,405.95 inclusive of 1-month salary for notice in lieu and 12 months' salary compensation for unlawful dismissal. This application is supported by affidavit of Susan Mwikali Mbinya.**

3. The Respondent has opposed the application by filling a replying affidavit wherein she avers that she is and has always been a Kenyan citizen and does not have dual citizenship as alleged by the Claimant.

4. The Respondent states further that she did travel out of the country on 28th December 2017 using her only passport which is issued by the government of Kenya as she required medical treatment for an injured hip and knee and returned back to the country on the 15th of January 2018 therefore it is clear that the Respondent was not sneaking out of country as alleged by the Claimant.

5. The Respondent states that the Claimant only worked for the Respondent for about 2 months between 5th February 2014 and 20th April 2014 and she herself admitted that in a statement before an Inspector of Police at Parklands Police Station dated 22nd April 2014 (Annexed hereto and marked “KS1” is a copy of the Claimant’s written statement dated 22nd April 2014). The Claimant was paid her salary of Kshs. 12000/= per month which was above the minimum wage and it is not true that on the 18th April 2014 she spoke to the Respondent about the minimum wage.

6. On the 20th of April 2014 at 16.10hrs, the Claimant was arrested for stealing assorted clothing, bed sheets and other personal belongings from the Respondent’s house which the Claimant admitted in her own handwritten note dated 20th April 2014 after the matter was reported at Parklands Police Station and it is clear how the Claimant has concocted lies and roped in a false witness, she has lied and demonstrated the extent to which she is capable of deceiving this Honourable court and there is no shred of truth in her alleged claim against the Respondent whatsoever.

7. The Claimant filed their Submissions where they stated that **Section 78 of the employment act 2007** is clear before any termination/dismissal takes place the employer should notify the employee in writing and the Respondent did not comply with this primary evidence according to the provision. In Court of appeal decision in **Civil Appeal No. 21 of 2015** in Court at Nyeri, the Court held that the cause of action arose immediately after the Respondent/Employees were served with Notice of termination by the meaning of **Section 78 of the employment act 2007. See Appendix 1 & 2 are true copies of the judgement of the court of Appeal at Nyeri.** The application and the replying affidavit on record filed by the Respondent be included by the meaning of **Section 41 and Section 78 of the Employment Act 2007** reason being that the Claimant/Applicant served the Respondent with Demand Notice attached on the supporting Affidavit but the Respondent was not willing to settle the dispute.

8. When it comes to time limitation, we look at **Section 90 of the Employment Act**, where there is no provision stating that the employee should go to Court in time to claim any dues but the only fact is that the dues should be claimed within a period of three (3) years which the Claimant did while she was on suspension through a demand letter from the legal office dated 4th July 2014.

9. The Respondent has also relied on the evidence of the lower Court which she failed to prove on her replying affidavit, the Respondent has attached a statement written by Police Inspector and yet the officer was not in court to testify and be cross examined, **Section 34 (2) a and b of the Evidence Act** is clear that, if the officer who wrote the statement cannot appear before the Court for testimony he should swear an affidavit (by oath) and the same should be deemed as evidence adduced in Court. The statement before the Court as an exhibit by the Respondent attached on the replying affidavit is paper work and has no merit.

10. When there is an alibi in a criminal prosecution, it is the responsibility of the prosecution to prove the complainant as tabled under **Section 234 (4) of the penal code**, the Respondent failed to prove in the Magistrate’s Court at Kibera, on the Respondent’s replying Affidavit where she insisted that the Claimant was found red handed stealing and the police arrested the Claimant in Respondent’s residence.

11. The judgement from the Magistrates’ Court reads that the Claimant was acquitted due to contradictions adduced in Court during the hearing, any contradicted evidence before the Court should be impeached by **Section 163 (1) (c) of the Evidence Act Laws of Kenya** adding to these the Respondent should be advised that **Article 50 (2) (o) of the Constitution** is clear that no person shall be tried for an offense or omission which she/he was acquitted or convicted before.

12. In their submissions, the Respondent stated that under Section 90 of the Employment Act, a claim arising out of an employer-employee relationship is required to be filed within three years from the occurrence of the cause of action, the Claimant’ claim therefore lapsed on the 20th April 2017 which was the end the third year from the date the cause of action allegedly arose, to this effect the Respondent relied on the case of **Maria Machocho Versus Total Kenya Limited [2013] eKLR** whilst considering an application for leave to file suit out of time the learned judge Radido relied on the Court of appeal

decision in **Divecon Vs Samani (1995-1998) EA 48** and stated that:-

“in my considered opinion, the holding by the Court of Appeal stated the correct legal principle applicable in this type of case and I therefore do hold that this Court has no Jurisdiction nor discretion to extend time or grant leave of court to file a case grounded on breach of employment contract where the limitation time set out in Section 90 of the Employment Act has expired.”

13. The Respondent also relied on her Replying affidavit dated 30th January 2018 in disputing all the Claimant’s allegations in the Notice of Motion dated 18th December 2017 stating that there is no evidence provided by the Claimant to prove that she holds an Indian passport and therefore there is no justification for restraining her from exercising her constitutional right to free movement.

14. I have examined evidence on record. The Claimant has averred that she was dismissed by the Claimant on 20/4/2014 and was arraigned in Court on charges of theft. She was acquitted of the same. She now seeks to file a claim against the Respondent for unfair termination.

15. Under Section 90 of Employment Act (supra) such a claim should be filed within 3 years from the time the cause of action arose. In this case, the cause of action arose on 20/4/2014 and so this claim should have been filed by 19/4/2017.

16. The Court of Appeal in the case of **Divecon vs Samani (supra)** held that the Employment and Labour Relations Court has no jurisdiction to extend time or grant leave to file a case out of time. That being the correct position of the law, I find I have no jurisdiction to grant orders sought by the Applicant. I therefore dismiss this application accordingly. The entire suit is also dismissed in it’s entirely for being time barred.

17. Each party will bear its own costs.

Read in open Court this 21st day of March, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Weru holding brief for Kamau for Claimant Applicant

No appearance for Respondent