



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 871 OF 2017

JOHN MUIA NGOLANIE

CLAIMANT

v

ELECTRIC LINK INTERNATIONAL LTD RESPONDENT

RULING

1. John Muia Ngolanie (Claimant) sued Electric Link International Ltd (Respondent) on 10 May 2017 and he stated the Issues in Dispute as
 - 1) Unfair and unlawful dismissal
 - 2) Non-payment of terminal dues.
 - 3) Other benefits arrears.
2. In paragraph 4 of the Statement of Claim, the Claimant pleaded that he served the Respondent from 1989 to 2010 while in paragraphs 6 and 7 he pleaded that he was put on compulsory leave in 2010 pending hearing and determination of a criminal case he was facing and that after acquittal in 2014 he was informed he had been dismissed.
3. On 6 June 2017, the Respondent filed a verbose *Notice of Preliminary Objection* to the effect
 - i. The entire suit offends section 90 of the Employment Act 2007 which limits actions based on employment contracts to three (3) years, and in of "**case of continuous injury**" to a strict period of 12 months after cessation thereof without any extension whatsoever.
 - ii. That in view of limitation in and being a trite law that **a litigant who is guilty of laches, and sleeps on his right (for seven years such as this case) to come to court cannot escape the limitation dragnet by waving criminal proceedings**, therefore the **Court lacks jurisdiction** as the entire claims are statute barred and cannot stand.
 - iii. That further as it relates to the claims of wrongful prosecution, it is trite law that the Director of Public Prosecutions (DPP) is an independent office, **under Kenya's 2010 Constitution , Under Article 157 and 158 and the Office of the Director of Public Prosecutions Act, No. 2 of 2013** responsible for investigating, instituting and undertaking criminal prosecutions against any person before any court, being the sole and independent mandate of the state (**which is not a party to this case**) the Claimant cannot purport to arrogate jurisdiction to court to confer/shift liability of such outcomes to the Respondent.
 - iv. That further and without prejudice to (iii) above such claims of malicious prosecution are now statute barred and stale as contemplated by Section 3(1) of the Public Authorities Limitation Act, Cap 39 Laws of Kenya provides, which states "**No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.**"
 - v. That it will cause the Respondent irredeemable prejudice if they must meet claims and counter claims made long after the cause of action has lapsed, when memories have faded, documents lost, untraceable and which action not to keep and or give such evidence is a legitimate expectation peremptorily shielded and prohibited by **section 10(6) of the Employment Act**.
 - vi. That there is no any claim or remedy in law under the Employment Act 2007 called "**wrongful termination**".
 - v. That there is no claims or relief in law called wrongful prosecution and therefore, the Court cannot sit to hear such claims of "**wrongful termination**" and "**wrongful prosecution**" not contemplated in law.

4. When the Cause was placed before the Court on 6 February 2018, the Court directed the Respondent to serve a hearing notice upon the Claimant and hearing was scheduled for 14 February 2018.
5. However, when the preliminary objection was called on 14 February 2018, the Claimant was not present/represented.
6. On record was an affidavit of service deposing that the firm of Lestin Smith Advocates were served with a hearing notice and same was acknowledged (signed and stamped).
7. The Court therefore allowed the Respondent to urge the objection.
8. It is clear from the Statement of Claim that the Claimant separated with the Respondent in 2010.
9. If the separation was either an unfair termination of employment or unlawful suspension amounting to repudiation of contract by the Respondent, then in terms of section 90 of the Employment Act, 2007, legal proceedings should have been instituted by end of 2013.
10. If at all some of the heads of claim advanced amounted to *continuing injury*, the same ought to have been in Court within 12 months of the separation.
11. The mere fact that criminal proceedings were ongoing did not serve as an estoppel in law to save the claims by the Claimant (see *Attorney General & Ar. v Andrew Maina Githinji & Ar* (2016) eKLR).
12. The Court upholds the preliminary objection and orders the Statement of Claim be struck out with costs to the Respondent.

Delivered, dated and signed in Nairobi on this 2nd day of March 2018.

Radido Stephen

Judge

Appearances

For Claimant Lestin & Smith Advocates

For Respondent Mr. Mwangombe instructed by Njora Waweru & Associates Advocates

Court Assistant Lindsey