



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1659 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 30th May, 2018)

NICHOLAS AKOTH AKURA.....CLAIMANT

VERSUS

BOARD OF TRUSTEES BOC (K) LTD

STAFF PROVIDENT FUND SCHEME.....1ST RESPONDENT

BOARD OF TRUSTEES BOC (K) LTD STAFF

RETIREMENT BENEFITS SCHEME.....2ND RESPONDENT

BOC KENYA LTD..... 3RD RESPONDENT

JUDGEMENT

1. The Claimant filed suit claiming damages for provident fund contribution not paid. He avers that the 3rd Respondent is the founder member of both BOK Kenya Ltd staff provident fund and BOC Kenya Ltd Retirement Benefits Scheme.
2. He avers that on or about 30th August 1989 the 3rd Respondent employed the services of the Claimant as an Assistant to P.600 Plant Operator and at a gross salary of Kshs. 3,651.00 which was increased as the Claimant climbed the ranks of the Company to Ksh. 16,510.
3. The Claimant was given an appointment letter as required by the law. It was an express term of the contract that after probation of 3 months the Claimant would be confirmed into permanent employment which was done at the expiry of the probation period.
4. The Claimant further avers that after confirmation and more specifically in October 1989 he joined the company's staff provident fund where as a junior staff would contribute 5% of his salary and the employer the same. The 1st and 2nd Respondents were in-charge of the staff provident fund scheme and staff retirement scheme.
5. The Claimant avers that for many years, he has gone to the Respondent's offices to claim payment of this contribution but in vain. The Claimant states that he was in the service of the 3rd Respondent for 7 years up to 27/2/1997 and he faithfully contributed to the pension/provident fund scheme founded by the 3rd Respondent and it was the duty of the employer to ensure that the fund is being properly managed and those who leave employment are paid their contribution but the 3rd Respondent the employer has been promising every time to deal with the matter to no avail.
6. The Respondent filed a Replying Memorandum raising a Preliminary Objection to the instant suit on the grounds that the same has been filed out time and in breach of the provisions of Section 90 of the Employment Act.
7. The Respondent stated that the Claimant was earning a basic salary of Kshs. 10,980 at the time of his resignation having been in employment of the 3rd Respondent since the year 1989. That the Claimant resigned from the 3rd Respondent's employment on 27th February 1997 and has never made any claim from his benefits to date, the period being 16 years from the date of resignation.
8. In his submissions, the Claimant submits that when he left the employment of the 3rd Respondent, after a while he declared the desire to be paid his contributions together with that of the employer. It was the duty of the employer to monitor the work done by the trustees and their

performance and intervene where necessary and asked the Court to protect the employees from malpractices of some employers and those entrusted with funds for employees. The cause of action arose in Nairobi within the jurisdiction of this Honourable Court.

9. The Respondents submit that the Claimant has never followed up his contributions, which in any event are not payable after 16 years of indolence on his part in so far as the rules of the Pension Fund as well as the Retirement Benefit Fund are concerned.

10. The Respondents further aver that the Court does not have a duty to protect employees from malpractices of some employees. However there was no malpractice on the part of the Respondents with regard to the Claimant nor his Claim. The jurisdiction of this Honourable Court is denied in so far as the Pension Fund as well as Retirement Benefits Fund are concerned.

11. I have examined evidence of the parties plus submissions filed. The issues for determination are as follows:-

1. Whether this claim is time barred.

2. Whether this Court has jurisdiction to entertain this claim.

3. Whether the Claimant has established his claim against the Respondents to warrant issuance of orders sought.

12. On the 1st issue, the Claimant has told Court that he joined Respondent's employment on 30th August 1989 and left employment on 27.2.1997 when he resigned. His claim is for payment of his payments in the Respondent providence fund. Indeed as admitted by the Claimant, he left employment in 1997. It is not clear what held him until 2013 when he filed this claim.

13. Under the Trades Disputes Act Cap 236 (now repealed), a claim under the Employment Act was to be filed within 6 years. This is because, the Act did not provide for a limitation period but relied on Cap 22 Limitation of Action Act, which envisaged that matters of contract in nature were to be filed within 6 years.

14. The Claimant chose to sleep on his right and to come to Court 16 years later when he was already late. Other than the late period, the claim could not be directly filed in Court until the matter had gone through the conciliation process.

15. Section 14(9) (e) of the Trade Disputes Act process as follows:-

9) "The Court shall not take cognizance of any trade dispute or deal with any matter connected therewith:-

e) unless the Court has received a certificate signed by the Labour Commissioner stating that the Minister has accepted the report of the trade dispute and that all available machinery (including statutory machinery) for the voluntary settlement of disputes prior to reference to the Court has been exhausted;

16. In either case, the Claimant has come to Court too late and without passing through the conciliation process as envisaged under the Trade Dispute Act. In the circumstances, I find I have no jurisdiction to handle this claim and the Claimant is also time barred.

17. This claim is therefore dismissed accordingly with no orders as to costs.

Dated and delivered in open Court this **30th day of May, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ashubwe holding brief for Guserwa for Respondents – Present

Claimant in Person – Present