



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1281 OF 2012

ALEX GICHUKI GAKURU.....CLAIMANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

KENYA WILDLIFE SERVICE..... 2ND RESPONDENT

RULING

Introduction

1. The Claimant was employed by the respondent and he was dismissed by the letter dated 27.12.2006. He brought this suit on 24.7.2012 seeking declaration that his dismissal was wrongful and praying for reinstatement to his employment in the alternative he prayed for terminal dues as outlined in the suit.

2. The respondents filed defence on 1.10.2012 admitting the dismissal of the claimant but denied that it was wrongfully done. Thereafter the respondents filed a Preliminary Objection (P.O) urging for the striking out and dismissal of the suit on grounds that;

- a. The suit was filed under the wrong statutory law.
- b. The suit was filed using improper legal procedure.
- c. The suit is statute barred and it is incompetent and fatal.
- d. The reliefs sought are untenable and lack any legal underpinning.

3. The P.O. was opposed by the claimant and by consent it was disposed of by written submissions the respondents filed their on 25.2.2016 and the claimant filed his on 2.3.2018.

Respondent Submissions

4. The respondents submitted that the cause of action having arisen on 27.12.2006 the relevant law was section 4 the limitation of Action Act which limited the period within which to sue to 6 years. In their view filing the suit on 26.7.2012, 8 years after the date the cause of action arose rendered the suit incompetent and the suit lacks jurisdiction to determine it.

5. In addition to the foregoing, it was submitted for the respondents that the cause of action having arisen under the repealed Employment Act and the Trade Dispute Act, the procedure followed it is defective. It was urged that the correct procedure under the repealed statutes was first to file a claim with the Labour Minister within 28 days of the dismissal for conciliation who would later refer the dispute to the Court if it is not resolved by the conciliator.

6. Finally, the respondent submitted that there is lack of clarity of the law on which the claim is based. In the respondents view the claimant should have been more specific as to whether the claim is founded on the pre-2008 regime or otherwise. For the foregoing reason the respondents are of the opinion that the reliefs sought by the claimant are untenable.

Claimant's Submissions

7. As regards the alleged statute bar, the claimant submitted that six years within which to file the suit was on 25.12.2012 because the cause of action arose on 26.12.2006. It was therefore urged that, the suit was filed within the statutory period on 26.7.2012 and as such the Court has jurisdiction to determine it within the meaning of section 4 of the limitation of Action Act.

8. As regards the alleged procedural defect, the claimant submitted that the suit was properly instituted. He submitted that the Employment Act 2007 which repealed the earlier Act has saving provisions in favour of the existing disputes.

9. Finally, the claimant submitted that the reliefs sought by the suit are tenable and are well founded in law. He contended that the reliefs are founded on the repealed statute but urged that section 93 of the Employment Act 2007 provides for a transition provision to the effect that contracts under the former regime were to be enforced as if they were made under the new regime. He cited several *Dr. Ezekiel*

Nyangonya Okemwa Vs Kenya Marine & Fisheries Research Institute [2016] eKLR to fortify her submission.

Analysis and Determination

10. The issue for determination are:-

- a. Whether the suit is statute barred.
- b. Whether the procedure followed to institute the suit was fatally defective.
- c. Whether the reliefs sought are untenable for lack of legal underpinning.

Statute Barred

11. There is no dispute that the applicable law herein is section 4 of the Limitation of Actions Act. Under the said law, any suit founded on contract, including employment contract, could not be brought unless it was commenced within 6 years next after the date when the cause of action arose. In this case, the cause of action arose on 26.12.2006 and as such, the six years limitation period was to end on 25.12.2012. The impugned suit was filed on 24.7.2012 before the lapse of the 6 years limitation period. Consequently, I find and hold that the suit is properly before the court and the Court has the requisite jurisdiction to determine it.

Improper Procedure

12. The respondents alleges that the claimant ought to have first lodged the dispute to the Labour Minister for conciliation within 28 after the cause of action arose and only refer it to the Court if not resolved. The respondents have however not cited the specific provisions of the law which bar a party from filing a suit directly to the Court if he did not wish to refer the dispute for conciliation by the Minister for Labour. In my view, the provision of section 4 of the Trade Disputes Act (repealed) was not mandatory. The said section only gave the parties to a trade dispute or their representatives an option of reporting a dispute to the Minister provided that any dispute involving dismissal of an employee had to be reported within 28 days. The section provided:

“4(1) subject to subsection (4) any dispute, whether existing or apprehended, may be reported to the Minister by or on behalf of any party to the dispute.

4. Any dispute involving the dismissal of an employee or termination of any contract of employment shall be reported to the Minister within twenty eight days of the dismissal or termination of employment;”

Untenable Reliefs

13. The reliefs sought include declaration of wrongful termination and reinstatement to employment and in the alternative terminal dues. They are subject to evidence being adduced at the hearing. This Court has jurisdiction to entertain any employment and labour relations disputes between employers and employees by dint of section 12 of the ELR Act and Article 162 of the Constitution. The law applicable to the claim is clear to both the Court and the parties herein because the submissions on record support the view that the law applicable is the repealed Employment Act and the limitation of Action Act. I therefore allow the suit to go to full hearing.

Disposition

14. For the reasons that the suit is not statute barred and that it is properly before the Court, I dismiss the Preliminary Objection with costs and direct the parties to fix the suit for hearing at the registry on priority basis.

Dated, Signed and Delivered in Open Court at Nairobi this 10th day of May, 2018

ONESMUS MAKAU

JUDGE