



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 51 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

DANIEL KIPTOO KAAKIMA.....CLAIMANT/APPLICANT

-Versus-

EAST AFRICAN PORTLAND

CEMENT COMPANY LIMITED.....RESPONDENT

RULING

In its defence filed on 25th May 2016, the respondent raises preliminary objection against the claimant's case as follows:-

- i. That the suit offends the provisions of Section 90 of the Employment Act and is therefore time barred.
- ii. That the claimant has come to the Honourable Court too late in the day as he has filed this claim more than 3 years after his employment was terminated on 20th November 2012.
- iii. The claimant's case is misconceived, incompetent and bad in law and ought to be dismissed for reasons that:
 - a. The dispute is time barred.
 - b. The claim violates the provisions of Section 90 of the Employment Act which provides that "*Notwithstanding the provisions of section 4 (1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof*".
- iv. The claimant's claim is based on a contract of employment which was terminated on 20th November 2012, more than three years after the claimant filed his memorandum of claim.
- v. The claimant's action would deny the respondent the protection of the law against unreasonable delay in bringing legal action. The claimant's action is unreasonable and lacks due diligence since there has been inordinate delay of more than ten years in filing the memorandum of claim, contrary to the provisions of the law. The law obliges litigants to exercise due diligence and to take reasonable steps to bring action.
- vi. Consequently it is apparent that the claimant is time barred from filing this claim and the respondent prays that the suit be dismissed with costs to the respondent for reasons above.

In the submissions on the preliminary objection filed on 30th March 2017 the respondent submits that it has met the threshold for preliminary objection *in limine* as set out in the leading case of **Mukisa Biscuits Manufacturing Co. Ltd. –v- West End Distributors Ltd. [1969] E.A. 696** where the court stated:-

The Courts have held as follows: That a preliminary objection is a point of law if taken would dispose of the suit *in limine*. It is what was formerly known as a "*demurrer*" (from the French word *demorrrer* "*to wait or stay*").

In the same case of Law J.A. stated: “So far as I am aware, a preliminary objection consists a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

The respondent further relied on the decision in **Industrial Court Cause No. 1981 of 2011** as consolidated with **Industrial Court Cause No. 1996 of 2011 Tailors and Textile Workers Union –Vs- Moi University and Rivatex E.A. Ltd** where the court reiterated the principles of preliminary objection as one that raises a point of law argued on the assumption that all the facts pleaded by the other side are correct.

The respondent submitted that the issue of limitation is one arguable by way of preliminary objection that should be disposed off before the substantive suit. It further relied on **Industrial Court Cause No. 1686 of 2011 Peter Musembi -Vs- Barclays Bank of Kenya Limited** in which the Court held that limitation is not a technicality that can be cured by evoking any authority or any part of the Constitution.

The respondent submits that the claimant’s action would deny it the protection of the law against unreasonable delay in bringing legal action. That the claimant’s action is unreasonable and lacks due diligence since there has been inordinate delay of more than ten years.

The respondent further relies on the case of **Aggrey Amugune Akwiyanga -Vs- Inderpal Singh (K) Limited, Nairobi Civil Appeal No. 367 of 2007 (eKLR)** where the court referred to the case of **Gathoni -Vs- Kenya Co-operative Creameries Limited [1982] 2 KLR 104** in which the learned Judge observed that:

“The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The stature expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

The respondent again relied on the **Industrial Case No. 2138 of 2012 Rama Krishnarao -Vs- Saj Ceramics Limited** in which the court held that: “Section 90 of the Employment Act, 2007 in my understanding provides a limitation period of 3 years without exception” therefore the Industrial Court neither has the statutory jurisdiction nor discretion to grant leave or extend time in causes of action based on breach of contract of service or actions arising out of the Employment Act, 2007.”

The respondent prays that the suit be dismissed with costs.

The claimant was granted leave severally to file submissions in response to the preliminary objection but failed to do so. The court therefore decided upon request of the respondent, to dispose of the respondent’s preliminary objection without the claimant’s response.

Determination

The issue of limitation of actions is a well trodden path with numerous judicial authorities among them those referred to in the respondent’s submissions. In the case of **Divecon -Vs- Samani** the Court of Appeal stated that no court has jurisdiction to entertain a matter that is time barred by limitation.

In the present suit the claimant did not contest the preliminary objection.

The facts of the case as set out in the statement of claim are that the claimant was wrongfully and unfairly dismissed. He has appended the letter of termination dated 20th November 2012. The suit was filed on 22nd February 2016, some 3 years and 3 months after the termination of employment.

The case was clearly filed more than 3 years after the cause of action accrued on 20th November 2012. This court therefore lacks jurisdiction to entertain the same by virtue of Section 90 of the Employment Act which provides that:-

“Notwithstanding the provisions of Section 4 (1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

From the foregoing reasons the preliminary objection succeeds. I accordingly strike out the claimant’s case for having been filed after the lapse of the limitation period and therefore being statute barred.

DATED AND SIGNED AT NAIROBI ON THIS 20TH DAY OF APRIL 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 3RD DAY OF MAY 2018

MATHEWS NDERI NDUMA

JUDGE