



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 243 OF 2017

JULIUS MWALIMU MITSANZE.....CLAIMANT

VS

EXON INVESTMENT LIMITED.....RESPONDENT

RULING

1. This ruling relates to a preliminary objection raised by the Respondent by notice dated 25th April 2017 and filed in court on 26th April 2017. In its objection, the Respondent states that the Claimant's claim is statute barred by dint of Section 90 of the Employment Act, 2007.

2. By consent of the parties, the objection was urged by way of written submissions. The preliminary objection in this case is hinged on Section 90 of the Employment Act which states the following:

90. 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.

3. The Respondent submits that the Claimant was terminated on 14th March 2013 and his suit filed on 4th April 2017 is therefore way out of time and the Court lacks jurisdiction to entertain it.

4. In advancing its objection, the Respondent cited the decision in ***Attorney General & another v Andrew Maina Githinji & another[2016] eKLR*** where the Court of Appeal affirmed that this Court has no jurisdiction to entertain employment related claims filed out of time.

5. In his Memorandum of Claim dated 31st March 2017 and filed in court on 4th April 2017, the Claimant concedes that his employment was terminated on 14th March 2013. He however filed an amended Memorandum of Claim on 15th May 2017, in which he states that his employment was suspended on 14th March 2017. In a further amended Memorandum of Claim filed on 20th November 2017, the Claimant states that his employment was in fact terminated on 5th August 2017.

6. These amendments were effected after the Respondent had raised its preliminary objection and it would appear that the Claimant sought to escape the limitation dragnet by amending his claim, not once but twice.

7. Even assuming that the amendments to the Memorandum of Claim were properly effected, their effect

is at best cosmetic. I say so because in the demand letter issued by the Claimant's Advocates on 21st February 2017, it is clear that the act complained of is unfair and unlawful dismissal. Further, at paragraph 8 of his further amended Memorandum of Claim, the Claimant pleads as follows:

“The Claimant states that on the 5th August 2016, two days after he was acquitted by the Chief Magistrate in line with the provisions of section 210 of the Criminal Procedure Code CAP 75 laws of Kenya, he proceeded to the Respondent business premises at Changamwe and he was turned away as a stranger by the security guard of the Respondent.”

8. In the ***Andrew Maina Githinji Case*** (supra) **Waki JA**, made reference to the case of ***Drummond Jackson v Britain Medical Association (197) 2 WLR*** where a cause of action was defined as:

“an act on the part of the defendant, which gives the plaintiff his cause of complaint.”

9. It seems clear to me that the Claimant's complaint against the Respondent has to do with the cessation of his employment, which evidently occurred long before 5th August 2016, when the Claimant showed up at the Respondent's premises. This is why he was deemed a stranger by the security guard manning the Respondent's gate. It cannot therefore be true that the cause of action arose on 5th August 2016.

10. In the circumstances, the Court reckons 14th March 2013 as the accrual date and finds that the suit herein filed on 4th April 2017 is statute barred under Section 90 of the Employment Act, 2007. The Court therefore lacks jurisdiction to entertain this claim and the only action available is to strike it out.

11. The Claimant's claim is therefore struck out with no order for costs.

12. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 3RD DAY OF MAY 2018

LINNET NDOLO

JUDGE

Appearance:

Miss Obonyo for the Claimant

Mr. Ngaine for the Respondent