



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 35 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

MELLEN MORAA MAIKO.....CLAIMANT

VERSUS

THE BOARD OF MANAGEMENT, MARANI SECONDARY SCHOOL....RESPONDENT

RULING

Before me for determination is a notice of preliminary objection filed by the respondent on 5th April 2017. The objection is that this suit is time barred hence untenable in law.

The claimant responded to the notice of preliminary objection. In the response it states that –

1. That the suit herein had progressed through the conciliation process at the Ministry of Labour and hence the limitation period could not run concurrently.
2. That the pre-trial process at conciliation failed to resolve the dispute and hence the claimant opted to file this suit before court for further arbitration, within the meaning of mandatory provisions of Section 12 of the Employment and Labour Relations Court Act, Cap 234B of 2014, Laws of Kenya.
3. That it is not true that the suit is time barred and untenable in law.
4. That the court within its jurisprudence to find the notice of preliminary objection hopelessly misconceived, frivolous and devoid of merit.

The claimant relied on the decision in the case of **KENYA SCIENTIFIC RESEARCH INTERNATIONAL TECHNICAL AND ALLIED WORKERS UNION -V- RAINALD SCHUMCHER'S [2012] eKLR**.

The application was argued in court by counsel for the parties. Mr. Nyamweya appeared for the claimant while Mr. Marigi appeared for the respondent.

Mr. Maingi submitted that the suit is time barred based on Section 90 of the Employment Act as it was filed almost one year after the cause of action lapsed. He relied on the case of **NICODEMUS MARANI -V- TIMSALES LIMITED** in which the court held that it had no power to extend time and further that no application was made to expand the limitation period.

The respondent further relied on the case of **FRED MUDAVE GOGO -V- G4S SECURITY SERVICES (K) LIMITED** in which the court held that limitation is not a technicality and is a fundamental flaw to be addressed before the suit is filed.

Mr. Marigi prayed that the suit be dismissed with costs.

Mr. Nyamweya for the claimant submitted that the preliminary objection is premature, that the pleadings do not disclose the date of termination of employment and the date of termination is therefore a disputed fact that is subject to proof by calling of evidence. He submitted that the claimant's prayers are that he was constructively terminated.

Mr. Nyamweya further submitted that this matter having been under conciliation before the labour officer, time does not run until after the

conciliation process is concluded. He relied on the authority cited in the claimant's response to the notice of preliminary objection. He further stated that this case is distinguishable from the two cases cited by Mr. Marigi as in the two cases there was no conciliation.

He further submitted that the Limitation of Actions Act provides for expansion of limitation period in several circumstances including where there is concealment of material facts like in the present case where the respondent has concealed the date of termination of employment. He prayed that the notice of preliminary objection be dismissed.

Determination

I have considered the rival submissions by counsel for the parties herein. The issue of limitation in employment cases is provided for in Section 90 of the Employment Act as follows –

90. Limitations

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), 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.

The issues for determination herein are twofold: when time started running and whether the claim is time barred by virtue of Section 90 of the Act.

The respondent argues that because the matter went for conciliation, time did not start running until conciliation process was concluded relying on the decision in *KSRTIWU -V- RAINALD SCHUMCHER'S*. There is no law that provides that time does not run when a matter is referred to conciliation. Section 62(3) of the Labour Relations Act provides for disputes to be reported to the Minister within 90 days and Section 67 provides that once a conciliator is appointed the dispute is deemed to be unresolved within 30 days unless the parties agree on a longer period.

In this case there is no evidence of report of the dispute to conciliation. In the case of *KSRTIWU -V- SCHUMCHER'S* the case was based on the repealed Trade Disputes Act (now repealed) wherein a dispute reported by a trade union was deemed to have been commenced upon the reporting of the matter to the Minister as it is the Minister who referred the dispute to the Industrial Court once conciliation process failed.

Secondly only disputes filed by or against trade unions were reported the Minister. The authority is therefore not relevant to this case as the claim is not under the repealed Trade Disputes Act nor is the claimant a trade union.

The claimant herein was last at work on 27th June 2011 as pleaded in paragraph 4 of the claim. Time therefore started running on 27th June 2011. This means that the limitation period lapsed on 26th June 2014 while this claim was filed on 13th February 2017, more than five years after the cause of action arose.

Even assuming the cause of action arose on 7th December 2011 when the union's Kisii Branch reported the dispute to the union's office in Nairobi, the claim would still be time barred by more than five years.

Section 90 is explicit that no claim may be instituted after the lapse of three years from the date the cause of action accrued. This was the decision in the case of **FRED MUDAVE GOGO -V- G4S SECURITY SERVICES (K) LIMITED** and **NICODEMUS MARANI -V- TIMSALES**. I have no reason to depart from the two cases whose decisions I agree with and follow in the present case.

For these reason the claim herein is statute barred and I accordingly strike out the same with no orders for costs.

DATED AND SIGNED AT NAIROBI ON THIS 21ST DAY OF JUNE 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 5TH DAY OF JULY 2018

MATHEWS NDERI NDUMA

JUDGE