



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 160 OF 2017

(Formerly CMCC No. 2256 of 2010)

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

BENSON KIPKORIR BII.....CLAIMANT

Versus

STANDARD CHARTERED BANK OF KENYA LIMITED..... RESPONDENT

RULING

1. The Respondent filed a Preliminary Objection dated 8th May, 2018 opposing the Claimant, Benson Kipkorir Bii's claim on the grounds that the claim is in abuse of the Court process because he failed to follow the mandatory procedures set out under the now repealed Trade Dispute Act.

2. That disputes that arose between an employer and employee in relation to termination or dismissal before the enactment of the Employment Act, 2007 were governed by the Trade Disputes Act which required the Claimant/Plaintiff to report a dispute on his dismissal to the Ministry of Labour as provided in **Section 4(4) of the Trade Dispute Act** which provided in mandatory terms that:-

“Any trade dispute involving the dismissal of an employee or the termination of any contract of employment shall be reported to the Minister within twenty-eight days of the dismissal or termination of employment:

Provided that the Minister may, if he considers that the circumstances of a particular case so warrant, accept the report of a trade dispute concerning a case of dismissal or termination not so reported to him within twenty-eight days.”

3. Further, that claims were only referred to the Industrial Court as it was known then, when the Minister was unable to resolve the dispute between parties which did not happen in this case since the Claimant/Plaintiff instead chose to file his claim before a Court without jurisdiction in an attempt to defeat the provisions of Section 4 of the Limitations of Action Act. That the same is provided for in **Section 5 of the Trade Dispute Act** as follows:-

“The Minister shall consider any trade dispute reported to him and shall consult a Tripartite Committee and/after such consultation, may take any one or more of the following steps as seem to him expedient for promoting a settlement:-

(g) recommend to the parties that the trade dispute be referred to the Industrial Court”.

4. That even if the Claimant sought to have this dispute heard and determined as a civil matter, the same ought to have been dealt with as a case on breach of contract and not an employment dispute which was not the case as this claim was later transferred to the Employment and Labour Relations Court in 2017.

5. The ELR Court has no jurisdiction to entertain the Claimant's claim because he filed his claim over 5 years after the cause of action took place and the Claim is barred by limitation under **Section 90 of the Employment Act which 2007** provides: -

“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.”

6. The Respondent submits that whenever a cause of action is statute barred, the Court has no jurisdiction to deal with the matter and they cite the Supreme Court of Kenya cases of The Matter of the Interim Independent Electoral Commission S.C., Constitutional Application No. 2 of 2011; [2011] eKLR and in Samuel Kamau Macharia SC Another vs Kenya Commercial Bank Limited & 2 Others S.C. Application No. 2 of 2012; [2012] eKLR, which held that the assumption of jurisdiction by Courts in Kenya, is a subject regulated by the Constitution, statute law, and judicial precedent. It stated:-

"A Court's jurisdiction flows from either the Constitution or legislation or both. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is dear and there is no ambiguity".

7. They also rely on the Civil Appeal No. 21 of 2015 wherein the decision of the ELRC to dismiss a Preliminary Objection challenging the jurisdiction of the Court to hear a matter filed out of time was overturned and the Court of Appeal upheld the Preliminary Objection. That the Court of Appeal decision was that time began to run when the Claimant was terminated and not when the criminal proceedings were completed. The Preliminary Objection was upheld, the claim was struck out and the Claimant was condemned to pay the costs for the Appeal and for the trial Court.

8. The Claimant filed this suit on 15th April, 2010 in the Chief Magistrate's Court after the enactment of the Employment Act, 2007 as if to cheat the 'clock' and Section 90 of the Employment Act had already replaced or amended the provisions of Section 4(1) of the Limitations of Actions Act. The Respondent cites the case of Maria Machochi -v- Total (K) Industrial Cause No. 2 of 2012, where Radido, J. expressed as follows:-

"Before the coming into operation of section 90 of the Employment Act, the statutory limitation period for causes of action based on breach of employment contract or contract of service was that provided for contracts in general, in Section 4(1) of the Limitation of Actions Act, and it was 6 years.

Section 90 of the Employment Act has now amended the Limitation of Actions Act to specifically provide for a limitation period of three years in actions based on breach of contract of service or arising out of the Employment Act".

9. The Claim herein ought to be dismissed as the inordinate delay in filing the claim has highly prejudiced the Respondent particularly in producing documents to support the Defence as **Section 10(6) of the Employment Act, 2007** provides that: -

"The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment".

10. The Respondent finally submits that the claim is time-barred and hence incurably defective and any actions advanced by the Claimant are futile. They pray that the Court upholds the Preliminary Objection and dismisses the claim on the above grounds.

11. The Claimant has not responded to the Preliminary Objection.

12. It is true as submitted by the Respondent that the Claimant failed to follow the laid down procedure before filing this claim. This Court finds that the Preliminary Objection has merit. I therefore find the claim cannot stand as instituted. I therefore strike it out with no order as to costs.

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

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties