



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO 735 OF 2018

PETER WAWERU MBURU.....CLAIMANT

VERSUS

TUSKER MATTRESSES LIMITED.....RESPONDENT

RULING

1. The claimant brought this suit on 17.5.2018 seeking terminal benefits plus compensation for unfair termination of his employment contract by the respondent. He contended that on 9.10.2012 he was suspended for 2 weeks to pave way for investigations into a robbery that occurred at the work place. He was to report back on 24.10.2012 but before then he was arrested and charged with conspiracy to commit a felony and stealing by servant on 18.10.2012.

2. As a result of the said charges when he reported back to work on 24.10.12 he was told by the respondent's General Manager Human Resource to continue with his suspension without pay and keep off the respondent's premises until he receives further instructions after the conclusion of the said criminal case. However, after his acquittal on 11.12.2017, he communicated the same to the respondent but no instructions were given to him as earlier advised by the General Manager HR as a result of which he brought this suit after his demand letters were ignored.

3. In response, the respondent filed the Notice of preliminary objection and prayed for the suit to be dismissed on ground that:

- a) The suit is statute barred by dint of section 90 of Employment Act
- b) The cause of action arose in Mombasa and as such the suit ought to have been in Mombasa and not Nairobi.

Respondents submissions

4. The respondent submitted that the suit is statute barred and should be dismissed with costs because it was filed after the lapse of the 3 years limitation period provided under Section 90 of the Employment Act. She contended that the claimant was suspended on 9.10.2012 and later charged with criminal offences until December 2017 when he was acquitted and brought this suit on 17.5.2018. He therefore contended that the cause of action arose in October 2012 and not December 2017 as alleged by the claimant. He relied on the several authorities to urge that the suit should be dismissed *in limine*.

Claimants Submissions

5. The claimant opposed the preliminary objection and denied that his suit is statute barred. He contended that his cause of action crystalized on 11.12.2017 when he was acquitted from the criminal charges. He relied on *Ignas Karingo Mghoma & 4 Others Vs Star of Hope International Foundation [2016] eKLR* to urge that claim for salary arrears cannot be time barred.

6. As regards the objection on ground of territorial jurisdiction, the claimant submitted that the respondent's Head office is situated in Nairobi and that is where he executed his contract. He relied on *Judith Anyango Irulzan Vs Muthaiga Gold Club [2018] eKLR* to urge that the court has a nationwide jurisdiction. He cited *Mikisa Biscuits Manufacturing Co. Ltd* case to urge that the preliminary objection is misconceived and should be dismissed.

Analysis and Determination

7. There is no dispute that the claimant was employed by the respondent until October 2012 when he was suspended for 2 weeks and charged with a criminal case which went on until 11.12.2017 when he was acquitted. There is further no dispute that during the 5 years of trial, the

claimant never reported to work and was never paid any salary by the respondent and that after the acquittal, his demands for salary arrears were ignored. The issues for determination are:

- a) Whether the preliminary objection meets the threshold for a preliminary objection.
- b) Whether the suit is statute barred
- c) Whether the court lacks territorial jurisdiction

Threshold for a Preliminary Objection

8. It is trite law that an objection on ground that the court lacks jurisdiction or on ground of limitation of time meets the threshold of a valid preliminary objection. However, if the preliminary cannot be proved without calling evidence, the preliminary objection must fail in favour of trial. In this case, the claimant pleaded that he was suspended from work without pay until the finalization of his criminal case. The respondents counsel submits from the bar that the claimant's services were terminated after being given a hearing on 10.10.2012.

9. The question whether or not the claimant was suspended or dismissed in October 2012 in my view is a matter to be ascertained by taking evidence. It is not a pure point of law apparent from the pleadings. In fact, the respondent has not controverted the factual averments pleaded by the claimant. Consequently, I find and hold that the preliminary objection raised by the respondent does not meet the threshold for a valid preliminary objection. I therefore direct that the matter shall go to full trial. I will therefore not consider the other issues because they all require evidence to prove, that the cause of action arose earlier than December 2017 and that the respondent's Head office is not in Nairobi.

Conclusion

10. I have held that the preliminary objection herein does not meet the threshold for a valid preliminary objection because it does not raise pure point of law. Consequently, the preliminary objection is dismissed with no costs. The respondent is at liberty to file defence to the suit.

Dated, Signed and Delivered in Open Court at Nairobi this 16th day of November, 2018

ONESMUS N. MAKAU

JUDGE