



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
Cause No. 739 Of 2013
(CONSOLIDATED WITH 740/2013, 741/2013 AND 742/13)
(Before Hon. Lady Justice Hellen S. Wasilwa on 24th January, 2017)
SOLOMON KASAINI
STEPHEN MUSYIMI
JOHN M. KAMAU
MACHARIA GERALD MATHENGE CLAIMANTS
VERSUS
YAARS BAR & RESTAURANT LIMITED RESPONDENT

RULING

1. These are four files with the same cause of action. The first is Cause 739 of 2013, Macharia Gerald Mathenge vs. Yaars Bar & Restaurant Limited; the second is Cause 740 of 2013 John Mwaura Kamau vs. Yaars Bar & Restaurant Limited; Cause 741 of 2013, Stephen Musyimi vs. Yaars Bar & Restaurant Limited; and the final one is Cause 742 of 2013, Solomon Kasaine vs. Yaars Bar & Restaurant Limited.
2. The Respondent in the matter has filed a defence that has raised a similar Preliminary Objection in all the files.
3. The Preliminary Objection arises in the Respondents Statement of Defence as at Paragraph 3 where they state that the suits are time barred under the provision of Section 90 of the Employment Act 2007. They state that the claims are incompetent and ought to be struck out *in limine*.
4. The Respondent submits that on Cause 739 of 2013, the cause of action arose on the 17th of March 2010 but the Claim herein was filed on the 21st of May 2013, a period of two months after limitation period had expired. Further, they submit that in Cause No 740 of 2013 the delay was 3 months; in Cause no 741 of 2013 the delay was 8 to 9 days and in 742 of 2013 the delay was 9 days.
5. The Respondents refer to the case of **Josephat Ndung'u vs Henkel LTD EA 2013 eKLR** at paragraph 39 where a similar objection was raised and the Court allowed it. They therefore submit that all the 4 claims are time barred and the Court has no jurisdiction to extend the time.

6. They pray that the Court allows their Preliminary Objection.

7. In Response the Claimants submit that they are not hopelessly out of time. They state that in two matters the delay is but for 9 days and 7 days. In Cause No 740 of 2013 it is 3 months and in Cause 730 of 2013 it is 2 months.

8. They submit that they have annexed correspondence between themselves and the Respondents including a demand letter dated 26th November 2012 and a reply to it dated 10th January 2013 received on the 11th of January 2013.

9. They submit that they waited for their further reply but none was forthcoming and on the 21st of May 2013 the claim was filed. They submit that the Court applies substantive justice and in term of Article 159 (1) (d) the Court should administer justice without technicalities.

10. They submit that the Court should only apply substantive justice and that they should be allowed to canvass the case on merit.

11. In Response the Respondents state that in a civil suit, a demand letter is not a claim, further that Article 150 of the Constitution does not apply as limitation of action goes to the root of action and is not merely procedural. They refer to the Court to the Supreme Court Decision on **Raila Odinga & 5 others vs. IEBC & 3 others.**

12. Having considered the Preliminary Objection as raised in these 4 claims, I note that Section 90 of Employment Act 2007 states as follows:

“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 un less 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.”

13. Provisions of Section 90 are couched in mandatory terms to the effect that an extension of time is not envisioned. In the Court of Appeal decision Civil Appeal No. 6/2015 KAA vs. Shadrack Abraham Kisongochi (2010) eKLR – the Learned JJA Maraga (as he then was), Musinga and Gatembu held that the “Court has no jurisdiction to extend Limitation period even under Section 4 of Limitation of Actions Act except in matters of contract and merit.

14. That being the position, the Preliminary Objection must be upheld and I rule that indeed the Claimants came to Court albeit too late even if it was after one day and so their cases must all collapse for want of time.

Read in open Court this 24th day of January, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Sifuna Kevin for Claimant – Present

No appearance for Respondent