



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 353 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

KENYA UNION OF SUGAR PLANTATION

AND ALLIED WORKERSCLAIMANT

-Versus-

CHEMELIL SUGAR COMPANY LIMITEDRESPONDENT

R U L I N G

By a notice of preliminary objection dated and filed on 14th September 2015 the Respondent seeks the striking out of the claim herein with costs on grounds that the entire suit is statute barred under section 4(2) of the Limitation of Actions Act and section 90 of the Employment Act, that this court therefore has no jurisdiction to hear and determine the same and that it is an abuse of court process.

The Respondent relied on the following authorities -

1. Josephat Ndirangu -VRS- Henkel Chemelils (EA) Ltd [2013]eKLR
2. Boniface Inondi Otieno -VRS- Mehra Electrical Ltd [2013] eKLR
3. Willis Onditi Odhiambo -VRS- Gateway Insurance Co. Ltd [2014] eKLR
4. Peter Nyamai & 7 others -VRS- M.J. Clarke Ltd [2013] eKLR
5. The Employment Act, 2007
6. Any other authority (s) to be availed during the hearing hereof with leave of the court.

The Claimant union responded to the notice of Preliminary Objection by its statement dated 5th October 2016 in which it states that the filing of the case was delayed due to the fact that there were other related matters pending in other courts and the case could not be handled in more than one court at the same time. It further states that the suit was filed in accordance with section 9 of the Collective Bargaining Agreement and that the case is procedurally before this court.

The application was argued in court on 26th September, 2016.

Mr. Oyuko for the Respondent submitted that it is clear from the pleadings in this matter that the claimants' employment were terminated on 28th October, 2006 while the claim was filed on 14th

December 2014, that the claim was lodged 5 years after the course of action arose, that under section 90 of the Employment Act Claims in respect thereof must be lodged within 3 years. He submitted that although 3 years lapsed before the filing of the claim no attempt was made to seek leave to file suit out of time before the suit was filed. He submitted that even if leave was sought section 90 of the Employment Act does not make any provision for extension of time. He submitted that this court has no jurisdiction to hear the claim.

Mr. Oyuko submitted that **Cause No.346 (N) of 2009** between **Kenya Union of Sugar Plantation and Allied Workers v South Nyanza Sugar Company Limited** which the Claimant relied on is not relevant as it did not deal with the issue of jurisdiction and limitation. He urged the court to find that the claim is time barred under both section 4 of the **Limitation of Action's Act** and Section 90 of the **Employment Act** and that the suit be dismissed with costs to the Respondent.

Mr. Ogutu for the Claimant opposed the preliminary objection and submitted that under section 4 of the **Limitation of Actions Act** the limitation period is six years. He further submitted that the dispute was reported to the Ministry of Labour before 3 years was over and that the process of filing suit commenced upon reporting of the dispute to the Minister for Labour. He submitted that the Claimant had several cases in court relating to the same matter as evidenced by its appendix 7 of the Memorandum of Claim. He submitted that this case was not filed in court on the date it was submitted to this court. He relied on cause no.346 (N) of 2009 in which similar preliminary objection was dismissed on grounds that the parties have a collective bargaining agreement which provided for the manner of dealing with discipline. He referred to clause 2 (d) of the Collective Bargaining Agreement which states that no suspension shall be for more that 21 days and that where a case is pending in court the parties were to await the decision of the court. He submitted that the claimant should have been placed under half salary until the matter in court was finalised. He submitted that although the Respondents did not wait, the Claimant waited as it did not wish to take the matter to two separate courts at the same time.

Mr. Ogutu submitted that the Claimant is procedurally before the court and should be allowed to proceed with the case to its conclusion.

Determination

I have considered the pleadings and the submissions by the parties. There are two issues for determination being -

1. What is the relevant law applicable to this suit as between section 4(1) of the **Limitation of Actions Act** and Section 90 of the **Employment Act**, and,
2. What is the effect of Clause 9(ii) of the Collective Bargaining Agreement to the present application.

I will start with the 2nd issued.

Clause 9(ii) of the Collective Bargaining Agreement between SUGAR EMPLOYERS GROUP OF THE FEDERATION OF KENYA EMPLOYERS and KENYA UNION OF SUGAR PLANTATION AND ALLIED WORKERS to which Chemelil Sugar Company Limited subscribers provides as follows -

ii. Suspension

- a) Where misconduct by an employee requires investigations, the employee may be suspended from duty with half pay for a period not exceeding 21 days whilst and inquiry is being carried out.*
- b) Depending on the circumstances, all suspension letters will be accompanied by show cause letters within seven days.*
- c) All suspension/show cause letters shall be copied to the Union Branch Secretary and Human*

Resource Manager within seven days. Where such letters may not be copied for whatever reasons as provided, the union shall take up the matter in accordance with the grievance handling procedures.

d) No suspension period shall exceed 21 consecutive days. If exceeded the employee shall be reinstated except where the Union and Management have both agreed that more time is required to complete the investigations or where the investigation is done by the police or the case is pending before a Court of Law, then the employee will continue to receive half pay.

e) If it is proved that the employee has committed an offence he/she shall be dismissed or terminated as from the date of determination.

f) If the offence does not warrant dismissal or termination of service, the employee shall be served with a written warning letter copied to the Union Branch Secretary.

g) If the offence is not proven the employee shall be reinstated in his/her job, with full pay and benefits from the date of suspension.

h) An employee on suspension shall not be subjected to daily reporting unless required.

i) Security investigations reports touching on suspended employee shall be available to the Union on request.

The Claimant contends that the Respondent acted prematurely and in contravention of clause 9(ii) of the Collective Bargaining Agreement as there was a case pending in court at the time of termination of employment which is the subject of this dispute, and that the claimant was entitled to wait until after conclusion of the case before filing dispute.

This is not a valid argument as the cause of action is not determined by the CBA but by the date on which the action complained of was committed, in this case, the date of termination of employment. What the Respondent should have done is file a complaint immediately on both the breach of the Clause and the premature termination of employment and perhaps seek orders declaring such termination as breach and reinstatement of the grievance.

I will say no more on that issue as it is not the determinant factor in the preliminary objection.

The second and main issue is which between section 4(1) of the **Limitation of Actions Act** and section 90 of the **Employment Act** is applicable to this dispute.

According to the Memorandum of Claim, the employment of the grievants were terminated on 8th October, 2009. This is confirmed by copies of the letters of dismissal appended to the Respondent's statement of Defence. Thus the cause of action arose on 8th October, 2009. This being the case the relevant legislation is the Employment Act which came into force on 2nd June 2008.

By virtue of section 31 of the Limitation of Actions Act the Limitation period under section 4 is amended by section 90 of the Employment Act so that section 4(1) (a) of the Limitation of Actions Act is read together with section 90 of the Employment Act with the effect that limitation period for claims arising out of employment relations is 3 years. Section 31 provides as follows -

31. Part to apply to other laws of limitation

Where a period of limitation is prescribed for any action or arbitration by any other written law, that written law shall be construed as if Part III of this Act were incorporated in it.

The Claim herein should therefore have been filed within 3 years that is by 8th October, 2012. Having been filed on 18th December 2014, the Claim is statute barred and accordingly this court has no

jurisdiction to hear and determine the same.

The consequence is that the suit is struck out. There shall be no orders for costs.

Dated, Signed and Delivered this 19th day of January, 2017

MAUREEN ONYANGO

JUDGE