



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 111 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

JOSEPH NYARIKI OGURI.....CLAIMANT

Versus

KIPKEBE ESTATE LIMITED.....RESPONDENT

R U L I N G

By a Notice of preliminary objection dated 29th March, 2016 the Respondent through its advocates Nyachae and Ashitiva Advocates raised objection to the suit herein on grounds that the claim as filed and presented before the Honourable Court is fatally defective and bad in law for being time barred. On 21st September, 2016 the Respondent filed written submissions in support of the preliminary objection.

The Claimant filed written submissions on 1st November, 2016, opposing the preliminary objection.

When the file came up for highlighting of the submissions on 1st November, 2016 the parties opted to rely entirely on their written submissions.

Respondents submissions in Support of Preliminary Objection

The Respondent submitted that according to paragraph 4 of the Statement of Claim the Claimant's employment with the Respondent was terminated in 2002 but the Claim was filed on 27th May 2014, about 12 years later, outside the mandatory statutory period of 3 years provided for under section 90 of the Employment Act 2007. The Respondent submitted that the Claimant did not move the court for leave to institute his claim out of time even after the court pointed out the fact on 2nd March, 2016.

The Respondent referred to the case of GATHONI v KENYA CO-OPERATIVE CREAMERIES LIMITED, Civil Appli. No. 122 of 1981 as relied upon by Mbaru J in Nairobi ELRC Cause No.1889 of 2015 LYDIA PAMELA NYAGALA v ROYAL MEDIA SERVICES LIMITED In which the court stated that -

"... the law on limitation is intended to protect the defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest ..."

The Respondent further submitted that Article 41 of the Constitution reserves the right of every person including the Respondent as employer, to fair labour practices. The Respondent submitted that section 3 of the Employment and Labour Relations Court Act spells out its overriding/principal objective as the just, expeditious, efficient and proportionate resolution of disputes governed by the Act.

The Respondent submitted that courts cannot be seized of jurisdiction to entertain claims such as the claimant's and that jurisdiction is everything, without which courts have no power to make one more step, and must down tools as was observed in OWNERS OF THE MOTOR VESSEL "LILIAN S" v CALTEX OIL (KENYA) LIMITED [1989] KLR 1.

The Respondent prayed that the preliminary objection be allowed and the claim be dismissed with costs to the Respondent.

Claimant's Submissions

The Claimant opposed the Preliminary Objection through its written submissions dated 31st October, 2016 through his advocates Mboga G. G. & Co. Advocates.

It is submitted that the Claimant was employed by the Respondent in 1996 as a general worker until 2002 when his employment was unlawfully terminated, that he was locked out of the Respondent's premises and denied a chance to collect his personal effects. It is submitted that the claimant tried to settle the claim out of court but failed due to delay by the officer mandated with investigations of the same.

It was submitted for the claimant that section 83 of the Employment Act gives an employee the option of reporting a labour complaint to the Labour Officer or lodging a complaint in the Industrial Court. It is submitted that the Claimant lodged his complaint with the Labour Officer but this channel failed after dragging for a long time. It is submitted that allowing the preliminary objection would prejudice the claimant immensely.

The Claimant referred the court to the Court of Appeal decision in TRUST BANK LIMITED v AMALO COMPANY LIMITED [2002] eKLR in which the court stated that "The Principle which guides the court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit." The Claimant further referred the court to the decision of the court in Tanzania by Georges CJ in the case of ESSANJI AND ANOTHER v SOLANKI [1968] EA 224 where the court stated -

"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right."

The Claimant urged the court to apply the maxim that equity assists the vigilant and not the indolent. It was submitted that the Claimant has not been sleeping on his rights and should be allowed to enforce its rights that have been infringed by the Respondent.

It was submitted that allowing the preliminary objection would cause great injustice to the claimant and that no prejudice will be suffered by the Respondent. The Claimant urged the court to dismiss the preliminary objection with costs.

Determination

I have carefully considered the pleadings, the written submissions of the parties and the authorities cited. There is no dispute that the Claimant's employment was terminated in the year 2002. It is a matter of judicial notice that the implementation date for the Employment Act 2007 is 2nd June 2008 and therefore it is not applicable to the Claimant's case as the cause of action arose before the enactment of the Act. Section 90 of the Act which provides for limitation period of 3 years is therefore not applicable to the Claimant's case.

The relevant law for purposes of this case is therefore the Limitation of Actions Act. Section 4(1) (a) thereof provides as follows -

4. Actions of contract and tort and certain other actions

(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(a) actions founded on contract;

The Claimant's cause of action having arisen in 2002, the limitation period of 6 years lapsed in 2008. In 2014 when the claim herein was filed, the cause of action had been time barred for about 6 years.

The Claimant has narrated in detail what he was doing from the time the cause of action arose till he filed suit. He has however not made any reference to the provisions of the Limitation of Actions Act and how it affects his claim. He has instead relied on the maxim of equity to the effect that equity assists the vigilant. Equity cannot defeat the express provisions of the law.

The Claimant has further sought refuge under section 83 of the Employment Act. As I have already pointed out, the section is not available to him as his cause of action arose many years before the enactment of the Act. The case that the claimant relied upon has no relevance to this case as the issue discussed by the court related to procedural issues about late service of documents on a party.

Limitation of Actions Act is substantive law with the effect of extinguishing a party's cause of action. Once the cause of action is extinguished the court's jurisdiction to enforce the right is correspondingly extinguished as there is no longer any right to be enforced by the courts. This means that limitation compromises the court's jurisdiction to hear a case. This was succinctly stated by the Court of appeal in *DIVECON v SAMANI* when the court stated that -

"No court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for bringing action."

As was stated in *GATHONI v KENYA CO-OPERATIVE CREMERIED LIMITED* quoted with approval by Mbaru J. in *LYDIA PAMELA NYANGALA v ROYAL MEDIA SERVICES*, limitation is intended to protect defendants against unreasonable delay in bringing suits against them.

The Claimant's suit is on the face of it statute barred and therefore bad in law. This court has no jurisdiction to entertain the same. As was stated in *OWNERS OF THE MOTOR VESSEL "LILLIAN S" v CALTEX OIL [KENYA] LTD*, without jurisdiction a court must down its tools and make no further steps.

The fate of this case is thus irreversible. The preliminary objection succeeds and is allowed with the effect that the Claimant's claim is dismissed. There shall be no orders for costs.

Dated and signed and delivered this 23rd day of February, 2017

MAUREEN ONYANGO

JUDGE