



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.332 OF 2015

NICHOLAS MORARA ASUGA CLAIMANT

VERSUS

KENYA REVENUE AUTHORITY RESPONDENT

RULING

1. The respondent, Kenya Revenue Authority filed preliminary objections herein and on the grounds that;

The claim was filed out of the limitation period as provided for under section 90 of the Employment Act;

The claim offends the provisions of section 3 of the Public Authorities limitation Act.

2. Both parties filed written submissions.

3. The Respondent submits that in the Memorandum of Claim filed on 6th March, 2015 the claim and cause of action arose with the dismissal of the Claimant on 2nd June, 2008. In this case, by application of section 90 of the Employment Act, the suit is time barred as it has been filed after a period of over 3 years. The Claimant did not seek for time extension to file suit even where it is apparent from his claim that the suit if filed outside the limitation period.

4. This court in **Lydia Pamela Nyangala versus Royal Media Services Ltd [2016] eKLR** held that the provisions of section 90 of the Employment Act are mandatory. Such provisions are based on sound legal foundations to ensure an employee whose rights have been violated is able to get appropriate redress within 3 years of termination and for the employer to be protected against indolent claimants who unreasonably delay filing suits.

5. The Respondent also submits that under the provisions of section 3 of the Public Authorities Limitations Act, no suit may be brought against the government after 3 years. Section 3 of the Kenya Revenue Authority Act provides that any legal proceedings against the Respondent shall be deemed to be proceedings against the government within the meaning of Government Proceedings Act. In **Sheila Waruga Kimani versus KRA, Cause No.1058 of 2011** the court held that where the parties were in a contractual relationship the provisions of Public Authorities Act applied with regard to limitation of time in making an employment claim against a government entity.

6. In this case there is no allegation of continuing injury. The Claimant was charged in a criminal case and he was acquitted on 28th March, 2014. The claim was then filed within the next 12 months. However, criminal charges and employment disputes cannot be termed as similar. Such cannot constitute continuing

injury as held in **George Hiram Ndirangu versus Equity Bank Limited [2015] eKLR**.

7. The objections made should be allowed and suit dismissed.

8. The Claimant submits that he was suspended by the Respondent on 4th July, 2008 on allegations of stealing and despite his defence; he was unfairly dismissed from his employment on 6th May, 2009. The Claimant was then charged in Criminal Case No.708 of 2008 – Republic versus Nicholas Morara Asuga on allegations of stealing Kshs.2, 074,000.00 among other 9 counts. On 28th March, 2014 the Claimant was acquitted and on 6th March, 2015 he filed his claim herein.

9. The Claimant also submits that section 90 of the Employment act contemplates an employee who has been unfairly dismissed and is faced with a continuing injury of damage within 12 months after the cessation thereof to file suit. The criminal proceedings ended and within 12 months the claim herein was filed, the criminal proceedings related to employment matters and leading to the malicious charges made against the claimant.

10. The criminal case against the Claimant was a continuing injury to the Claimant as the Respondent unfairly and falsely had accused the Claimant and leading to his dismissal. The Claimant required facts and the outcome of the criminal case to prove his claim herein.

11. In **Hesbone Gavunji Mafunya versus KCB, Case No.691 of 2013** the court held that the suit was filed 3 years and 11 months without leave as there was continuing injury and damage within the managing of section 90 of the Employment Act. In **Gladys Amukoya Were versus Mumias Sugar Company, Case No.163 of 2013** the court held that where the Claimant was terminated from employment and criminal charges made against her and the court held there was continuing injury and damage.

12. That section 4(1) of the Limitation of Actions Act provides for actions based on contract to be filed within 6 months and the Claimant has fully complied.

13. The objections herein should be dismissed with costs.

Determination

14. It is not in dispute that the Claimant was dismissed from his employment with the Respondent on 6th May, 2009. The suit herein is filed on 6th March, 2015. Such is a period of over 3 years contemplated under section 90 of the Employment Act.

15. The Claimant has pleaded continuing injury and damage under the provisions of section 90 of the Employment Act and that as such by filing suit after his criminal case acquittal on 28th March, 2014 the was within the 12 months provisions of the law.

16. Section 90 of the Act provides as follows:

“90. 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 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.”

17. Section 4 (1) of the Limitation of Actions Act, Cap.22 provides for 6 years limitation period in the cases founded on contract. The effect of section 90 of Employment Act 2007 is to prescribe 3 years limitation period in place of six years in cases based on the contract of employment.

18. In **Fred Mudave Gogo v G4s Security Services (K) Ltd [2014] eKLR** the court held that a claim

based on the provisions of the Employment Act, 2007 must comply with mandatory provisions of section 90 of the Employment Act and be filed within 3 years from the time when the cause of action arose.

19. The criminal charges made against the claimant, was this ‘continuing injury and damage’ within the meaning of section 90 of the Employment Act so as to enjoy the 12 months rule? once an employee has been *wrongfully, unprocedurally or unfairly terminated* or he has been dismissed, he suffers a violation of the rights to fair labour practice. The employee can file claim within 3 years for The wrongful, unprocedural or unfair termination/dismissal but it cannot be deemed to be continuing because of criminal charges. The criminal process cannot and does not restore the employment relationship which has been ended in breach of the law or contract. The legal regime applicable in criminal and employment relations is fundamentally different. An employee who believes that they have been unfairly treated by the employer has recourse before this court immediately the cause of action arises up and until the 3 years whereas criminal proceedings have a life of their own. Such cannot be juxtaposed to mean continuing injury even in a case where the complaint leading t criminal proceedings arise from the employer.

20. I agree with findings in **Stephen Kamau Karanja & another v Family Bank Ltd [2014] eKLR** where the court held;

When the criminal process is engaged, it cannot divest from the fact that the employee has suffered an injury because of the impugned termination. The injury cannot continue in motion because of the pendency of the criminal process. The criminal process has its own momentum, objectives and purposes.

Different legal principles apply to the criminal process. An employer cannot without more be stopped from proceeding with disciplinary processes as an employer because of pendency of criminal trial unless there is an express intention to await the outcome of the criminal process.

In the same vein, it cannot be that time for purposes of limitation would stop running because an employee has been charged with a criminal offence. If this were the intention, it would have been expressly provided for either in the Limitation of Actions Act or the Employment Act, 2007.

21. Criminal proceedings are not a bar to instituting a claim arising out of employment and labour relations dispute. On-going criminal proceedings against an employee following dismissal from employment are not continuing injury.

As such, for the reasons above I find merit in the objections made by the Respondent and are hereby upheld. The claim file don 6th March, 2015 is statute barred and is hereby dismissed. no order as to costs.

Dated and delivered in open court this 30th day of March, 2017

M. MBARU

JUDGE

In the presence of:

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