



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2124 OF 2014

ELIZABETH WAMBUI MBURU.....CLAIMANT

VERSUS

BOARD OF DIRECTORS KENYA PLANT HEALTH

INSPECTORATE SERVICE (KEPHIS).....RESPONDENT

RULING

The Respondent by Chamber Summons dated 23rd May 2016 brought under the provisions of section 90 of the Employment Act and section 4(1) of the Limitation of Actions Act is seeking for orders that;

Order issued on 22/7/2013 granting Claimant leave to file suit out of time be set aside;

The claimant's suit be struck out for being filed out of time

Costs be provided for.

The application is supported by the affidavit of Frida Mbugua on the grounds that on 22nd July, 2013 the Claimant obtained leave to file suit out of time while the court lacked jurisdiction to extend such time on a suit founded on employment contract. The Respondent was never served with the application seeking leave so as to have a chance to oppose the same. The suit is time barred having been filed 3 years from the date the cause of action arose as required under the mandatory provisions of section 90 of the Employment Act.

The Claimant filed suit on 27th November, 2014 claiming reinstatement and damages against the Respondent on account of alleged unlawful and malicious dismissal. The alleged unlawful dismissal arose from the decision of the Respondent on 25th June 2008 to retire the Claimant on medical grounds. The Claimant thus being founded on employment of the Claimant was filed 5 years after the cause of action arose. The court lacks jurisdiction to entertain the suit and he orders sought cannot issue.

no affidavit of **Frida Mbugua** is attached.

The Claimant filed Replying Affidavit on 26th August, 2016 and avers that the court rightfully acted in granting prayer to file suit out of time and nothing warrant the court to set aside the orders of 22nd July, 2013. From the pleadings and correspondence between parties the dispute has been standing to date and the issue in dispute not settled and suit alive. The suit raises constitutional issues which have not been

addressed. There is no limit in filing constitutional matters.

On 4th October, 2016 the court directed both parties to file written submissions with regard to the respondent's application and chamber summons. Only the Respondent filed written submissions.

The Respondent submits that this court has no jurisdiction to grant the orders sought as suit is filed out of time. Cause of action arose on 25th June, 2008 when the Claimant was retired on medical grounds and she filed suit on 27th November, 2014 a period of over 5 years after the fact. Such offends the provisions of section 90 of the Employment Act.

The Employment Act provides an overriding exception to the limitation period in respect to claims founded on general contracts under section 4(1) of the Limitation of Actions act. The Employment act does not give room for extension of time as held in **Jeremiah Mutua Mutea versus Standard Newspapers Limited [204] eKLR** that the court has no power to extend time of 3 years in disputes relating to employment contracts or one year in cases of continuing injury, given under section 90 of the Employment Act.

The Respondent also submits that the court dismissed an application seeking to extend time to file suit out of time in **Bat Shoe Company (K) Limited versus Laban Chema Libabu [2013] eKLR** and that even where the right to extend time is applied for, the court is denied jurisdiction to extend time to file suit out of time in a matter on employment and labour relations unless he same is premised on a tort in terms of the Limitation of Actions Act as held by the Court of Appeal in **Divercon versus Samani [1995-1998] 1 E.A.**

The Respondent also submits that the Replying Affidavit filed by the Claimant is misplaced on the averments that this suit I a constitutional petition premised on constitutional questions and thus not limited in time which is not the case. The memorandum of claim sets out the issue in dispute as the termination of the Claimant and thus the single issue in dispute is clear and does not relate to constitutional questions. The court in **Benjamin Wachira Ndiithi versus Public Service Commission & another [2014] eKLR** held that even where employment contracts may embody constitutional rights such does not elevate the law on limitation as far as enforcement of the rights concerned. Employment contracts remain subject to limitation either under section 4(1) of the Limitation of Actions Act or under section 90 of the Employment Act and depending on the effective date of the employment contract.

Determination

The application dated 23rd May, 2016 is filed as a Chamber Summons. Questions of law with regard to matters before the court can be addressed by application or by oral submissions before court. On questions of law, such can be addressed by either party at any point of the proceedings and before judgement can be read.

The Respondent took the option to file the Chamber Summons. The issues noted relate to matters of law.

The application on file by the Respondent and dated 23rd May, 2016 has no supporting affidavit. The set out grounds that the application is supported by **Frida Mbugua**, Legal Officer of the Respondent is not attached.

I take it with the missing documents that is crucial and as required by the repealed Court Rules, Industrial Court (Procedure) Rules now the Employment and Labour Relations Court (Procedure) Rules, 2016 the orders of 22nd July, 2013 allowing the Claimant to file suit out of time are not attached or made part of the Respondent application.

This suit was filed on 27th November, 2014. Where there are orders of the court on 27th July, 2013 such is not part and parcel of this suit for the court to be able to take into account.

The matter raised by the Respondent that the suit offends the mandatory provisions of section 90 of the Employment Act is a legal issue and where raised, the same must instantly be addressed by the court. The application is premised on the grounds that, the cause of action arose in 2008 and suit filed in 2015 a period of over 5 years after the cause of action arose. The Respondent further avers that the court allowed the Claimant to file suit out of time.

This court on the materials presented has made an order. Premised on that order even though not attached herein, on the face of it, to allow the Claimant file suit out of time is not a matter that this court can set aside. Where the Respondent is aggrieved thereof, the basis is not an application to set aside. This is not the appropriate remedy.

For this court to move and address the orders of the court allowing the filing of suit out of time as prayed by the Respondent would be to seat on appeal. To set aside such orders on a matter of law is to ask the court to apply its discretion on a concluded matter of law. Further, The orders sought to be set aside are not premised on the pleadings or proceedings herein. The court is thus invited to apply extraneous matters outside of the proceedings and pleadings herein to address a matter of law that is already dealt by orders said to have issued on 27th July, 2013. Such will not meet the ends of justice and will further confuse and mar the issues.

Accordingly, on the basis that the respondent's application is not supported by any affidavit, such being a material factor and further that the orders sought relate to orders of the court that cannot be re-opened and or set aside on material submitted, the application lacks merit, an abuse of court process orders sought cannot issue.

Application dated 25rd May, 2016 is hereby dismissed with costs.

Dated, signed and read in open court this 25th day of May, 2017

M. MBARU

JUDGE

In the presence of:

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