



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1652 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 29th June, 2017)

JOSEPHAT MOSETI MOTANYA.....CLAIMANT

-VERSUS-

AMRUTT KENYA LIMITEDRESPONDENT

RULING

1. The Application before Court is dated 12th August, 2016, wherein the Applicant seek for orders that:-
 1. *The Applicant herein be granted leave to enlarge time in order to file a suit out of time.*
 2. *The attached Draft Memorandum of Claim be deemed as duly filed.*
 3. *The costs of this application be in the cause.*
2. The Application is premised on the grounds that:-
 1. *The Applicant was illegally terminated from his place of work by the Respondent.*
 2. *The Applicant was awaiting the conclusion of the Criminal case No. 3687 of 2012 in Makadara Law Court to conclude but the same is dragging.*
 3. *The Respondent will not suffer any prejudice if the orders are granted while the Applicant stands to suffer if the orders are not granted.*
3. The Application is supported by the Claimant's Affidavit wherein he stated that he was an employee of the Respondent Company working as a Store Keeper for the period between 2006 and 18th July, 2012 when he alleges that he was summarily dismissed without reason and without following legal procedure.
4. He further states that on 18th July, 2012, the Respondent filed a complaint against him wrongly accusing him of stealing several goods from their workshop and he was charged in Court and the case is taking long to conclude.
5. That the Respondent's actions amount to illegal termination and denial of payment of his salary and terminal dues by reason of which he suffered loss.
6. The Respondent has opposed the application and has filed a Replying Affidavit by one Ramesh

Kunvarji Vasta who is the Managing Director of the Respondent. He admits that there was an employment relationship with the Claimant from January 2009 to July, 2012, when he was arrested by the police on suspicion of theft of goods.

7. That he was thereafter charged with the offence of stealing contrary to Section 268 read together with Section 250 of the Penal Code in case No. 3787 of 2012 which is still pending in Court. They state that the application is misconceived as the law does not provide for jurisdiction to grant the orders sought.

8. That the Claimant did a demand letter on 8th August, 2012, going to show that he was aware that he could lodge a claim for the reliefs that he now seeks from an early date and he has not given any reason to show why he did not do so. They pray for the Application to be dismissed for lack of merit.

Submissions

9. The Claimant submits from the facts it is impossible to tell when time began to run for the reason that the Claimant was never formally sacked but was just charged in Court for the offence of stealing. Further that he was not taken through a disciplinary hearing before dismissal. They rely on Section 90 of the Employment Act which provides:

“Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act (Cap. 22), 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.”

10. They further rely on the case of **Mary Osundwa vs Nzoia Sugar Company Limited Civil Appeal No. 224 of 2000** where it was held:

“Section 27 (1) of the Limitation of Actions Act clearly lays down that in order to extend time for filing a suit section 4(2) does not afford a defence to an action founded on tort where the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or a of a written law or independently of a contract or written law) and the Court has, whether before or after the commencement of the action granted leave for the purposes of this Section.”

11. The Claimant further submits that failure by the Respondent to institute disciplinary action against the Claimant prevents the Respondent from raising the bar of limitation. They rely on the case of **Wilberforce Ojiambo Oundo vs. Regent Management Limited (2013) eKLR** where it was held that an employer is not bound to await the outcome of a criminal trial before taking disciplinary action against an employee, the employee’s rights cannot be held in abeyance pending the outcome of a criminal trial. Once an employer decides to initiate an internal disciplinary process against an employee that process must be completed irrespective of the status of the criminal proceedings. They pray for the application to be allowed as drawn.

12. The Respondent on the other hand submits that the Court has no jurisdiction to enlarge time once section 90 becomes operational. That the law does not make provision for extension of time in cases of contract and cite the case of **Denis Kisang Ripko Vs Kenya Commercial Bank Limited (2016) eKLR** where the Court cited the case of **Divecon Limited Vs Samani (1995-1998) 1EA 48 at 54** where the Court stated:

“...no one shall have the right or power to bring an action after the end of six years from the date on which a cause of action accrued on an action founded on contract. The corollary to this is 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 the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract. In the light of these clear statutory provisions, it

would be unacceptable to imply as the learned judge of the superior court did, that ‘the wording of section 4(1) of the Limitation of Actions Act (Cap 22) suggests a discretion that can be invoked.’

13. The Respondent further submits that Article 159(2) of the Constitution of Kenya does not apply since issues of limitation of actions are not procedural issues. That the right to invoke Section 90 of the Employment Act is a substantive one and an issue of jurisdiction as well.

14. They pray for the application to be disallowed.

15. I have considered submissions of both parties and I note that the cause of action arose on 18.7.2012 when the Claimant was summarily dismissed. As per Section 90 of Employment Act, this cause should have been filed by 17th July 2015 and therefore the Claimant is time barred. The issue for this Court to determine is whether this Court has jurisdiction to extend time within which a time barred Cause can be filed.

16. The Claimant has indicated that he was late in coming to Court because he was awaiting the determination of a criminal case No. 3787/2012 wherein he was charged with stealing by servant. However, it is this Court’s position that the pendency of a criminal case against an accused is not a bar to the said accused/(read Claimant) filing a claim for compensation before the Employment and Labour Relations Court.

17. That notwithstanding, this Court has ruled severally that under Section 90 of Employment Act, the Court has no jurisdiction to extend time unless it is in the case of a continuing nuisance whereby the cause has to be instituted within 12 months for the time of cessation thereof.

18. This position was articulated in the Court of Appeal case **Kenya Airports Authority vs. Shadrack Abraham Kisongochi (2016) eKLR** where the Court of Appeal sitting in Kisumu and referring to **Mary Osundwa vs. Nzoia Sugar Company Limited (2002) eKLR** held as follows regarding the provision of Section 27 of the Limitation of Actions Act”

“This Section clearly lays down the circumstances in which the Court would have jurisdiction to extend time. That action must be founded on tort and must relate to the torts of negligence, nuisance or breaching duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort”.

19. This Section does not give jurisdiction to the Court to extent time for filing suit in cases involving contract or any other cause of action other than those in tort.

20. This Court agrees with the above proportion and is in any case bound to uphold the law. I therefore make a finding that the prayers sought by the Applicant cannot be granted and the application is therefore dismissed accordingly with no order as to costs.

Read in open Court this 29th day of June, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Chichi holding brief for Kariu for Claimant – Present

No appearance for Respondent