



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.636 OF 2016**

**LUCY ANDISI ELOLO .....CLAIMANT**

**VERSUS**

**MRS IREN TABU .....RESPONDENT**

**RULING**

1. The ruling herein relates to Notice of Preliminary Objections filed by the respondent, Mrs Iren Tabu on 30<sup>th</sup> January, 2017 on the grounds that;

*The averments in paragraphs 12(2) (a) to (e ) of the Claimant under the heading ‘submissions’ herewith violates the mandatory provisions of section 90 of the Employment Act, 2007 by which they are statute barred and shall therefore apply that the same be struck out in limine.*

*This suit has been brought to this court in clear disregard of the above stated provision and is an abuse of the court process.*

2. The Claimant replied to the notice and avers that section 43 of the Labour Institutions Act provides for the process on the establishment of wages councils and section 45 and 46 provides for the publication of Wage Orders. The averments in paragraph 12 of the Claimant is based on the provisions of section 48 of the Labour Institutions Act and thus do not violate the provisions of section 90 of the Employment Act.

3. A continuing injury or damage at the time of termination constitutes part of the claims that arose with termination of employment on 3<sup>rd</sup> November, 2015 and hence the same not statute barred. The suit being based under the provisions of section 45, 46 and 48 of the Labour Institutions Act is not an abuse of court process as held in Cause No.195 of 2013, **Alfred Mwangi Karuru versus Del Monte Kenya Limited**.

4. The Respondent filed written submissions while the Claimant relied on the grounds filed in opposition to the objections made by the respondent.

5. The Respondent submits that the Claimant filed suit on 7<sup>th</sup> aril, 2016 on the grounds of alleged wrongful termination of employment and that she is owed kshs.753, 629.05 as terminal dues and Kshs.11, and 248.00 lost income per month from 3<sup>rd</sup> November, 2015 until determination of the suit. That the averments made in the claim at paragraph 12 are statute barred by virtue of section 90 of the Employment Act which requires a suit be filed with 3 years. Time cannot be extended to file any claim upon the lapse of 3 years as held in **BIFU versus Kirinyaga District Cooperative Union Ltd & another [2014] eKLR**.

6. The Claimant or her trade union did not address the issue of underpayments. As a sign of no

underpayment, all issues on service gratuity and unpaid leave which the Respondent agreed to and paid but underpayment was not due.

7. Where parties agree to terms in a contract, they are estopped from claiming outside of the same. The Claimant agreed on her own volition to the salary the Respondent was able to pay and is therefore estopped from claiming outside the agreed terms.

8. There was no continuing injury to warrant the claims made under paragraph 12 of the memorandum of claim as held in **Domiciano Kinyua Magambo & 5 others versus Invesco Assurance Company Limited [2016] eKLR**. The Claimant was under a verbal contract of employment which she consented to without duress and question of continuing injury does not arise.

9. The issue in dispute as set out in the Statement of Claim is that of *unfair termination/wrongful dismissal*. The basis of the claimant's claim is that she was employed by the Respondent on 1<sup>st</sup> August, 2008 until 3<sup>rd</sup> November, 2015 when she was terminated and during the course of employment she was underpaid and was not paid the due terminal dues.

10. The Claimant is therefore seeking terminal dues of the nature of underpayments from 2008 on the grounds of the applicable Wage Orders. The objections by the Respondent are that claims outside the 3 years period as required under section 90 of the Employment Act are time barred and should not arise. That the Claimant was paid and accepted the salaries paid and should not claim outside the verbal contract entered into by the parties herein.

11. Section 90 of the Employment Act allow a party in an employment and labour relations claim arising out of matters set out under section 12 of the Employment and Labour Relations Court Act, matters arising out of Labour Relations Act; suits based upon the Labour Institutions Act; to file the same with the court within three (3) years from the time the cause of action arose. The date of the cause of action is the time when the act complained of took place or took effect.

12. Where a claim relates to unfair termination; wrongful dismissal; constructive dismissal or a matter between parties in employment and labour relations outlined under section 12 of the Employment and Labour Relations Court Act, the date of the same must form the basis of filing a suit with the court not later than 3 years from such date. Section 90 is couched in mandatory time and the question of extension of time is dealt by the provisions that all suits should be filed within the 3 years period and not later than such a time.

13. In **Fred Mudave Gogo versus G4S Security Services (K) Ltd [2014] eKLR** where the preliminary objection was upheld on a time bar basis the court observed as follows;

*It cannot be denied that the cause of action herein is based on a contract of employment. The Claimant's employment was terminated on 8<sup>th</sup> August 2008, a period over 3 years from the date of filing this claim in the Industrial Court on the 5<sup>th</sup> June 2013 and therefore by operation of the law, the claim had already lapsed. There are no good grounds advanced for the delay in causing the claimant/applicant from filing the claim in good time.*

14. The court in **Kenya Union of Commercial, Food and Allied Workers v Water Resource Management Authority & another [2015] eKLR** set out a three principles in addressing the question of what constitutes a cause of action and when the time starts running; when a matter before court is time barred; and whether the court can extend time to file suit. Relevant here is what the court cited from the case of **Benjamin Wachira Versus Public Service Commission & Another, [2014] eKLR** that;

*... accrual of the cause of action in a claim emanating from an employment contract takes effect from the date of termination as stated in the letter communicating the termination. The fact that an employee whose employment has been terminated seeks a review or an appeal does not mean that accrual of the cause of action is held in abeyance until a final verdict on the review or appeal.*

15. As such, the Claimant having been terminated from her employment with the Respondent on 3<sup>rd</sup> November, 2015 whether this was through verbal communication or in written form, time started running from such date. The claims arising out of employment from the date employment took effect and such claims were not settled as at the time of the termination, or became part of any claim that the Claimant can lawfully lodge with the court.

16. The contest that claims that arose from 2008 to 2013 abate with time and cannot be part of the cause of action as at 3<sup>rd</sup> November, 2015 is addressed under section 90 of the Employment Act which requires the court to look at all claims arising out of employment as from the date when the cause of action arose. Where the Claimant served without break, served continuously to one employer and such employment did not cease until termination occurred, all claim due and arising out of such termination are valid and must be addressed on their merits. The only condition set under section 90 of the Employment Act is that all such claims must be lodged with the court within 3 years.

**The objections therefore filed by the Respondent are without merit and are hereby dismissed with costs to the claimant.**

Delivered in open court at Nairobi this 29<sup>th</sup> day of June, 2017.

**M. MBARU**

**JUDGE**