



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**CAUSE NO. 566 OF 2016**  
**GEPOFREY MUTAMBU.....CLAIMANT**  
**VERSUS**  
**MABATI ROLLING MILLS LTD.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The claimant brought this suit on 28/7/2016 seeking terminal benefit plus compensation for unfair dismissal by the respondent on 30/7/2012. The respondent filed her defence on 5/10/2016 admitting that she indeed dismissed the claimant summarily on 30/7/2012 but contended that the dismissal was fair because the claimant had committed theft from her which led to his arrest by the police. The respondent further contended that after the dismissal she paid the claimant all his rightful dues and none was outstanding.

2. In addition to the foregoing the respondent objected to the suit on ground that it was filed out of time and was therefore time barred. In response the claimant filled an amended claim to delete the averments that he was served with dismissal letter on 30/7/2012 and pleaded that he in fact received the dismissal letter dated 30/7/2012 on 6/8/2013. By the said amendment the claimant contended that his dismissal took effect on 6/8/2013 when he was notified of the same by the letter dated 30/7/2012. He however filed a witness statement repeating the earlier claim that he was dismissed on 30/7/2012.

3. When the suit came up for hearing on 24/7/2017, the respondent raised her objection to the suit and the court directed the parties to dispose the objection by written submissions. The respondent filed hers on 3/5/2017 followed by the claimant on 18/5/2017.

**RESPONDENT'S CASE**

4. The respondent submitted that she dismissed the claimant on 30/7/2012 for theft and as such his right to sue for wrongful termination lapsed on 30/7/2015. For that reason, he lacks *locus standi* to agitate any cause of action against her and the court lacks jurisdiction to entertain the present suit. According to her, the amendment to the claim is a desperate attempt to breath new life into an already time barred suit. She cited Section 90 of the Employment Act as the basis of her objection. She further cited several decisions of this court to back her objection.

**CLAIMANTS CASE**

5. The claimant has opposed the preliminary objection by the defence and maintained that he was notified of his dismissal on 6/8/2013 after being acquitted from the criminal charges he was facing. He therefore termed the dismissal letter dated 30/7/2012 as a fabrication meant to lock him out from litigating his case. In his view the dismissal letter was prematurely served by dint of the Collective Agreement (CBA) between the respondent and his union.

6. The claimant has further contended that his dismissal was unfair by dint of Section 41 of the Employment Act and cited decisions of this court and Court of Appeal to contend that limitation period can stop running while parties engage in other dispute resolution mechanism and that time can be extended for good cause being demonstrated.

#### ANALYSIS AND DETERMINATION

7. The issue for determination herein is whether or not the suit before the court is time barred. Section 90 of the Act provides that:

*“Notwithstanding the provision of Section 4(1) of the Limitation of Actions Act, no civil action or proceedings based on or arising out of this Act or 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 of or in case of a continuing injury or damage within twelve months next after the cessation thereof..”*

8. In this case, the cause of action arose when the respondent dismissed the claimant from employment by serving him with a summary dismissal letter dated 30/7/2012. According to the claimant initial pleadings and witness statement, he acknowledged that he was dismissed on 30/7/2012. That is the basis upon which the objection by the respondent stands. The respondent further contends that after dismissing the claimant, she paid him his terminal dues including his accrued leave.

9. The claimant corroborates that contention by his August 2012 payslip which he filed alongside his initial pleadings. The said payslip indicates payment of leave, an item which is not reflected in all the other payslips filed by the claimant as exhibits to the suit. Consequently, I find on a balance of probability that the claimant was dismissed on 30/7/2012 by the letter which was served on him the same day. His suit having been filed on 28/7/2016 is therefore time barred and the court must down its tools for lack of jurisdiction.

#### DISPOSITION

10. The suit herein was filed outside the statutory limitation period of 3 years and it is therefore struck out for being time barred.

Dated signed and delivered this 29<sup>th</sup> September 2017

O. N Makau

Judge