



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

CAUSE NO. 136 OF 2017

(Originally Nakuru Cause No. 81 of 2015)

REUBEN NYAMBASO NYAMBAGERA

CLAIMANT

v

INTER SECURITY SERVICES LTD

RESPONDENT

RULING

1. Reuben Nyambaso Nyambagera (Claimant) instituted legal proceedings against Inter Security Services Ltd (Respondent) on 17 March 2015 alleging breach of contract.
2. On 5 April 2017, the Respondent filed a Response and a Notice of Preliminary Objection in the following terms
 1. That the cause of action is time barred as prescribed by the Employment Act, 2007.
 2. That therefore the entire suit should be struck out with costs to the Respondent.
3. The Court took arguments on the Preliminary Objection on 21 November 2017.
4. In urging the objection, the Respondent took the position that the Claimant was dismissed in November 2008 after absconding duty and therefore in terms of section 90 of the Employment Act, 2007, the cause of action was time barred, having been commenced over 3 years after the accrual of the cause of action.
5. The Claimant in resisting the preliminary objection submitted that he was still on suspension as the Respondent had never communicated to him whether his employment had been terminated or not.
6. According to the Claimant, because the suspension still subsisted, this was a case of *continuing injury* and thus not caught up by the 3 year limitation period outlined in the first limb of section 90 of the Employment Act, 2007.
7. A suspension of an employee, within the employment relationship, generally under the common law must have a contractual basis. Without the contractual authority, unilateral suspension by the employer with or without pay would constitute breach of contract (see *McKenzie v Smith* (1976) IRLR 345 and *Kenya Plantation & Agricultural Workers Union v Finlays Horticulture Kenya Ltd* (2015) eKLR).
8. In so far as the Claimant alleged the suspension was in breach of contract, he ought to have instituted legal proceedings within 3 years.

9. However, a legal difficulty arises in the instant case because the Respondent contended that the Claimant deserted work in November 2008 and therefore it was entitled to dismiss him, without expressly stating when or how he was dismissed in the Response.

10. Legally, *desertion* or *absconding work* or even *absence without lawful cause or permission* would constitute a repudiation of contract in that the employee demonstrates an intention not to be bound by a fundamental obligation of the contract (*essentialia* of employment contract).

11. Now, under the common law, a repudiated contract is not terminated unless and until the repudiation is accepted by the innocent party (see *London Transport Executive v Clarke* (1981) IRLR 166; *Geys v Societe Generale, London Branch* (2012) UKSC 63 and *Philomena Aromba Mbalasi v Uni-Truck World Ltd* (2015) eKLR).

12. If the defence advanced by the Respondent is correct that the Claimant deserted or absconded from work, then it would be necessary for it to lead evidence as the innocent party, to show whether it accepted the repudiation.

13. And because such evidence can only be presented during the hearing, it is the view of the Court that the preliminary objection herein does not meet the threshold set out in the case of *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* (1969) EA 696.

14. The preliminary objection is thus unmerited.

15. It appears to the Court that both parties have deliberately not pleaded the full facts in order to bring out the real issues in dispute as a tactical strategy. For example exact dates of suspension and or dismissal are not pleaded. Even the reasons for the suspension are not disclosed.

16. Towards achieving the ends of justice, the Court orders as follows

(i) The preliminary objection is dismissed.

(ii) The Claimant to file and serve an Amended Memorandum of Claim on or before 30 November 2017.

(iii) The Respondent to file and serve an Amended Response on or before 15 December 2017.

(iv) If the Claimant fails to comply with (ii) above, the Cause shall stand struck out.

17. Costs of the objection in the Cause.

Delivered, dated and signed in Eldoret on this 22nd day of November 2017.

Radido Stephen

Judge

Appearances

For Claimant Ms. Khadambi instructed by Kamau Lagat & Co. Advocates

For Respondent Mr. Ngetich instructed by Anthony Burugu & Co. Advocates

Court Assistants Martin/Etyang