

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1695 OF 2012

ROBERT MATOYA MAGETO.....CLAIMANT

VERSUS

BIDCO OIL REFINERIES LIMITED.....RESPONDENT

RULING

1. Before me is a Preliminary Objection dated 13th July 2013 taken by the Respondent that the suit is contra statute in particular that it offends Section 90 of the Employment Act and Section 4(1) of the Limitation of Actions Act as the cause of action arose in July 2005. The preliminary objection was canvassed on 7th November 2017 as counsel for the Respondent Miss Kabagi submitted that the claim is statute barred. It was submitted that the Respondent's records indicate that the Claimant's last date of service was 22nd July 2005 and that this claim was filed on 21st September, 2012 way out of time. She stated that the claim does not fall within the ambit of Section 90 of the Act and that it also fails under the 6 years provided under the Limitation of Actions Act, Section 4(1). She prayed that the suit be struck out and relied on the case **Fred Mudave Gogo v G4S Security Services Limited [2014 eKLR]** whose principle is that limitation is not a mere technicality as it touches on substance and only good reasons can cause the court to grant extension of time. She also relied on the case of **Alex Odhiambo Owiti v Magnate Ventures Limited [2015] eKLR** where there is a somewhat similar principle. The court quoted the Court of Appeal decision of **Gathoni v KCC Limited** and held that the law of limitation to protect Defendants against unreasonable delay. She submitted that the reply to Respondent's Preliminary Objection raised that the Ministry of Labour was seized of the matter and that the process at the Ministry was concluded on 22th October, 2007 when recommendations were given. Yet again the Claimant only filed this claim 5 years later on 21st September, 2012 and she thus submitted that the delay of over 5 years to file a claim after the conciliator's recommendations is unfair. She stated that the suit was not filed within reasonable time. She placed reliance on the case of **KUCFAW v Water Resource Management & Another [2015] eKLR** where the Court found that if conciliation is ongoing, the time stops to run but limitation periods take effect once Conciliation is over. She submitted that the provisions of Section 45 (3) of the Employment Act provides another ground as it allows a party who has served for 13 months can file suit. She stated that the suit is on unfair termination and that the Claimant was a casual working intermittently as shown on amended response between 3rd January, 2005 to 22nd July, 2005 a period of over a little over 6 months. She thus submitted that the Claimant's claim does not fall within ambit of Section 45 and sought its dismissal on that ground and that the claim should be dismissed for being defective for failure to comply with provision of Rule 7(a) of the 2010 Procedure Rules. She stated that the claim has to be signed by Claimant or the advocate and that the papers served on the Respondent were not signed by either Claimant or Counsel. These defects cannot be cured by Article 159 (2) (d) as Rule 7(a) is couched in clear and mandatory terms. She held that constitutional provisions cannot be used to overrun clear statutory provisions.

2. The Claimant who was the respondent in the objection submitted that the Respondent's counsel Mrs. Nyaberi submitted that the authorities cited do not apply to the case. She stated that the Claimant relied on Section 87 (1) of the Employment Act 2007 and that the Claimant had to exhaust all the available avenues. She submitted that the Claimant did not sleep on his rights as he reported the dispute to the Ministry and KUCFAW per the letter of 8th August 2005 addressed to Secretary of union and that the case was taken up by Ministry of Labour who wrote the letter dated 8th November 2005 and another one

of 8th August, 2007 as well as the letters of 27th October, 2007, and those of 27th July, 2005 and 29th March, 2006. She submitted that the communication shows the Claimant could not abandon the matter and that once negotiations failed, that is the time the limitation started running. She stated that the Claimant was keen on pursuing the case and that the Respondent is the one who caused the delay and then rushes to court to stating the suit is time barred. She submitted that the Claimant has a very good case with high probability of success and that if the court grants the opportunity to Claimant to be heard the case will be determined on merits.

3. In her submissions in reply. Miss Kabagi submitted that the Respondent did not have any objection to the Claimant following the dispute resolution under Section 87 of the Act. She stated that the position of the Respondent is that the Claimant took so much unreasonable time from time from the conclusion of the discipline process to commence this case. She submitted that no response had been made on the issues she had raised and that the Preliminary Objection should be allowed on the uncontested grounds.

4. The objection taken is one on limitation. Limitation of actions was in respect to cases under the repealed Employment Act cap 226 subject to the provisions of Section 4(1) of the Limitation of Actions Act cap 22 as the Employment Act did not have an express provision on limitation. Under the Employment Act 2007, the provision on limitation is found under Section 90 of the Act. Under the previous legal regime, the limitation was capped at 6 years whereas the 2007 Act sets the limit at 3 years and one year after cessation for a continuing breach. The Claimant herein was relieved of his position in July 2005 and the outer limits of the limitation period was 23rd July 2011 which was 6 years after the determination of his employment. If the present Employment Act was to apply, it would only apply if the termination occurred after the commencement of the act. In this case, the applicable law was the repealed Employment Act. The claim was filed on 21st September 2012 when the time for filing the suit had expired. The Court of Appeal (Waki, Nambuye, Kiage JJA) recently pronounced itself in the case of **David Waweru v Hon. Attorney General & Another [2017] eKLR** citing with approval the case of **Boniface Inondi Otieno v Mehta Electricals Ltd [2016] eKLR** as follows:-

*There is a long line of authorities on the application of section 4 (1) and we do not share the desperation of the appellant, through counsel, that the law is in a state of confusion or flux in the ELRC. Yes, some conflicting decisions in that court exist. But this Court, which guides the ELRC, has been emphatic that there is no discretion to extend the time limitation of six years set under section 4 (1) of LAA - see the **Divecon case (supra)**. The Court has also held in the **Boniface Inondi Otieno case (supra)** that the pursuit of a parallel remedy does not stop time from running, thus overruling the ELRC which had extended sympathy to the appellant on account of having pursued similar remedy before another court.*

5. I am entirely in agreement with the Court of Appeal that in spite of this case being one where an alternative route for remedy was pursued, time did not stop running. The time to lodge a claim thus ran out before the present suit was filed and even if the Court is sympathetic to the Claimant there is no room to extend time. The Respondent's objection thus succeeds and the claim is struck out with no order as to costs.

It is so ordered.

Dated and delivered at Nairobi this 16th day of November 2017

Nzioki wa Makau

JUDGE