

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NUMBER 1965 OF 2015

SAMUEL NDUNGU GITONGA..... CLAIMANT

VERSUS

TNS RESEARCH INTERNATIONAL LTD..... RESPONDENT

RULING

1. The respondent raised as preliminary the objection that the suit herein was statute barred in that it offended section 90 of the Employment Act, which prohibits the filing of suits based on the Act or Employment contracts generally, more than three year from the date of the accrual of the cause of action.

2. According to the respondent the alleged cause of action as stated in paragraph 1 of the memorandum of claim arose on 30th April, 2006 when the claimant's contract of employment was terminated by effluxion of time. The claim therefore became time barred on 30th April, 2009 exactly three years thereafter. The respondent further contended that even if the cause of action accrued in June 2006 when the claimant alleges to have received his last payment, the claim was still barred under section 4(1) of the Limitations of Actions Act given the fact that time lapsed in June 2009.

3. The claimant on its part submitted that his services were terminated in June, 2008 which he disputed and referred the matter to the Minister who proceeded to appoint a conciliator. Upon deliberations, the conciliator recommended that the claimant be paid severance pay at the rate of 15 days for every complete year of service. By a letter dated 30th July 2014 the respondent being dissatisfied with the labour official's recommendations sought a certificate confirming that the dispute had not been resolved by the conciliator for filing in the then Industrial Court. This request was granted by a letter dated 6th October, 2014.

4. According to the claimant's counsel, the law applicable at the time of termination of claimant's services was the Employment Act (cap 226) (repealed) and the Trade Disputes Act. It therefore followed that the limitation provisions in section 90 of the current Employment Act were not applicable to contracts for services terminated before its commencement. Further, in claims for unfair termination where compensation, reinstatement or re-engagement was sought the applicable substantive law was section 15 of the Trade Disputes Act (repealed). Under that Act the court could not take cognizance or deal with a trade dispute which was in the process of settlement, investigations or determination by other lawful means.

5. It therefore followed that during this period which the Minister was seized of the matter resting with the letter dated 6th October, 2014 certifying that the dispute could be escalated to the next level, time could not run. Counsel relied on the case of **Silvester Ndega Oniango Vs Cables and Plastics & Another [2015] eKLR** where Justice Rika held that once the Minister has exercised his discretion, the statutes of limitation would have no effect on subsequent adjudicatory process before the Labour Court is seen as a continuation of a multitiered dispute resolution *edifice*, so that the cut off point in time for filing of the claim cannot be confirmed to the date of filing the statement of claim.

6. Apart from the authority cited by counsel for the claimant, the court in an earlier case of Kenya Plantation Agricultural workers Union Vs Mununga Leaf Base 2013 eKLR has held that resolution of

labour and employment disputes is a process with the court in most cases, the final arbiter when other pre-court mechanisms fail. What this meant was that once a disputant invokes the prescribed dispute resolution mechanism the accrued cause of action becomes suspended until the outcome of the conciliation process is known. The failure of the conciliation process to warrant litigation is usually known when the conciliator issues his certificate referring the dispute to the court in accordance with section 69 of the Labour Relations Act.

7. In this particular case, the certificate was issued on 6th October, 2014 and the matter filed in this court on 4th November, 2015. This cannot be said to have offended the Employment Act, 2007 or the Limitation of Actions Act whichever would be applicable in this case.

8. The court therefore finds no merit in the preliminary objection and hereby directs that the suit proceeds to full trial on merits.

9. It is so ordered.

Dated at Nairobi this 10th day of November 2017

Abuodha J. N.

Judge

Delivered this 10th day of November 2017

Abuodha J. N.

Judge