



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO.1889 OF 2015

LYDIA PAMELA NYAGALA CLAIMANT

VERSUS

ROYAL MEDIA SERVICES LTD RESPONDENT

RULING

1. On 19th November 2015, the respondent filed Notice of Preliminary Objection to the claim was filed on the grounds that the cause of action is time barred pursuant to section 90 of the Employment Act; the cause of action arose on 19th June 2012 when the claimant was retrenched; and that there is no jurisdiction to entertain the suit and should be struck out with costs.
2. Both parties filed their written submissions.
3. The respondent submitted that the principles with regard to preliminary objections are set out in **Mukisa Biscuit Co. versus West End Distributors [1969] EA** where such objections must be on a point of law pleaded and with its determination may dispose of the suit. In this case the claimant has not complied with the mandatory provisions of section 90 of the Employment Act, she was terminated from employment on 19th June 2012 and the claim was filed on 23rd October 2015 a period of over 3 years since. The claim relates to employment and labour relations and to file it after the limitation period makes it time barred.
4. The principles set out in the case of Owners of Motor Vessel Lillian “S” versus Caltex (K) Ltd [1989] KLR, is that a court must have jurisdiction to entertain any matter. Where the claim is time barred for having been filed outside the mandatory time period make it out of the court jurisdiction. To move with the suit any further would be without such a necessary prerequisite.
5. The respondent submit that in the circumstances of this case, the court cannot confer jurisdiction to a suit that is time barred and must be dismissed. The claimant has failed to comply with the legal provision under section 90 of the Employment Act. The respondent has relied on the following cases – **Mutinda Anthony Nzioka versus TSC [2014] eKLR** and **Fred Mugave versus G4S Security (K) Ltd [2014] eKLR**.
6. The claimant submit that the claim is premised on the violation of fair labour practices protected under article 41 of the constitution and section 90 of the Employment Act does not apply. The court has unlimited jurisdiction over employment and labour relations matters to entertain claim on the violation of fundamental rights and freedoms. The objections raised relate to matters of fact and not law and should be dismissed.

7. Paragraphs 4 to 26 of the Claim comprise factual exposition of violations of claimant's rights and article 229(1) of the constitution apply without restriction. The court, guided by the provisions of article 259(1) of the constitution should interpret the matter before is in a manner that promotes the constitutional purpose, values and principles so as to advance the rule of law, development of the law, and for good governance. As a superior court, the court has the jurisdiction to hear the matter under article 162(2) of the constitution. Further the court under section 3 and 12 of the Employment and Labour Relations Court Act set objectives and jurisdiction of the court with a mandate to grants the orders sought by the claimant. In this regard, section 90 of the Employment Act, 2007 was enacted under the constitution, 1963 which did not have the right to fair labour practices and therefore any violations in employment should not be allowed under the current constitutional regime.

8. The claimant has relied on the cases of **USIU versus Attorney General [2012] ekr; KEMRI versus AG & Others [2014] ekr; and Eliud Gatundu Wanjohi & 3 Others versus Kenya Railways Corporation [2014] ekr.**

Determination

9. It is the submission of the Respondent that the Claim is time barred by virtue of Section 90 of the Employment Act, 2007 which provides,

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

10. Though the claimant in the Statement of Claim does not comply with the provisions of Rule 4 (e) of the Court Rules, prayer (a) relate to;

A declaration that the termination of the claimant's employment was unfairly, unlawful and unprocedural.

11. The basis of the claim is that on 19th June 2012 she was retrenched, stripped off her employment, medical cover and other benefits and dismissed from employment. That the termination was in blatant contravention of the constitution and the Employment laws which guarantee the right to fair labour practices.

12. Therefore, the claim is premised on the employment of the claimant by the respondent. It is trite that such a relationship is governed by the Employment Act vide letter of appointment issued to the claimant by the respondent and dated 17th January 2005. The claim, premised on the fact that the claimant was terminated on the reason of retrenchment or redundancy, whether valid or just is a matter governed under the Employment Act, 2007 as at 19th June 2012 when such termination occurred. The regulation of the relationship therefore being governed by the applicable law, section 90 of the Employment Act require that any suit arising out of an unfair labour practice should be filed within 3 years.

13. A claim under the Employment Act, 2007 filed before this court is also guided by the Rules of the Court. Under such Rules parties who file a Statement of Claim, a Memorandum of Claim or simply a Claim, set out the right violated and the remedies sought. However where a party is aggrieved by the violation of constitutional rights and freedoms, section 12 of the Employment and Labour Relations Court Act, allow such a party to seek remedies set out under section 12 by filing a Petition setting the remedies and prayers prayed for under such a suit. Filing of a Petition has the benefit of reliance on rules now established under article 22 which allow for the grant of constitutional remedies while a claim filed under the Rules of the Court allow for the grant of remedies set out under the Employment Act, 2007 particularly under section 49.

14. The context therefore of the authorities cited by the claimant **USIU versus Attorney General** and

KEMRI versus AG & Others, are fundamentally different from the case herein. Such is different from the case in **Eliud Gatundu Wanjohi & 3 Others versus Kenya Railways Corporation**, in that this suit was filed in accordance with the Court Rules and under a statement of claim. In the case of **Eliud Gatundu Wanjohi & 3 Others versus Kenya Railways Corporation**, the finding on time limitation of predicated on the finding that the parties had engaged in negotiations with correspondences spanning a time that tilted the issue of limitation. There was also the finding that the issue of time in that case required further interrogation and could not be determined *in limine*. This is not the case here, the fact of time is not disputed. Termination of the claimant's employment was on 19th June 2012. The Statement of Claim was filed on 23rd October 2015. That was a time of over 3 years since the cause of action arose. Such is regulated by section 90 of the Employment Act.

15. The provisions of section 90 of the Employment Act, 2007 are premised on sound legal foundations. Such is set to regulate employment and labour relations disputes and to ensure that an employee whose rights have been violated is able to get appropriate redress within 3 years of termination. Equally an employer is protected against indolent claimants who unreasonably delay filing their suits. This is aptly captured by the Court of Appeal decision in the case of **Gathoni versus Kenya Co-operative Creameries Ltd, Civil Appl. No.122 of 1981** that;

The law on limitation is intended to protect the defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.

16. Such findings are grounded upon the recognition that there exists constitutional and legal rights, such rights must be asserted within reasonable parameters of the applicable law. The law applicable in this case is section 90 of the Employment Act, 2007 which when read with the provisions under article 41 of the constitution firmly entrenches the constitutional protections therein. Such as submitted by the claimant is also the basis of the objectives of the court set out under section 3 of the Employment and Labour Relations Court Act which requires this court to act expeditiously so as to guarantee the just administration of disputes.

The objections raised by the respondent must succeed in that the claim herein is filed out of the limitation period set out by section 90 of the Employment Act. With the objections thus allowed, the suit cannot stand and is dismissed. In the interests of justice, each party shall bear the own costs.

Orders accordingly.

Delivered in open court at Nairobi this 25th day of February 2016.

M. Mbaru

JUDGE

In the presence of

Court Assistant: Lilian Njenga

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