



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.127 OF 2015

(Before D. K. N. Marete)

JOASH MONG'ARE AKUNGA.....CLAIMANT

VERSUS

THE NATIONAL OIL CORPORATION OF KENYA.....RESPONDENT

RULING

This is a preliminary objection by the respondent dated 22nd June, 2015 and comes out as follows;

1. *The claim herein is statute-barred under the Employment Act, 2007, the Employment Act (Repealed), Chapter 226 of the Laws of Kenya and the Limitation of Actions Act, Chapter 22 of the Laws of Kenya.*
2. *The claim herein is frivolous, vexatious and/or otherwise an abuse of this Honourable Court's process.*

The preliminary objection was canvassed by way of written submissions by the parties.

The Respondent in her written submissions avers that the claim as presented is bad in law and is statute barred under the Employment Act, 2007, the Employment Act, Chapter 226, Laws of Kenya, now repealed and the Limitation of Actions Act. It is also the respondents submission that the claim is frivolous, vexatious and an abuse of the process of court.

“In the Amended Statement of Claim dated 28th July, 2015 and filed on 29th July, 2015 (hereinafter the Statement of Claim), the Plaintiff states that he was employed by the Respondent on 29th July, 1997 on probationary terms and his employment was confirmed on 16th January, 1998. On 12th April, 2001, the Claimant was suspended from employment vide a letter dated 12th April, 2001 and by the said letter, he was instructed to hand over to the Respondent's designated employees, and to report to one Mrs. Misoi fortnightly until such time that he would be advised not to by the said officer. The Claimant was never recalled to employment by the Respondent.”

The respondent pleads and submits a case of constructive dismissal and sought to rely on the authority of **David Musuwika Musundi v CFC Stanbic Bank (2014) eKLR** where the court stated as follows;

“Termination in the case before me was in the class known as constructive dismissal. The Claimant was not paid a salary for the months of March 2002 to December 2002. No salary was paid between January 2003 to December 2003. That was clearly a sign that the contract had come to an end. The treatment by the employer in failing to pay the employee a salary was sufficiently bad enough for the Claimant to regard himself as dismissed. In short, constructive dismissal occurs when the employer commits a fundamental breach of the contract. The employee was entitled to pay under the contract and non-payment of salary constituted a fundamental breach. Section 18 (5) of the Employment Act makes provision on termination of a contract of service by effluxion of time.”

Therefore no employment subsisted in December, 2002.

Again, the respondent submits as follows;

The Claimant's allegation that he remained under suspension for thirteen years while the criminal case was ongoing is unreasonable and cannot be sustained. Criminal proceedings are not a bar to the institution of civil proceedings on matters founded on contract, and it cannot therefore be held that the cause of action herein accrued on 27th September 2013 when the Claimant was acquitted of the criminal charges levied against him.

She further sought to rely on the authority of **Divecon v Samani (1195-1998) EA 48** cited in **Peter Nyamai & 7 Others v M.J. Clarke Limited (2013) eKLR**, where the court while considering the question of grant of leave or extension of time in respect of causes of action based on contract stated as follows;

“to us, the meaning of the wording of section 4(1).....is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action.....”

The claimant submits an absence of time bar in this cause and contends that the contract of employment is still in force as no termination was indeed made. He further seeks to rely on the authority of Section 4 (4) of the Limitation of Actions Act as follows;

“4 (4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest becomes due.”

He further sought to buttress this with the authority of **Andrew Maina Githinji & Another Versus Attorney General & Another (2015) eKLR** where the court upheld his decision in **Kenya Petroleum Workers Union Versus Kenya Pipeline Company Limited (2014) eKLR** and held as follows;

“Nevertheless, the court has considered the acquittal order of 14.07.2006 and finds that the grievants' and claimant's cause of action was properly grounded upon that acquittal order. Section 4 (4) of the Limitation of Actions Act provides 12 years as the limitation period for actions based on a court judgment or order and the court finds that the

claimant's suit was not time barred as based on the acquittal order."

Two observations come out of the submissions of the parties. Firstly, the respondent seems to rely on the doctrine of constructive termination of employment to locate a date of termination, there having been no letter of termination to the claimant. This is not sustainable and fails. Secondly, the claimant seeks to rely on Section 4 (4) of the Limitations of Actions Act above cited as employed in the authority of **Andrew Maina Githinji** above cited. This is the applicable position in law and precedent.

This matter however, has to be decided from the standpoint of a preliminary objection. This would call for reliance on the authority of **Mukhisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Company Limited, (1969) E.A. 696** where the court of appeal set out the meaning and basic principles of a preliminary objection as follows;

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

Further,

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of the judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."

The issue before court is whether this preliminary objection passes the test as set out above. It is my feeling that it does not. This is because it would require a scrutiny of further data and evidence on termination to establish its exact time so as to lead to a case of time bar. I am therefore inclined to dismiss the application with orders that each party bears its own cost in the matter.

Delivered, dated and signed this 24th day of February 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss Mwangi holding brief for Nyanchiro for the claimant.
2. Miss Chege for the respondent.