



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 147 OF 2014
(ORIGINALLY KISUMU HCC CASE NO. 09 OF 2013)
(Before Hon. Lady Justice Maureen Onyango)

PAUL OLANG' AKEYO.....PLAINTIFF

-Versus-

MAURICE ABURA OWINO.....1ST DEFENDANT

LILIAN ANYANGO ODHIAMBO.....2ND DEFENDANT

GEORGE OTIENO MUGUDHO.....3RD DEFENDANT

KANO PLAIN CHILD AND FAMILY PROGRAMME...4TH DEFENDANT

P.C. ETYANG.....5TH DEFENDANT

THE ATTORNEY GENERAL.....6TH DEFENDANT

R U L I N G

By a Plaint dated 5th February, 2013 filed on the same date the Plaintiff alleges that he was employed by the Kano Plains Child and Family Programme as a social worker. He alleges that he was wrongfully dismissed by the Executive Committee of the Programme on 16th September, 2004. The 1st, 2nd and 3rd Defendants are sued in their capacity as Chairperson, Secretary and Treasurer of the Kano Plains Child and Family Programme, the 4th Defendant while the 6th Defendant, the Attorney General is sued on behalf of the Permanent Secretary Office of the President. It is not clear from the Plaint why the 5th Claimant, a police officer, has been joined in the suit.

The Plaintiff prays for the following reliefs:-

(a) One month in lieu of notice

(b) Terminal benefits

(c) pending annual leave

(d) Salary arrears 9 months

(e) Pending claims die for refund

(f) *General damages for defamation of character, malicious prosecution and false imprisonment*

(g) *Cost of the suit and interest*

The 1st, 2nd, 3rd and 4th Defendants filed their defence on 20th May, 2013 in which they denied the allegations in the plaint. The 1st, 2nd, 3rd and 4th Defendants further denied that the High Court had jurisdiction to hear the case, and further averred that the claim is statute barred.

The 5th and 6th Defendants filed their defence on 6th June 2013 also denying the allegations in the plaint. The 5th and 6th Respondents averred that the plaint was statute barred and offended the mandatory provisions of The Public Authorities Limitations Act, Cap 39 of the Laws of Kenya.

The case was transferred to this court by the High Court on 12th June, 2014 upon which it was registered under the current cause number.

On 2nd September, 2014 the 1st, 2nd, 3rd and 4th Defendants filed a Notice of Preliminary Objection on grounds that the suit violates section 90 of the Employment Act No.11 of 1007.

The parties agreed to Canvass the Preliminary Objection by way of written submissions.

In the written submissions filed by the P.D. Onyango & company Advocates on behalf of the 1st, 2nd, 3rd and 4th Defendants, it is argued that the Plaintiff's claim is filed out of time, having been dismissed from employment on 16th February, 2004 while the Plaint was filed on 5th February, 2013.

It was further submitted that the Claimant's suit is misconceived and incompetent, and that the suit ought to be dismissed for reasons that the suit would deny the Defendants protection of the law against, unreasonable delay in bringing an action, that the law obliges litigants to exercise due diligence and to take reasonable steps in instituting legal actions and that this court has no jurisdiction to extend limitation period.

The 1st, 2nd, 3rd and 4th Respondents relied on the case of **RAMA KRISHNARAO v SAJ CERAMICS LIMITED**, Industrial Court Cause No.2138 of 2012 in which the court held that the provisions of the Employment Act provide for suits to be brought to court within 3 years without exception.

They further relied on the case of **PETER NYAMAI & 7 OTHERS v M. J. CLARKE LIMITED [2013]eKLR** in which the court held that *"... the court has no jurisdiction or discretion to extend time or grant leave of court to file a case grounded on a breach of employment contract where the limitation time set out in section 90 of the Employment Act has expired."* and further that *"...it is the general legal principle that a limitation clause grants a respondent or defendant an accrued substantive benefit/right/defence of limitation."*

The 1st, 2nd, 3rd and 4th Defendants also relied on the case of **BEATRICE KAHAI ADAGALA v POSTAL CORPORATION OF KENYA [2014] eKLR** in which the court held that *"To file a suit and to seek within the suit to have time extended to bring the "illegal" suit in conformity with the law is an abuse of the court which this court cannot entertain. This suit having been filed already out of time, the application to extend time and correct the situation is untenable and is therefore dismissed."*

The 1st, 2nd, 3rd and 4th Defendants prayed that the suit being fatally defective, should be dismissed with costs to the defendants.

The 5th and 6th Defendant's submissions raised preliminary objection to the Claimant's suit on grounds that it is time-barred and offends the Public Authorities Limitations Act. They submitted that the basis of the suit against the 5th and 6th Defendant;s is **NYANDO PM CR. CASE NO.140 of 2915** whose

judgement was delivered on 13th April, 2010. They submitted that the Plaintiff prayed for general damages for malicious prosecution, defamation and false imprisonment which are torts and ought to have been brought within 12 months after the date of the Plaintiff's acquittal.

The 5th and 6th Defendants further submitted that the plaintiff did not seek leave of the court to file suit out of time hence the suit is bad in law and should be dismissed with costs to the defendants.

On his part the Plaintiff submitted that he was dismissed on 16th September, 2004 before the coming into force of the Employment Act 2007 hence the applicable statute is the repealed Employment Act and the limitation period applicable is 6 years. He submitted that the Employment Act 2007 does not apply to his case and the limitation period in respect of his case has not lapsed.

The Claimant relied on the case of **MACHUKA ANYONA JULIUS & 5 OTHERS v OMAERA PHARMACEUTICALS LIMITED CAUSE NO.1189 OF 2012** in which the court held that the Act has no retrospective application.

The Claimant also relied on the case of **ESTHER KAHAI KIHIMA v TRIDENT INSURANCE COMPANY LIMITED [2013]eKLR** in which the court held that the claim filed by the Claimant therein was not statute barred as it was filed 5 years and 8 months short of the limitation period of 6 years applicable under section 4(1) of the Limitation of Actions Act, and that the Claimant having been terminated on 1st July 2007 before the coming into force of the Employment Act 2007, the applicable law was the repealed Employment Act.

The Claimant submitted that the right to bring a claim by the claimant against the respondents therefore accrued on the 13th April 2010 when the Criminal charges against him by the 4th Defendant were dismissed and thus the preliminary objection lacks merit and should be dismissed.

The Plaintiff first lodged his complaint with the labour officer Kisumu on the 24th September 2004, and a letter was written to the Chairperson Kano Plains on the 27th September 2004 summoning them for a hearing but they did not respond, that on the 1st November 2004 the Plaintiff wrote to the 4th Defendant claiming his terminal benefits and dues again they did not respond, and that on the same date the labour officer wrote to the 4th Defendant requiring them to appear before the Labour Officer on the 10th November, 2004 which letter they did not respond to.

He submitted that on the 30th November 2004 the Plaintiffs advocate wrote to the 4th Defendant informing them of the Plaintiff's intention to sue and demanding for the plaintiffs benefits which latter they responded to on the 17th January 2005. On 8th December 2004 the plaintiff was charged with stealing by agent and the matter was heard to conclusion and Judgement delivered on the 13th April 2010 acquitting the Plaintiff . He then filed a case at the High Court sometime on the 5th February 2013 against the Defendants being Kisumu High Court Case No.9 of 2013 and on the 30th June 2014 the matter was transferred to the Industrial Court and assigned the number Kisumu Industrial Cause No. 147 of 2014.

It was further the submission of the Plaintiff that Section 90 of the Employment Act 2007 is not merely procedural but substantive provision. That it is a general presumption at common law and rule of statutory interpretation that statutes should not be interpreted to operate retrospectively unless there is express intention by the legislature.

The Plaintiff relied on the Interpretation and General Provisions Act. Cap 2 which provides under section 23 provides:

(1) where in a written law a reference is made to another written law, that Reference shall, except where the context otherwise requires, be deemed to include a reference to the last mentioned written law as it may from time to time be amended.

(2) Where a written law repeals and re-enacts, with or without modification, a provision of a

former written law, references in another written law to the provisions so repealed shall, unless a contrary intention appears, be construed as references to the provision so re-enacted.

(3) Where a written law repeals in whole or in part another written law, then unless a contrary intention appears, the repeal shall not -

(a) Revive anything not in force or existing at the time at which the repeal takes effect; or

(b) Affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or

(d) Affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or ...

The Plaintiff thus prayed that the preliminary objection be dismissed and relied on the case of **Balozi Housing Co-operative Society Ltd versus Samuel Waiganjo Thuo t/a Waiganjo and Associates [2002]eKLR** where the court held that in a case with a single triable issue, a party should be given their day in court and the same issue heard on merit.

Determination

I have considered the submissions of both parties. The issue for determination is whether the claim filed by the Claimant is statute barred and whether the suit is bad in law for failing to seek extension of time before filing. A further issue for determination is whether the applicable law is the Employment Act 1976(repealed) or the Employment Act 2007.

I will begin with the last issue that is, which law is applicable.

As was stated in the case of **MACHUKA ANYONA JULIUS & 5 OTHERS v OMAERA PHARMACEUTICALS LIMITED** cited by the Claimant, the law applicable to this case is the repealed Employment Act. This is because the Claimant's employment was terminated on 16th September, 2004 before the enactment of the Employment Act 2007.

The next issue is whether the suit is statute barred.

The 1st, 2nd, 3rd and 4th defendants argue that the suit against them for unfair termination is statute barred. Their argument that it offends section 90 of the Employment Act 2007 has already been dealt with. However, even if the case is considered under the repealed Employment Act which provided for a 6 year limitation period as provided for contracts under the Limitation of Actions Act, the suit is still statute barred as it was filed at the High Court on 5th February, 2013 more than 6 years after the termination of the Claimant's Employment on 16th September, 2004.

The Claimant's contention that the cause of action arose upon the Plaintiff's acquittal in Criminal charges against him on 13th April, 2010 is only applicable to the claim against the 5th and 6th defendants for defamation and false imprisonment which accrued after his acquittal. However, the Plaintiff has not shown that he complied with the Public Authorities Limitation Act which requires that such claims are filed within a year.

The 5th and 6th Respondents further raised the issue of the plaintiff's failure to seek extension of time. This being the case, the claim is on the fact of it, bad in law. As was stated by the court in the case of **BEATRICE KAHAI ADAGALA v POSTAL CORPORATION OF KENYA**, the leave should be sought before the claim is filed as without leave, the claim is bad in law and what is bad in law cannot be cured retrospectively by an order of the court.

For these reasons the preliminary objections by the Respondents succeed. The Plaintiff's suit is struck out for being filed outside the limitation period. Each party shall bear its costs.

Dated and signed and delivered this 26th day of May, 2016

MAUREEN ONYANGO

JUDGE