



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO.596 OF 2015

WASHINGTON OMOLO OWINO.....CLAIMANT

VS

RIFT VALLEY RAILWAYS (K) LTD.....RESPONDENT

RULING

Introduction

1. The application before the court is the respondent's Notice of Motion dated 9.11.2015. It is brought under Article 159(1) 8(2) and Article 50(1) of the Constitution of Kenya, Section 90 of the Employment Act (EA), Section 3, 12 and 20 (1) of the Employment and Labour Relations Court Act (ELRCA), Order 2 Rule 15 (1) (a) of the Civil Procedure Rules (CPRs), inherent powers of the court and all other enabling laws. The Motion seeks for the striking out of paragraphs 7, 8, 10, 11,12,13,14 and 17(c) of the statement of claim for being time barred and for disclosing no cause of action in law. The said paragraphs relate to salary arrears resulting from under payments.
2. The Motion by the claimants through the replying affidavits dated 1.2.2016. According to the claimants, the under payment was a continuous breach of their employment contract that stretched from 2006 to October 2014 when they were retrenched. That under section 90 of the EA, the cause of action for their continuing breach or injury through under payment was to last upto October 2015 being 12 months from the date of termination being October 2014. That they filed their suits on 13.8.2015 before the lapse of the said 12 months limitation period.
3. The Motion was disposed of by written submissions.

Analysis and Determination

4. After careful consideration of the pleadings, Motion, the Replying affidavit and the rival submissions, it is clear that the cause of action involves under payment of salary to the claimant from 2006 till October 2014. There is no dispute that the breach by the respondent was continuing breach. There is also no dispute that the claimants were retrenched in October 2014 and filed their suits on 13.8.2015. The issue for determination is whether the claim for the salary under payment was filed out of time.

Time barred claim

5. Section 90 of the Employment Act provides that:

“Notwithstanding the provisions of section 4 (1) of the Limitations of Actions Act Cap 22, no civil action or proceedings based 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.”

6. The applicant submitted in part that:-

“...Since the allegation of underpayment and unpaid accrued shift allowances were of continuing nature the claimant should have filed his claim within 12 months after cessation thus the claimant can only claim based on allegations that occurred within 12 months prior to 13th August 2015 that is 13th August 2014 anything outside the said duration is contrary to section 90 of the Employment Act and the court lacks jurisdiction to entertain it.”

7. With due respect, the foregoing submissions by the applicant is not correct in relations to the facts of this case. It is therefore dismissed for being misconceived and invalid. The correct position is that the cause of action arose in October 2014 when the claimants were retrenched and was to expire in October 2015 which is 12 months from the time when the continuing default by the respondent to pay shift allowances and underpaid salary cease. The suit herein were filled on 13.8.2015 which was on the tenth month after the ceasartion of the default complained. Consequently the court finds and holds that the suits were filed within the statutory limitation period and are properly before the court.

Disposition

8. The respondent’s Motion dated 9.11.2015 is dismissed. Costs in the cause.

Dated, signed and delivered at Mombasa this 6th day of May 2016.

HON. ONESMUS MAKAU

JUDGE