



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA

CAUSE 458 OF 2015

PETER MUMO.....CLAIMANT

CAPTAIN ANDY'S FISHING SUPPLY LTD.....RESPONDENT

RULING

Introduction

1. On 9.7.2015, the Claimant brought this Suit seeking terminal dues plus compensation for unfair termination of his employment by the Respondent. Paragraph 3 and 13 of his Memorandum of Claim states as follows:-

“3. At all material times to the Suit herein, the Claimant was an employee of the Respondent from the 8th day of February 2007, as a Stock Control System Manager upto the 20th of April 2011.

13. By dint of the Claimant's malicious prosecution, the Respondent wrongly and unfairly terminated Claimant's on or about the 20th of April 2011 and has thereby suffered loss and damage.”

2. In response the Respondent filed her defence on 18.8.2015 denying liability for unfair dismissal of the Claimant and contending that the Suit is time barred. Simultaneously with the defence he filed a notice of Preliminary Objection (P.O) to the Suit dated 27.8.2015 and prayed for the entire Suit to be dismissed with Costs.
3. Before the Prosecution of the P.O, the Claimant filed the Notice of Motion dated 17.9.2015 seeking for leave to amend his Claim and the same was allowed on 22.9.2015. The effect of amendment was to clarify that the date of dismissal was not 20.4.2011 but either 15.4.2014 when he was acquitted of the Criminal Charges instituted by the Respondent in August 2014 when the Respondent failed to respond to the Notice of intention to file Suit. The Respondent never amended her defence and insisted on prosecuting her P.O. The P.O was disposed of by Written Submissions.

Respondent's Submissions

4. It was submitted for the Respondent that the Suit herein is time barred because it was filed out of time. That according to the Respondent the cause of action arose on 25.3.2011 when the Claimant was arrested by police and was summarily dismissed and as such the Suit having been filed on 9.4.2015 is time barred. That under section 90 of the Employment Act (EA), no Suit arising from an employment Contract shall be brought after expiry of 3 years from the date when the cause of action arose. According to the Respondent, the Court lacks jurisdiction to entertain the Suit or to

enlarge the limitation period.

Claimant's Submission

5. It was submitted for the Claimant that the actual date of the termination of the Client's employment is not certain. That according to paragraph 3 of the defence, the Respondent pleaded that the date of termination was 20.4.2011 while in paragraph 2 she pleaded that the termination was on 25.3.2011. The Court was therefore urged that it was necessary to determine the correct date at the full hearing.
6. In addition it was submitted for the Claimant that the objection was overtaken by events and the error on the Claimant's pleading was cured by the amendments done on 24.9.2015. That the P.O. is not sustainable and does not pass the threshold of a P.O. because it is premised on facts and not points of law.

Analysis and Determination

7. After careful consideration of the pleadings, the P.O. and the submissions filed, there is no dispute from the pleadings filed before the P.O. that the parties herein related as employer and employee until either 25.3.2011 or 20.4.2011. There is also no dispute that the Claimant was prosecuted for an alleged fraud until 15.4.2014 when he was acquitted and in August 2014 gave notice of intention to sue the Respondent for unfair dismissal. There is further no dispute that the claimant brought this Suit on 9.7.2015. The issues for determination herein are:-
 - a. Whether the Suit is time barred.
 - b. Whether the issue of time bar was cured by the amendment to the Claim.

Time Bar

8. The Claimant served a demand letter through his lawyers dated 12.8.2014 stating that:-

“That on or about 20.4.2011, you maliciously and without any probable cause continued to prosecute the said charge against our Client herein and as a result you illegally and/or unfairly terminated our clients employment with the Company herein.”

The foregoing statement corroborates the averment in paragraph 3 of the original Claim quoted above, that the employment contract was terminated on 20.4.2011. From 20.4.2011 to 9.7.2015 when the Suit was filed is well over 3 years limitation period prescribed under section 90 of the EA. Consequently the Court finds and holds that the Suit was filed out of time and as such it is time barred. The collorary to the foregoing is that the Court is barred by law from entertaining the Suit. Without the necessary jurisdiction to deal with the Suit the Court must down its tools.

Cured by Amendment

9. It is trite that the purpose of the Court is to do justice and that the Court should do its best to sustain the proceedings through amendments and not to deny parties their day in Court through procedural technicalities. In deed the Court granted leave to the Claimant to amend his pleadings when the matter came up for pretrial directions. However, that leave did not bar the Respondent from prosecuting his defence and the P.O. on the issue of time bar. As it was held in ***Civil Application No. NAI 22 of 1982 Gathoni vs Kenya Cooperative Creameries {1982}KLR*** page 105 cited by the Respondent,

“The law of Limitation is intended to protect defendants against unreasonable delay in bringing Suits against them. The statute expects the intending plaintiffs to exercise reasonable diligence and to take reasonable steps in his own interest.”

10. In view of the foregoing, the Court has entertained the Respondents defence of time bar.

Although it sounds like a procedural issue, statutory Limitation of actions is a substantive issue as it goes to the jurisdiction of the Court to entertain the Suit. Even though the Court gave leave to amend the Suit, the only amendment done was on the date of the purported termination of employment contract. The effect of the amended was to breathe a new life to the cause of action. That cannot be permitted. Section 90 of the E.A and section 4 of the Limitations of Actions Act do not leave any chance for the extension of life of an expired cause of action. Consequently, the Court finds that the cause of action herein having arisen on 20.4.2011, it had expired by 20.4.2014. In that respect, the Claimant had no right to file this Suit on 9.7.2015 after it expired on 20.4.2014. It follows therefore that the Court had no jurisdiction to entertain the Suit *ab initio* including granting the leave to amend the pleadings. The answer to the second issue for determination is therefore that the amendment to the Claim did not cure the Suit and defeat the defence of time bar.

Disposition

11. For the reasons stated above, the P.O. by the Respondent is allowed and Suit struck out for being time barred. Each party to bear his or her own costs.

Signed, Dated and Delivered at Mombasa this 24th day of June 2016.

ONESMUS MAKAU

JUDGE