



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1654 OF 2013

MICHAEL WACHIRA KING'ARA.....CLAIMANT/RESPONDENT

VERSUS

NAIROBI CITY COUNTY.....RESPONDENT/OBJECTOR

RULING

1. What is before me is the Preliminary objection by the Respondent/Objector dated 13th March 2014. In the objection contained in the defence, the Respondent states that the suit offends the provisions of Section 90 of the Employment Act on the grounds that the case is misconceived, incompetent and bad in law and should be dismissed because it violates the provisions of the Employment Act Section 90 as suit was founded on a contract that ended in or about January 2001.

2. The Claimant/Respondent replied to the defence on 3rd April 2014 and sought that the delay was because he had no money to file claim and that it was only after getting a casual job in 2012 that he was able to present the case. He stated that he did not know that there was a time limit for one to sue or be sued and prayed to the Court on humanitarian grounds to grant his prayers to allow him leave to file suit out of time.

3. The preliminary objection was raised on 19th May 2016 and the Respondent was represented by Mr. Maramba while the Claimant appeared in person. Mr. Maramba submitted that the suit was filed out of time and that Section 90 of the Employment Act upon which the suit was predicated provided that the limit for filing suit was 3 years from the negligent act. He submitted that the Claimant alleged to have been dismissed in January 2001 and filed this claim 12 years after alleged termination. He submitted that the Claimant admitted that the suit was filed out of time and that based on the admission the suit should be dismissed as prayed. He relied on the case of **Gerald Muli Kiilu v Barclays Bank of Kenya Cause No. 124 of 2010** (unreported) and the case of **Kenya Union of Commercial Food & Allied Workers v National Social Security Fund Cause No. 81 of 2007** (unreported).

4. The Claimant submitted that he did not know that time limits applied and that he also did not get a dismissal letter. He stated that he followed up the matter with the Union and that he did not receive notification. He submitted that he remained on the duty roster but was not on the payroll. He stated that he was working and stopped going in November 2013.

5. In his reprise, Mr. Maramba submitted that what the Claimant was asserting was different from the pleadings and pointed out that the claim was filed in October 2013. He submitted that the submissions made by the Claimant were meant to mislead the Court and that the Court should ascertain the facts.

6. The Court deferred the Ruling to today. In matters related to limitation, the law is clear. The Respondent asserts that the Claimant's suit is time barred and contrary to the provisions of the law. It was submitted that the Claimant filed the suit 12 years after the accrual of the cause of action.

7. Section 90 of the Employment Act 2007 provides as follows:-

90. 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.

8. The ingredients for what is comprised in a preliminary objection are well enunciated in the celebrated case of **Mukisa Biscuit v West End Distributors Ltd [1969] E.A. 696** the *locus classicus* on preliminary objection. In the case Law J.A. stated a preliminary objection to be thus:-

“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.”

Sir Charles Newbold, President stated thus in the same judgment:-

“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 judicial discretion.”

9. The Claimant readily admits that he was not aware that there could be limitation of action. Ignorance of the law is no defence. The case was one involving the class of dismissals known as constructive dismissal. The Claimant was not paid a salary from January 2001. That was clearly a sign that the contract had come to an end. Put another way, 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.

10. The Claimant in his reply has made an entreaty to Court to extend time. In the case of **Divecon v Samani (1995-1998) EA 48** the Court of Appeal made a definitive and binding position on extension of time in relation to limitation. Though the **Divecon** case was based on tort, the Court of Appeal did consider the grant of leave or extension of time in respect of causes of action based on contract as well. The Court of Appeal 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. A perusal of Part III shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, ‘that the wording of section 4(1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked’.

11. The upshot of the foregoing is that there is merit in the preliminary objection taken by the Respondent. I strike out the suit and make no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 2nd day of June 2016

Nzioki wa Makau

JUDGE