



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1817 OF 2014

FAITH NJOKI MUTHEE.....CLAIMANT/RESPONDENT

VERSUS

G4S SECURITY SERVICES (KENYA) LTD....RESPONDENT/APPLICANT

RULING

1. The Respondent filed a notice of preliminary objection on 14th January 2015 to the effect that the cause of action accrued on 8th January 2009 and therefore the claim was time barred in terms of Section 90 of the Employment Act of 2007. The Respondent asserted that the Claimant's right to sue for alleged unfair and/or unlawful termination having lapsed she lacked the capacity to agitate any cause against the Respondent and that the cause was an abuse of court process. The Respondent stated that the Court therefore has no jurisdiction to entertain the suit and that the suit should be struck out with costs to the Respondent.

2. The Claimant seemingly did not file any grounds or an affidavit upon service of the preliminary objection and instead parties opted to dispose of the preliminary objection through submissions. The Respondent filed its submissions and some authorities on 23rd May 2016 whereas the Claimant filed her submissions and list of authorities on 22nd June 2016. In its submissions, the Respondent submitted that the Claimant's employment with the Respondent was terminated on 8th January 2009 while the proceedings herein were commenced on 15th October 2014. The Respondent cited the provisions of Section 90 of the Employment Act and submitted that the suit was filed after 5 years of accrual of cause of action. The Respondent relied on the case of **Jared Mien Mayi v G4S Security Services (K) Limited [2014] eKLR** where Abuodha J. held that the argument of awaiting outcome of a criminal process before commencing suit to be flawed. Reliance was also placed on the case of **Attorney General & Another v Andrew Maina Githinji & Another [2016] eKLR** where Waki JA held that the cause of action did not arise on the conclusion of the criminal case but at the point of receipt of termination letters and Kiage JA also held in the same judgment that a dismissed employee need not await the outcome of any criminal proceedings that may be mounted concurrently with internal disciplinary process that may culminate in the impugned dismissal. The Respondent also relied on the cases of **Charles Bob Odhiambo Owuonda v Kenindia Assurance Company Limited [2014] eKLR** and **Industrial Cause No. 1417 of 2010 Faustino Waigwa Maina v G4S Security Services Limited** where Rika J. upheld objections to the suits on basis of limitation. Also cited was the case of **Kenya Planters & Agricultural Workers Union v Unilever Tea (K) Limited [2012] eKLR** where this Court upheld similar objections based on limitation.

3. The Claimant submitted that the Respondent had filed a preliminary objection and stated that the issue regarding whether the Employment & Labour Relations Court has jurisdiction to hear and determine

statute barred claims and the issue in respect of whether the learned judge vide a Ruling delivered on 5th February 2015 exceeded her jurisdiction in light of Section 90 of the Employment Act is pending before the Court of Appeal in **Nairobi Civil Application No. 100 of 2015 Justice Torgbor (Rtd) & Another v Ladislaus Odongo Ojuok** and that the Court of Appeal had granted stay pending the hearing and determination of Civil Appeal No. 65 of 2015 between **Justice Torgbor (Rtd) & Another v Ladislaus Odongo Ojuok**. The Claimant submitted that the Court has no jurisdiction to determine the Respondent's preliminary objection since there is stay in the Court of Appeal case as to whether the Employment & Labour Relations Court has jurisdiction to hear and determine statute barred claims in accordance with Section 90 of the Employment Act. The Claimant cited Article 2(1) of the Constitution and submitted that the Constitution is the supreme law and any law inconsistent with the Constitution is invalid. Counsel submitted that the provision of Section 90 of the Employment Act is inconsistent with Article 159(2)(d) of the Constitution and should be declared null and void. The Claimant submitted that according to Article 159(2)(d) of the Constitution, all courts are obliged to be guided by the principle that justice shall be administered without undue regard to technicalities. The Claimant submitted that Article 159(2)(d) is applicable on case by case basis. The Claimant further submitted that once there is a conflict between any other law and the Constitution, there is no way the provisions of Section 90 can prevail upon the explicit provisions under Article 159(2)(d) of the Constitution. The Claimant thus submitted that the Court should stay all proceedings pending the hearing and determination of the Court of Appeal in **Nairobi Civil Application No. 100 of 2015 Justice Torgbor (Rtd) & Another v Ladislaus Odongo Ojuok** or order the matter to proceed for full hearing of the main cause. The Claimant attached a Ruling the case of **E. Torgbor v Ladislaus Odongo Ojuok [2015] eKLR**.

4. The issue raised is on limitation. This accords with the decisions of the Courts in this realm. A preliminary objection can be raised whenever there is ground for it. The decision in **Mukisa Biscuits Manufacturing Ltd. v West End Distributors Ltd. [1969] EA 696** is instructive. In that case, In that case **Law, JA** held as follows:-

A preliminary objection consists of a point of law which has been pleaded, or which arises from a 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.

In the same decision, **Newbold, P** held as follows:-

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

5. In the suit before this Court, it is asserted that there is an issue of limitation of action. The Claimant raised the issue of Section 90 of the Employment Act being inconsistent with Article 159(2)(d) of the Constitution and thus null and void. The Constitution is the supreme law of the land. Any law that is inconsistent with the Constitution of Kenya is invalid to the extent of that inconsistency. Such law is void of effect reflected against the provision of the Constitution. 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 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.

6. The Constitution of Kenya 2010 makes provision under Article 159(2)(d) as follows:-

159 (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

- (a) justice shall be done to all, irrespective of status;
 - (b) justice shall not be delayed;
 - (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
 - (d) justice shall be administered without undue regard to procedural technicalities; and
 - (e) the purpose and principles of this Constitution shall be protected and promoted.
- (underline mine)

7. The law is clear. Justice shall be administered without undue regard to procedural technicalities. Is application of Section 90 of the Employment Act undue regard to procedural technicalities? In my view, undue regard to procedural technicalities is the bringing to fore the unwarranted consideration of procedure and the technicalities associated therewith. A party before the Court has raised the specter of limitation. As far as I can discern, the issue of limitation is not undue regard for technicalities.

8. In the cases cited before me by the Respondent/Applicant, many of which are of persuasive value, a common thread emerges. They all hold that in suits where a party seeks to obtain relief for infractions of the contract of labour post-Employment Act 2007, a limit of 3 years is set by statute. It is during the period of 3 years after accrual of the cause of action that one can mount a suit. That is the law as I have held in the few cases where this issue has arisen. I am persuaded that Rika J, Radido J. and Abuodha J. have a correct exposition of Section 90 of the Employment Act 2007.

9. In the case of **Attorney General & Another v Andrew Maina Githinji & Another** (*supra*) the Court of Appeal (Waki, Nambuye, Kiage JJA) considered the question of limitation in a labour case. The appeal was against a decision by Ongaya J. who had held that the objection on limitation was erroneous and that the accrual of cause of action was upon discharge by the criminal court. In a majority decision, Nambuye JA dissenting, the appellate court upheld the objection taken in the superior court and overruled the superior court. In his words, Waki JA held:-

...that the cause of action in the case did not arise after the conclusion of the criminal case against the respondents. The respondents had a clear cause of action against the employer when they received their letters of dismissal on 2nd October 2010. They had all the facts which had been placed before them in the disciplinary proceedings and they could have filed legal proceedings if they felt aggrieved by that dismissal and they did not.

Kiage JA concurred in the decision and stated that

A dismissed employee need not await the outcome of any criminal proceedings that may be mounted concurrently with internal disciplinary processes that may culminate in the impugned dismissal. If he chooses to do so he does so at his own peril should the statute bar him, as happened herein.

10. In the case before this Court, the Claimant abided the outcome of the criminal case facing her before mounting the suit herein. The cause of action accrued upon dismissal on 8th January 2009 and by simple arithmetic, the expiry of the cause of action was 8th January 2012. The suit herein was filed on 15th October 2014 over 2 years and 8 months after the expiry of the cause of action. I do not agree that the issue of statute barred suits is pending for determination in the Court of Appeal. What is before the Court of Appeal in the case of **Torgbor & Another v Ojuok** (*supra*) is a determination that would apply purely to the suit before the Employment & Labour Relations Court involving the parties in that appeal. The stay granted is not a blanket stay and therefore cannot be a bar to this Court hearing the present preliminary objection. To hold otherwise would be an affront to reason. The upshot of the foregoing is that the preliminary objection succeeds and I strike out the Claimant's suit with costs to the Respondent/Applicant.

Orders accordingly.

Dated and delivered at Nairobi this 14th day of July 2016

Nzioki wa Makau

JUDGE