



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
CAUSE NO. 941 OF 2014
(Formerly HCCC 1619 of 2002)

LABAN M. KIMONDO.....CLAIMANT

VERSUS

THE HON. THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

1. The claim was filed as a plaint at the High Court on 24th October 2002 and assigned case number 1619 of 2002. In the plaint, the Claimant averred that in February 1986 he was appointed as general manager of Yuken Textiles Industry Limited by the Ministry of Commerce and Industry on a 3 year contract of employment. He stated that he was replaced as chief executive of the Respondent and was not posted anywhere. He amended his plaint on 2nd June 2004 and in the amended plaint averred that he was removed from his employment with ICDC and appointed as general manager of Yuken Textiles Industry Limited and it was expressly stated that the Claimant would work on such terms as he had enjoyed as a personnel manager at ICDC until new terms were determined under Yuken Textiles. He sought payment of salary Kshs. 2,934,972/-, house allowance Kshs. 1,908,000/-, other allowances Kshs. 1,028,400/-, leave pay Kshs. 286,599/-, pension, interest on the sums due and any other relief the court may deem just to grant. The Claimant further amended his claim on 30th November 2009 pursuant to leave of the Court and the claim then stood at Kshs. 36,415,008/- special damages being lost earnings and the Claimant also sought Kshs. 36,415,008/- as general damages based on the lost earnings. Interest on the sums claimed was at commercial rates.

2. The defendant entered appearance on 3rd December 2002 and defaulted in filing a defence and interlocutory judgment was entered against the Respondent. The Respondent finally succeeded in setting aside the entry of judgment and the defence was filed on 31st May 2004. In the defence, the Respondent denied that any contract existed between the Claimant and the Respondent. The Respondent averred in the alternative that if any contract existed between them, the same was lawfully terminated and all the Claimant's dues paid. The Respondent gave notice of a preliminary objection to the suit on grounds that the suit offended the mandatory provisions of Public Authorities Limitation Act, Government Proceedings Act and Order VII of the Civil Procedure Rules.

3. The Claimant filed a further amended plaint on 17th June 2005 and included a claim for lost earnings of basic salary of Kshs. 117,480/- per annum, entertainment allowance of Kshs. 500/- per month making Kshs. 6,000/- per annum, house allowance of Kshs. 5,500/- per month making Kshs. 66,000/- per annum, transport allowance of Kshs. 2,000/- per month making Kshs. 24,000/- per annum. The Claimant averred

that he was 45 years at the time of unlawful termination and would therefore have worked until his retirement at 55 years and therefore the lost earnings for the years would be Kshs. 2,134,800/-.

4. The Claimant was heard on 29th May, 2012 by the late Lady Justice Joyce Khaminwa at the High Court before the file was transferred to this Court. He was led in his testimony by Mr. Wambugu Kariuki his counsel. The Claimant testified that he was retired and is presently an author and was retired from employment though he had not reached his retirement age. He stated that he was forced out having been firstly employed by ICDC on 13th September 1971. He stated that the letter of appointment specified terms of employment and that he was earning £1450 p.a. with house allowance. The letter stated that his termination of service was to be in writing giving 30 days' notice. He testified that he was a provincial officer and was posted in Embu for a period of 3 years later transferred back to Nairobi and sent for a professional course in Germany. He stated that he continued working for ICDC up to 30th January 1986 a period of about 15 years and rose to the position of personnel and administrative manager earning £1,545 p.a. with allowances of house allowance of Kshs. 5,500/- per month, Kshs. 2,000/- transport allowance, and an entertainment allowance of Kshs. 500/- per month. He testified that on 31st January 1986 he was appointed by the Government to Yuken Ltd the successor of the previous textile company. He stated that a letter was addressed to executive director and the letter is dated 2nd February 1986. He testified that his appointment was announced on radio, he was to report on 1st February 1986 and the appointment was for 3 years at the discretion of Government of Kenya. He stated that the terms of employment were to be harmonized with those of Government. He stated that he received the letter on 12th March 1986 under cover of executive director of ICDC and he reported at Thika. He testified that he had not applied for this job. Yuken was a manufacturing company and he was the general manager under the same terms and his period of service at Yuken was to end in 1989. He stated that as of 25th June 1987 he had worked for 17 months then read in the Daily Nation newspaper for that day of his replacement. He proceeded to office and there was no other communication. He testified that he had been the chief executive for Yuken a subsidiary of ICDC and that Mr. Simba was aware of the changes but did not communicate to him. He stated that on the same date Mr. Simba brought another person, a Mr. R. R. Ojee. He testified that he tried to follow up on the matter but received no official communication at all. He stated that at the time he was aged 45 years and did not get other employment. He testified that he is now aged 70 years old. He thus sought damages and had employed the services of Mr. Okudo Akumu, an actuary, whom he paid an actuarial fee of Kshs. 100,000/-. He stated that the actuary calculated and showed that his earnings would have been Kshs. 36,415,008/- in the period. He testified that before filing this suit he gave Government notice of intention to institute a suit. He stated that the Government did not deny anything in his claim. He also wanted to be paid the costs of the suit.

5. The Claimant called Mr. Okudo Akumu who stated that he qualified as an Associate of the Society of Actuaries of the United States of America and a Fellow of the Actuarial Society of Kenya. He testified that he worked in Chicago, USA with a company called EWA of Kenya and had prepared the report produced by the Claimant. He stated that he was the managing consultant and chief executive of Actuarial and Benefit Consultant Ltd and that the Claimant had consulted him and paid Kshs. 200,000/- for preparation of the report and not Kshs. 100,000/-. He testified that the report worked out and showed the loss the Claimant had suffered as a result of losing employment arbitrarily. He stated that he considered the cash benefits the Claimant had received at ICDC, the level of engagement before he made the assumptions in a conservative manner. He stated that he assumed that the Claimant's salary would grow by 5% from what was received at ICDC and the formula was applied until the end of Government financial year 30th June 1986 then with effect from 1st July 1976. He relied on a Circular No.1/86 from the Permanent Secretary to Office of President No. OP/9/21/2A/XXV/300 dated 1st July 1986 which spelt out the benefits of various parastatals. He assumed the Claimant would get the lowest in the starting point. To calculate the Claimant's working life, expectancy on death, illness etc. the period of 6 years and 10 months was taken in account given the Claimant's age. Given the salary in that circular he applied it in accumulating benefits rates published by Central Bureau of Statistics as by 1986 up to the time 10 years would lapse and the year ending 30th June 1986. He stated that 5 months cash earnings would be Kshs. 171,245/- for year ending 30th June, 1987. He testified that placing reliance on the aforesaid circular, the Claimant would have received Kshs. 451,345/- and up to 30th June 1988 Kshs. 503,208/-. He stated that

he dealt with cash benefits on a conservative consent of 14% and as at 17th June 2005 a total of Kshs. 36,415,008/- was owed. He stated that a rate of 14% is fair and reasonable and interest rates are more variable.

6. The defendant did not call any witness from the record before me. The case was mentioned a few times before the High Court before Waweru J. and Ougo J. and ultimately was transferred to this Court on 4th June 2014 by Ougo J. Parties took directions before Onyango J. and it was proposed by the parties that the matter proceed to judgment. Submissions were filed on 19th July 2012 by the Claimant and later a reply to the Respondent's submissions were filed on 20th April 2016 whilst for the Respondent only one set of submissions was filed on 29th January 2016 and re-filed on 2nd February 2016.

7. In the submissions filed, the Claimant submitted that he was employed by the Government (ICDC) on 13th September 1971 and worked there for some time before he was transferred to Yuken Textile Industries Limited and worked there for a short while before he was dismissed or sacked through the 1.00pm radio news announcement. He submitted that he was replaced in employment and despite following up on the issue with the Ministry of Commerce & Industry without success he realised all doors had been closed and thus filed the case in 2002. The Claimant submitted that the Court should be guided by the actuarial scientist whom the Claimant called and whose evidence was uncontroverted by the Respondent. The Claimant relied on the case of **Samuel Chege Gitau & 283 Others v The Attorney General Industrial Cause No. 2212 of 2012** (unreported) where Nduma J. found in favour of the 284 Claimants who had sued the honourable the Attorney General for the dismissal from service by the Kenya Air Force following the aborted 1982 coup.

8. The Respondent on its part submitted that the issues for determination were 4. These were enumerated as follows:-

- i. Whether there existed an employment contract between the Claimant and the Government of Kenya during his tenure at Yuken Textile Industries Limited
- ii. Whether liability can attach to the Government in the circumstances of this case
- iii. Has the Claimant proved his claim?
- iv. Can the orders sought issue?

The Respondent submitted that back then, Yuken Textiles Ltd was a state corporation under the then Ministry of Trade and Industry. The Respondent submitted that save for a letter of appointment, the Claimant never produced any document to demonstrate that he actually accepted the job at Yuken Textiles and also failed to produce any evidence by way of payslip to prove that he actually received a salary from Yuken for the 17 months he alleged he was at Yuken. The Respondent also stated that the Claimant never called any witness to confirm that he actually worked at Yuken. The Respondent further submitted that the Claimant never exhibited a termination letter by Yuken Textiles. The Respondent submitted that the proper defendant in this case should have been Yuken Textiles Limited which would have had the opportunity to rebut the existence of the said contract. The Respondent submitted if there was a contract of service then it was between the Claimant and Yuken and not between him and the Government of Kenya. The Respondent stated that under Section 3 of the State Corporations Act, state corporations are legal entities capable of suing and being sued in their own name. The Respondent submitted that a state corporation is a body corporate and in its corporate name be capable of suing and being sued. The Respondent submitted that under the doctrine of privity of contract under common law, contractual obligations strictly bind the parties to the contract. The Respondent cited the decision in **Agricultural Finance Corporation v Lengetia Ltd [1985] KLR 765** where Hancox JA, as he then was, quoting from Halisbury's Laws of England 3rd Edition Volume 8 para 110 stated that as a general rule a contract affects only the parties to it and cannot be enforced by or against a person who is not a party even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The Respondent submitted that the Claimant never filed a claim against Yuken as a creditor once

Yuken was placed under receivership. The Respondent asserted that the Claimant chose to sit on his rights and having failed to pursue the receiver manager of the company under liquidation cannot blame the Respondent for anything arising out of the contract. The Respondent submitted that he who alleges must prove and stated that the Claimant had not proved his claim. The Respondent relied on the case of **Arnacherry Limited v Attorney General HC Petition No. 248 of 2013** where Lenaola J. stated that in a claim for special damages that special damages must both be pleaded and proved and cited with approval the case of **Waweru Thumbi v Samuel Njoroge Civil Appeal No. 445 of 2003**. The Respondent submitted that in an employment contract one cannot seek special damages based on anticipation or claims that his livelihood was curtailed by the termination. The Respondent asserted that the evidence of the actuarial scientist was insufficient to meet an award of special damages. The Respondent stated that the Claimant merely engaged the actuary to make calculations on anticipated earnings and that the claim could not be sustained. The Respondent relied on the case of **Addis v Gramophone Company (1909) AC 488** where the House of Lords held that where a servant is wrongly dismissed from his employment, the damages for the dismissal cannot include compensation for his injured feelings, or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment. The Respondent submitted that the Claimant cannot make an unjustifiable claim based on imponderables and that the Court would be guided by Section 49 and 50 of the Employment Act. The Respondent cited the case of **Mary Mutanu Mwendwa v Ayudia Ninos De Africa Kenya (Anidan K) [2013] eKLR** on the test for an award of damages. The Respondent asserted that equity aids the vigilant and not the indolent and submitted that the case should be dismissed as having been filed out of time a whopping 15 years after the accrual of cause of action.

9. The claim by the Claimant raised a slew of issues. During directions given by Khaminwa J., the preliminary issue taken by the Respondent regarding the limitation of the suit was to be taken during the substantive hearing. The Court must therefore determine whether the suit was mounted on time and against the proper party. The facts of therefore case lend themselves to determination on the issues the court has distilled as follows:-

- i. Is the Claimant non-suited against the Respondent?
- ii. Is the suit statute barred?
- iii. What orders would lie in the case?

10. The Claimant sued the Respondent on behalf of the Government of Kenya. The Hon. The Attorney General is a fit defendant on behalf of Government and proceedings can correctly be taken against him on behalf of Government. In the case cited above by the Claimant reported as **Samuel Chege Gitau & 283 Others v Attorney General [2016] eKLR** the 284 ex-servicemen of the Kenya Air Force sued the Attorney General for relief they sought against the Government on account of their dismissal from service in the Kenya Air Force by an entity called '82 Air Force. The Court found in their favour having distilled that the Respondent was the appropriate body to sue on account of the dismissal by an illegal entity created in the aftermath of the attempted coup. The Respondent was thus properly joined in the suit. In this case, the Claimant claims against the Respondent on account of a dismissal he faced over the famous 1.00pm lunch time news bulletin. The report of the dismissal is contained in the newspaper publication of the Daily Nation of Thursday, June 25th 1987. The paper indicated that a Mr. R. R Ojee had been appointed as the chief executive of the Thika based Yuken Textile Industries. From pleadings before the Court and the evidence adduced, the Claimant held the position of chief executive of Yuken Textile Industries Limited a state corporation. His letter of appointment from the Ministry of Commerce and Industry's Permanent Secretary D. N. Namu is dated 24th February 1986 and its reference is given as **MCI/A 82/01/(9)**. In the letter addressed to Mr. J. P. N. Simba the Executive Director of the Industrial & Commercial Development Corporation (ICDC), the Claimant was appointed as the general manager of Yuken Textiles Limited for a 3 year period effective 1st February 1986. The same was renewable at the discretion of the Government. The letter was copied to Mr. Simeon Nyachae Chief Secretary, Office of the President and Mr. S. K. Mbugua, Inspector of Statutory Boards. The letter was forwarded to the Claimant on 4th March 1986 by Mr. J. Simba the executive director of ICDC. In it the letter it was stated that the appointment of the Claimant to the position of general manager of Yuken Textiles Limited was

effective 1st February 1986. Yuken Textile Industries Limited was clearly a state corporation. Section 2 of the State Corporations Act defines a state corporation as follows:-

“state corporation” means— (a) a state corporation established under section 3; (b) a body corporate established before or after the commencement of this Act by or under an Act of Parliament or other written law

11. In the provisions of Section 3 of the State Corporations Act are as follows:-

(1) The President may, by order, establish a state corporation as a body corporate to perform the functions specified in that order.

(2) A state corporation established under this section shall—

(a) have perpetual succession;

(b) in its corporate name be capable of suing and being sued;

(c) subject to this Act, be capable of holding and alienating movable and immovable property.

12. Yuken Textiles Limited from all accounts was a state corporation also known as a parastatal. It was a body corporate, it had a perpetual succession. In such character, it had the capacity to sue and be sued. The Claimant averred that the defendant was sued on behalf of the Ministry of Industrial Development in accordance with the Government Proceedings Act. In the claim before me, the Claimant sued the Respondent on behalf of Government. His claim should have been mounted against Yuken Textiles Limited and upon liquidation, upon the Liquidator. In the Court’s view, the Claimant was non-suited against the Respondent. In regard to limitation, the suit ought to have been mounted in 6 years. The Court is guided by the findings of the Court of Appeal in the **Divecon Ltd v Samani [1995 - 1998] 1 EA 48** the Court stated as follows:-

No one shall have the right or power to bring an action after the end of six (6) 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 (6) 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 the 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'

13. There was no discretion to extend time to file suit and as the Court of Appeal rightly observed, it is incorrect to imply that Section 4(1) of the Limitation of Actions Act suggests a discretion that can be invoked. Section 4(1) of the Limitation of Actions Act applies to this case as the Employment Act Section 90 does not apply to actions that accrued prior to its enactment. The claim was therefore statute barred. That resolves the second issue.

14. In regard to the final issue for determination, the Claimant had a burden to discharge in regard to the claims on special and general damages. The actuary is not the source of the proof but rather the evidence the Claimant had. No payslips, bank statements or cheques were produced to show the income and allowances claimed. The proof that is required in the cases before the Court is one that would tip the scales on a balance of probability. The Claimant failed to discharge that evidentiary burden and the only fit order after assessing the issues for determination and making the findings above is to order a dismissal of the case against the Respondent with costs.

Orders accordingly.

Dated at Nairobi this 11th day of August 2016

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 24th day of August 2016

Hellen Wasilwa

JUDGE