



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. 494 OF 2014

HESBON OBOTE VIKIRU.....CLAIMANT

v

SUPER FOAM LIMITED.....RESPONDENT

JUDGMENT

1. Hesbon Obote Vikiru (Claimant) was employed by Super Foam Ltd (Respondent) sometime in 1993 and on 3 December 2003 he was transferred to the Respondent's Nakuru Service Centre to promote sales within the region.
2. On 29 July 2009, the Respondent placed a notice in a daily newspaper notifying the public that the Claimant was no longer its employee and was therefore not authorised to transact any business on its behalf.
3. On 7 October 2014, the Claimant commenced legal proceedings against the Respondent alleging unfair termination of employment (through a press notice) and seeking several reliefs.
4. Upon service, the Respondent filed a Statement of Response and a Preliminary Objection on 5 December 2014 and on 2 March 2016, a List of Documents. A human Resource Policy was filed during the hearing.
5. The Preliminary Objection which raised the issue of limitation was taken on 22 January 2015, but the Court declined to uphold it as it required the interrogation of facts which were not clear from the pleadings.
6. Consequently, the Court directed that the issue of limitation be raised during the hearing.
7. The Cause was heard on 3 December 2015 and 20 July 2016. The Claimant filed his submissions on 16 August 2016 while the Respondent filed its submissions on 16 September 2016.
8. The Court has considered the pleadings, evidence and submissions and identified the issues arising for determination as, *whether the cause of action is statute barred and if the answer is negative, whether the Claimant was dismissed through the press notice and if so, whether the dismissal of the Claimant was unfair and appropriate remedies.*

Whether cause of action is statute barred

9. It is not disputed that the Respondent caused a press notice to be published on 29 July 2009 notifying all and sundry that the Claimant was no longer its employee.
10. According to the Respondent's witness, the course of action was necessitated by the fact that the Claimant had absconded duty and could not be traced.
11. The Claimant on his part denied having absconded duty and stated that he had health issues which the Respondent's managers were aware of and that at one time, the Respondent's General Manager sent him to see a dermatologist (medical notes produced).
12. The Claimant further stated that as a sales person he was more often than not in the field and not office and that specifically on 6 July 2009, he had permission from the Manager, Nakuru to be away to seek medical treatment and that he was away for about 3 weeks to enable his scars to heal.
13. It is while recuperating that he received a call from a colleague alerting him to the newspaper notice.
14. When he called the Respondent's General Manager, he advised him to report to Nakuru and was advised he could use one of the Respondent's vehicle which was on duty around his home area but when he got to the vehicle, he was arrested by Police and charged.
15. According to the Claimant while under arrest, he was visited by the Respondent's Supervisor, Accountant and Advocate and prevailed upon to sign certain delivery notes, but he declined after which he was charged with theft.
16. Those are the facts. What is the law?
17. By putting up the press notice on 29 July 2009, the Respondent was evincing an intention that it was no longer interested to continue or be bound by the contract it had with the Claimant.
18. By publishing the notice, the Respondent was repudiating the contract and that notice came to the notice of the Claimant nearly around the same day.
19. The action of the Respondent served to frustrate the contract as it was such an action that destroyed or fundamentally altered the objective of the contract or made performance of the contract impossible.
20. Frustration, under the common law leads to an automatic termination of an employment contract and there is no dismissal as such (see Employment and Discrimination Law, Middlesex University Business School 2008/9).
21. For evidential purpose, it can be presumed that the Claimant knew of the Respondent's intention to frustrate and/or not to be bound by the contract when he read the press notice on 29 July 2009 and his arrest and arraignment in Court.
22. Further evidence of the Claimant's knowledge of the Respondent's repudiation/frustration can be gleaned from the demand letter from his advocates dated 15 November 2013, in which it was expressly stated that the you (Respondent) unlawful maliciously and without any reasonable and /or justifiable cause summary dismissed him through the press and arraigned him in court.....
23. Even in paragraph 5 of the Memorandum of Claim, the Claimant impugned his purported summary dismissal on 29 July 2009.
24. The effective date of a termination of employment, when not clear or specified should be determined objectively depending on the circumstances of each case.
25. Time for purposes of limitation here, in the view of the Court, therefore began to run on the day that the Claimant saw the press notice and the Claimant had 3 years from then to commence legal action.

26. The time lapsed on or around 28 July 2012.

27. The instant Cause was only commenced on 7 October 2014 and the Court reluctantly reaches the conclusion that the cause of action is statute barred in terms of section 90 of the Employment Act, 2007.

28. The Claimant should not have waited until the conclusion of the criminal trial where he was acquitted to commence action.

29. With the conclusion reached, it would be an academic exercise for the Court to embark on an examination of the other issues identified.

30. The upshot of the foregoing is that the Court orders that the Cause herein be dismissed with no order as to costs.

Delivered, dated and signed in Nakuru on this 30th day of September 2016.

Radido Stephen

Judge

Appearances

For Claimant Mr. Ombati instructed by Olonyi & Co. Advocates

For Respondent Mr. Kanyi instructed by Kanyi Ngure & Co. advocates

Court Assistant Nixon