



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 32 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

KENYA UNION OF SUGAR PLANTATION AND ALLIED WORKERS.....CLAIMANT

-Versus-

CHEMELIL SUGAR COMPANY LIMITED.....RESPONDENT

RULING

The Claimant herein the Kenya Union of Sugar Plantation and Allied Workers filed this suit alleging the unfair and wrongful dismissal of its member **Thomas Odera Minda** herein after called **the Grievant** by the Respondent on 16th January, 2001 and that the Claimant's appeal against dismissal dated 8th November, 2004 was also dismissed.

The Claimant filed the present suit on 4th January, 2015. There are no prayers or remedies sought in the Memorandum of Claim.

The Respondent filed a brief statement of Defence denying all the allegations in the Memorandum of Claim and putting the Claimant to strict proof. At the last paragraph of the Statement of Defence the Respondent pleads as follows -

The Respondent, without prejudice avers that the Memorandum of Claim drawn and filed is frivolous and vexatious and does not disclose any reasonable cause of action as against the Respondent as it is statute barred by the Limitation of Actions Act and also Section 90 of the Employment Act. It is therefore an abuse of the due process of this Honourable Court and shall raise a preliminary objection before the hearing thereto to have the same struck out or dismissed with costs.

On 14th September, 2015 the Respondent filed a Notice of Preliminary Objection seeking the striking out of the entire suit with costs on the following grounds -

1. **THAT** the entire suit is statute barred under Section 4(2) of the Limitation of Action Act and Section 90 of the Employment Act.
2. **THAT** this court therefore has no jurisdiction to hear and determine this suit.
3. **THAT** the entire suit therefore is an abuse of the due process of this Honourable Court.

The Respondent also filed a list of Authorities containing the following:-

1. **Josephat Ndirangu v Henkel Chemelils (EA) Ltd [2013]eKLR.**
2. **Boniface Inondi Otieno v Mehta Electrical Ltd [2013]eKLR.**
3. **Willis Onditi Odhiambo v Gateway Insurance Co. Ltd [2004]eKLR.**
4. **Peter Nyamai & 7 others v M. J, Clarke Ltd [2013]eKLR.**
5. **The Employment Act. 2007.**
6. **Any other authority (s) to be availed during the hearing hereof with leave of the court.**

The Claimant filed a response to the Notice of Preliminary Objection in which it submits that the dispute was processed in accordance with the procedure in the Recognition Agreement signed by the parties. The Claimant submitted that section 90 of the Employment Act does not specifically state that the matter must be in court within 3 years but that the matter should be started within 3 years.

It is further submitted by the Claimant that the court process for the parties begins when hearing of the matter begins at the enterprise level between Union Officials and respective management staff.

It is submitted that the matter is procedurally in court and the court has jurisdiction to hear the dispute, that the matter did not stagnate at any stage and had to go through the dispute resolution process before finally being filed in court.

The case was argued in court on 6th September, 2016.

Mr. Oyuko appearing for the Respondent submitted that the claim was lodged 4 years after the cause of action arose and is statute barred by virtue of section 90 of the Employment Act 2007. That no attempt was made by the Claimant to extend time, that section 4(1) of the Limitation of Actions cannot cure the damage, that the court has no jurisdiction to entertain the claim and should dismiss the same.

The Respondent relied on the cases on its list of Authorities which all upheld preliminary objections on grounds of limitation. With reference to the Claimant's written submissions Mr. Oyuko submitted that the Claimant's interpretation of section 90 of the Employment Act is erroneous. He urged the court to dismiss the claim with costs to the Respondent.

Mr. John Ogutu for the Claimant submitted that this matter began when the Grievant was admitted in hospital. That it took time for both the Union and the Respondent to know about the Grievant's admission in hospital. Mr. Ogutu submitted that the Grievant who was in court was still sick, that his case is different from those cited by the Respondent and the court should look at the case differently, on its own merits as the Grievant was going to suffer if he was not in the employment of the Respondent.

Findings and Determination

According to the facts in the Memorandum of Claim, the Grievant was dismissed from employment on 16th January, 2001. According to the treatment records and case summary from Nyanza Provincial General Hospital Kisumu, the Grievant was first treated on 15th August, 2000 and was declared fit to resume duty on 2nd October 2000 having fully recovered.

It appears that the Grievant did not resume duty following which he was dismissed from service on 16th January, 2001. He appealed against the dismissal by his letter dated 8th November, 2004 and the appeal was dismissed. He was informed of the dismissal of his appeal by letter dated 17th December, 2004.

It is not clear from the record when the claimant reported the dispute in respect of the Grievant's

dismissal but the conciliator advised the parties to refer the case to this court by a report dated 6th June, 2012. As I have already stated above, the dispute herein was filed on 4th January, 2015.

I have found it necessary to restate the above facts because while the parties were making their oral submissions in court I wondered whether the parties and I were referring to the same case. Mr. Oyuko submitted that the case was filed one year after the lapse of the limitation period while Mr. Ogutu submitted that the case went through the laid down procedure and was not out of time.

As I have stated above, there are no prayers for remedies in the statement of claim. The Grievant was dismissed on 16th January, 2001 and the suit herein filed in January, 2015. That is 14 years after the cause of action arose. It is clearly way out of time, and cannot be sustained by the most skilful ingenuity or argument.

Just to set the record straight, at the time of dismissal of the Grievant the Employment Act 2007 had not even been enacted. Section 90 of the Employment Act is therefore not applicable to the case, but rather section 4(1) of the Limitation of Actions Act. The case should therefore have been filed within 6 years, but was filed after 14 years. It is clearly beyond redemption and can accurately be considered an abuse of court process.

For the foregoing reasons I dismiss the case. Each party shall bear its costs.

Dated, Signed and Delivered this 27th day of October, 2016

MAUREEN ONYANGO

JUDGE