



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 356 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

PAUL KIBET TIKOGOCLAIMANT

-Versus-

NATIONAL CEREALS AND PRODUCE BOARDRESPONDENT

R U L I N G

By a Memorandum of Claim dated 17th August, 2015 and filed on 24th September 2015, the Claimant alleges that his employment was terminated by the Respondent without compliance with the Employment Act vide letter dated 6th January, 2010. He seeks a declaration that the termination process was unlawful and further seeks other remedies as particularly set out in the Memorandum of Claim.

The Respondent filed a Response to the Claim on 2nd March, 2016 denying that the termination of the Claimant's employment was unlawful. The Respondent filed a counter claim for Shs.523,184.02 together with interest from November, 2009 to date of payment.

Together with its response and counter claim, the Respondent filed a Notice of Motion under section 90 of the Employment Act, Section 1A, 1B and 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law seeking the following orders -

- 1.**THAT** this Honourable Court be pleased to and does strike out the Claimant's pleadings.
- 2.**THAT** this Honourable Court dismisses this suit as being filed outside of the limitation of time set out under section 90 of the Employment No.11 of 2007 as read together with Section 4 of the Limitations of Actions Act Cap 22.
- 3.**THAT** this Honourable Court be pleased to award the Respondent costs of this Application.

The motion is supported by the affidavit of VERONICAH MAPESA SHIUNDU, the legal officer of the Respondent and the following grounds -

- 1.**THAT** the Employment Act No.11 of 2007 sets a limitation of time wherein no civil action or proceedings based or arising out of the Act shall be commenced unless it is commenced within three (3) years after the act, neglect or default complained.
- 2.**THAT** the Claimant has slept on his rights and failed to file the suit within the stipulated time frame under the Act.

3.**THAT** the Claimant's suit ought to be dismissed in light of the limitation placed by the law.

4.**THAT** this suit should be dismissed in its entirety.

5.**THAT** the Claimant sat on his rights and allowing this suit to proceed will prejudice the Respondent as this was concluded way over five (5) years ago.

The Claimant filed a replying affidavit in which he states that although his employment was terminated by letter dated 15th July 2010, he appealed against the dismissal by his letter dated 18th August, 2010. The Respondent acknowledged the appeal by its letter dated 18th August, 2010 and invited the Claimant for the hearing of the appeal on 15th January 2015, that the claimant received the verdict of the appeal on 23rd March 2015 following which he filed the present claim on 24th September 2015.

It is the claimant's position that the cause of action accrued upon receipt of the verdict on the appeal on 23rd March 2015 and his claim filed on 24th September 2015 is therefore not filed out of time. He prays that the Respondent's application be dismissed.

The application was argued on 6th September, 2016.

Determination

The issue for determination herein is whether the cause of action for the Claimant's suit accrued on the date of dismissal on 15th July, 2010 or on the date he received the verdict on his appeal on 23rd March, 2015.

Section 90 of the Employment Act provides for limitation period of 3 years from the date on which the cause of action accrued. The section provides as follows -

90. Limitations

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), 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.

In the Memorandum of Claim filed by the Claimant, there is no mention of the appeal. Paragraph 4 thereof reads as follows -

The claimant avers that the respondent without compliance with the Employment Act 226 proceeded to purport to terminate his employment vide termination letter dated 6/1/2010.

All the prayers of the Claimant at paragraph 8 of the claim are based on accrual date of 15th July, 2010. The claim on the face of it is therefore bad in law as it is based on a cause of action accruing on 15th July, 2010 which is more than 3 years to the date when the claimant filed this suit.

It is the court's view that the averments in the replying affidavit are an afterthought as nothing would have prevented the claimant from pleading the said facts in the Memorandum of Claim. A party is bound by his pleadings and in this case the claimant pleaded that the cause of action upon which his claim is based accrued on 15th July, 2010.

The Claimant did not pray for extension of time for filing. As was stated by the Court of Appeal in the case of **DIVECON v SAMANI [1995-1998] E.A. 48** where the court stated -

"... 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 contracts. 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".

Making reference to **DIVECON v SAMANI**, Radido J stated as follows in the case of **JOSEPHAT NDIRANGU v HENKEL CHEMICALS (EA) Ltd [2013]eKLR**

35.To my mind, similar principles in respect of what the Court of Appeal stated about section 4(1) of the Limitation of Actions Act apply in respect of section 90 of the Employment Act and I would for the sake of clarity state that no employee has the right of power to bring after the end of three years from the date of dismissal or termination, an action founded on a contract of service and that the Industrial Court has no right or power to entertain such claims or extend time for bringing such action.

36.I state so bearing in mind that the Employment Act, 2007 has no provision for grant of leave to institute claims out of time or to extend time within which to commence such actions.

Having found that the Claimant's cause of action arose on the date on which he was dismissed on 15th July, 2010, the claim was already statute barred on 24th September, 2015 when it was filed in court.

The result is that this court has no jurisdiction to entertain the claim. For this reason the Respondent's application succeeds, and I therefore strike out the Claim filed by the Claimant on 24th September, 2014 for being statute barred.

Each party shall bear its costs.

Dated, Signed and Delivered this 6th day of October, 2016

MAUREEN ONYANGO

JUDGE