



REPUBLIC OF KENYA
IN THE IN THE EMPLOYMENT & LABOUR RELATION COURT OF KENYA

AT MOMBASA

CAUSE 908 A OF 2015

BEATRICE APUPHIA BUSILIRU.....CLAIMANT

VERSUS

KENYA PIPELINE CO. LTD.....RESPONDENT

RULING

Introduction

1. The claimant brought this suit on 4.12.2015 claiming kshs.219, 840.70 plus interest at the rate of 12% per annum from 1997 being part of his terminal dues arising out of his voluntary retirement in December 1996. The respondent entered appearance and filed defence on 21.1.2016. On the same day the respondent also filed a Notice of Preliminary Objection (P.O) objecting to the suit for being statute barred. The same objection is pleaded in paragraph 5 and 7 of the defence. The P.O was disposed of by written submissions filed by both parties.

Respondent's case

2. It was submitted for the respondent that this suit was filed out of time vis-à-vis section 90 of the Employment Act Cap 226 Laws of Kenya. That, as pleaded in paragraph 2 of the Amended Claim, the claimant applied for early retirement on 2.12.1996 and the same was accepted by the respondent on 13.12.1996 who also approved the payment of her full retirement benefits. That the foregoing pleading clearly shows that the cause of action herein arose way back in December 1996. The respondent has also relied on the prayer for interest backdated to 16.1.1997 as evidence to confirm that the suit is statute barred because that cause of action arose in 1997. In her view the suit should be dismissed with costs because it was brought after 19 years of waiting as opposed to 6 years proved under section 4 of the Limitation of Actions Act.

Claimant's reply

3. The claimant has oppose the P.O and submitted that her claim is properly before the court. That the claim is founded on fraud which she discovered on 27.10.2014 and wrote a letter to the respondent complaining that fellow employee had fraudulently received dues on her behalf. She submits that her claim is founded on the repealed Employment Act and the Limitation of Actions Act which in 1996, entitled him to six years before his employment claims became time barred. That time, for a claim based on fraud under section 26 of the Limitation of the Actions Act, does not run until the claimant has discovered the fraud or could with reasonable diligence have discovered it. She therefore prayed for the P.O to be dismissed with costs.

Analysis and determination

4. After careful consideration of the pleadings and submissions filed, there is no dispute that the claimant herein terminated her employment contract through voluntary early retirement in December 1996. There is also no dispute that she filed the suit herein on 4.12.2015. The issue for determination is whether the suit is statute barred.

Time barred suit

5. The claimant has attempted to sway the court to believe that the claim is founded on fraud by her former workmate who she did not name. That attempt however, cannot succeed because it is clear from the pleadings that the claim is solely founded on employment contract and not tort. If it were a claim founded on some tort, the jurisdiction of this court could not have been invoked. With that firm opinion, the question that begs answer is whether a suit founded on employment contract, can competently be brought after 19 years from the date when the cause of action arose. The answer is simply, no. The cause of action herein arose in December 1996 when the claimant voluntarily retired and the respondent admitted that she was entitled to full retirement benefits.

6. Under section 4 of the Limitation of Actions act, the claimant had 6 years within which to file suit to recover her retirement benefits. She however went to sleep until 4.12.2015, 19 year after retirement when she brought this suit. Section 4 *supra* states as follows:

“The following actions may not be brought after the of six years from the date on which the cause of action accrued –

(a) Actions founded on contract;”

7. In view the foregoing clear legal provision, I make a finding that the suit herein was filed out of time and it is therefore statute barred. The corollary to the foregoing finding is that the court is barred from determining the dispute in the suit and as such I must down my tools for want of jurisdiction to continue with the suit. Even if section 26 of the Limitation of Actions Act was to be considered, this court would still dismiss this suit on ground of time barred because, with due diligence the claimant ought to have known long time ago that her retirement dues had been defrauded.

Disposition

8. For the reasons stated above, the P.O is allowed and the suit struck out. Each party shall bear her own costs.

Signed, dated and delivered at Mombasa on 18th day of November 2016.

ONESMUS N.MAKAU

JUDGE