



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT AT KISUMU**

**CAUSE NO. 112 OF 2014**

**(Before Hon. Lady Justice Maureen Onyango on 27<sup>th</sup> February, 2015)**

**BEN KIPLAGAT TUNDUNY ..... APPLICANT**

**VERSUS**

**STANDARD CHARTERED BANK ..... RESPONDENT**

**R U L I N G**

On 28th May 2014 the claimant Ben Kiplagat Tunduny filed his claim herein against the respondent, the Standard Chartered Bank (K) Ltd alleging that on 22nd December 2008 while working as Branch Operations Manager, Kericho branch, he was constructively terminated by the respondent when he was forced to write a resignation letter. He alleges that he was 46 years old at the time of the forced resignation and had another 9 years to retirement age of 55 years. He seeks the following orders:-

- a. **Reinstatement in the defendant's employment with all benefits accruing from 22.12.2008 to date.**
- b. **Kshs. 10,868,580/= being the loss of income.**
- c. **Costs of this suit and interest on (b) at court rates.**
- d. **Interest on (a) and (b) at court rates.**

In its defence filed on 18th July 2014 through Federation of Kenya Employers, the respondent denies that the claimant resigned under intimidation or that it is involved in unfair labour practices.

The respondent also gives notice of preliminary objection in the defence on the following grounds:-

- a. **The claim is incompetent, fatally defective and an abuse of the court process as the same is statutorily time-barred and offends the provisions of Section 90 of the Employment Act, 2007.**
- b. **The claim was filed in court without leave of court on 28th May 2014 by the claimant more than five (5) years after the dispute arose on 22nd December 2008.**
- c. **The claim is frivolous, vexatious and an abuse of court of court process because the claim was heard and determined before in Industrial Court Cause 1610 of 2010, Banking, Insurance and Finance Union (K) versus Standard Chartered Bank of Kenya and an award**

given by Justice Linnet Ndolo to the same effect.

- d. **The claim arose from the same set of facts as in Industrial Court 1610 of 2010, Banking, Insurance and Finance Union (K) versus Standard Chartered Bank of Kenya. The parties and issues for determination are the same as in the above mentioned cause.**
- e. **The claim has been adjudicated upon by a competent court and a decision was made by Justice Linnet Ndolo in Industrial Court Cause 1610 of 2010, Banking, Insurance and Finance Union (K) versus Standard Chartered Bank of Kenya, and an award given by Justice Linnet Ndolo who stated that the 2nd grievant did not prove his case. This ought to have laid the matter to rest. The ensuing of a second claim based on the same set of facts amounts to *res judicata*.**
- f. **The claim has the same parties, based on the same set of facts and the issues for determination is the same as in the earlier cause, the entertaining of the claim amounts to an infringement on the respondent's Constitutional right under Article 50(1)(2)(o) of the Constitution.**
- g. **The claim is in breach of Section 88(3) of the Employment Act which provides that no employer or employee should be punished twice for the same offence. The claim was determined before in Industrial Court Cause 1610 of 2010, Banking, Insurance and Finance Union (K) versus Standard Chartered Bank of Kenya, where Justice Ndolo stated that the claimant failed to prove his case.**

The claimant filed submissions in response to the notice of preliminary objection. In the submissions it is submitted that the claim is not statutorily barred. It is submitted that the claimant and 16 others took up their claims through their union (K) and 14 of his colleagues were paid compensation while the claim for the claimant and one other colleague proceeded for hearing in the Industrial Court Cause No. 1610 of 2010. It is further submitted that on 11th November 2013 **Justice Ndolo** delivered judgment to the effect that the claim was incompetent as the union which filed the claim had no capacity. It is submitted that the period from the date of the said judgment to the date of filing the fresh claim on 28th May 2014 is less than one year and the claim is therefore not time barred.

The claimant relied on the decision in Nakuru Industrial Court Cause No. 204 of 2013 in which the court decided that limitation period does not run where there is a contract not to plead limitation or where the person pleading limitation is estopped from doing so. It is submitted that the respondent being aware of the earlier suit is estopped from pleading limitation. It was further submitted that the claimant is entitled to a fair hearing as enshrined in Article 25(c) of the Constitution.

I have perused the judgment by **Ndolo J** in **Banking, Insurance and Finance Union (K) V. Standard Chartered Bank of Kenya Ltd [2013]** eKLR. The case was dismissed on 2 grounds. The first was that there was no constructive dismissal in the case of the second grievant Ben Tunduny (the claimant in this case) and the second ground for dismissal of the claim is that the claimant had no *locus standi* to represent the grievants. These reasons are stated at paragraphs 20 and 23 as follows:-

**"20. The second grievant took issue with the respondent acceptance letter which was dated 10th December 2008, before his resignation on 22nd December 2008. Munyori told the court that this was an error and the court found that the dating of the respondent's acceptance letter did not change the fact that the second grievant actually tendered a letter of resignation on 22nd December 2008. The court further found that apart from his word, the second grievant did not provide any corroborative evidence to support his claim for constructive dismissal. The claim for constructive dismissal therefore fails and is dismissed."**

**"23. As held by Nzioki wa Makau J in Kenya Chemical & Allied Workers Union V Polypipes Ltd (Industrial Court Cause No. 1112 of 2012) "the only way a union has locus is when it represents a party who is its member." By virtue of his position, union membership was not**

**available to the second grievant and he could not therefore have been a member of the claimant union. The logical conclusion then is that the claimant union had no capacity to bring a claim on behalf of the second grievant and to that extent; the claim was incompetent *abinitio*. Ultimately, the second grievant's claim fails and is dismissed."**

This means that the claim is *res judicata* and by virtue of Section 8 of the Civil Procedure Act, the claimant is precluded from instituting a further suit in respect of the same cause of action.

The claimant has further stated that the limitation period for his suit is reckoned from the date of dismissal of the earlier case and is therefore not time barred as it was instituted less than one year from the date of the dismissal of the earlier suit. This argument is not supported by either Section 90 of the Employment Act or any provisions of the Limitation of Actions Act. By virtue of the two pieces of legislation, time starts running from the date of the act complained of or accrual of cause of action. In the claimant's case, this was on 22nd December 2008 when the claimant resigned. This claim having been filed on 28th May 2014, was filed way beyond the limitation period.

For the foregoing reasons I strike out the claimant's case for being both *res judicata* and time barred.

There shall be no orders for costs.

**MAUREEN ONYANGO**

**JUDGE**

**27/2/2015**

**Appearances:-**

..... for claimant present

.....for respondent

CC. Wamache