



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CAUSE NO. 48 OF 2014**

(Before Hon. Justice Maureen Onyango on 20<sup>th</sup> February, 2015)

KENYA UNION OF SUGAR PLANTATION &

ALLIED WORKERS ..... CLAIMANT

**-VERSUS-**

SONY SUGAR COMPANY LTD ..... RESPONDENT

**RULING**

The claim herein was filed by the respondent vide Memorandum of Claim dated 3rd March 2014 and filed in court on 14th March 2014. The issue in dispute is the illegal/unfair and unprocedural termination of the employment contract of Joseph Ogendo Ogolla, Cornel Awuondo Otieno and Mark Ongoro Ocholla. The claimant prayed for orders that the court;

- i. Overturn the decision of the respondent to terminate the employment contract of the 3 claimants.**
- ii. Order for the reinstatement of the claimants without loss of benefits therefrom.**
- iii. Order for costs of the suit.**

The respondent filed its Memorandum of Defence on 31st July 2014. In the defence the respondent stated that the 1st grievant was employed on 22nd April 2003 and terminated on 29th August 2007, the 2nd grievant was employed in 1992 and terminated on 20th June 2008 while the 3rd grievant was employed on 14th April 1997 and terminated on 14th September 2007. The respondent averred that the termination of employment contracts of the grievants were for good cause and prayed that the court upholds the terminations.

On 19th May 2014 the respondent filed a notice of preliminary objection on the grounds that the claim is statutorily barred both under Section 4 of the Limitation of Actions Act and Section 90 of the Employment Act. The respondent's 2nd ground of objection is that there are three grievants in the claim and the manner in which the claim is filed amounts to a misjoinder of issues as the grievants were all terminated on different dates and on different grounds.

Both parties filed elaborate submissions in respect of the preliminary objection.

The parties appeared before me for hearing of the preliminary objection on 20th January 2015. Mr. Ogutu instructed by the claimant union appeared for the claimant union while the respondent was

represented by Mr. Molenje instructed by the Federation of Kenya Employers. Both Mr. Ogutu and Mr. Molenje stated that they were relying on their written submissions.

Mr. Molenje submitted that both the Limitation of Actions Act and Section 90 of the Employment Act do not provide for extension of time in contracts. Mr. Molenje further submitted that the conciliation process does not stop time from running and as such does not bar a plea of limitation. He further submitted that the claimant came to court over a year after conciliation was finalized.

Mr. Molenje also submitted that limitation is a point of law and not a procedural matter as it is provided for by substantive law. He further submitted that even after the respondent filed the notice of preliminary objection and the list of authorities the claimant did not make any attempt to seek extension of time, which in any event cannot be granted as it is not permitted by law.

On the issue of misjoinder, Mr. Molenje submitted that the termination letters of the grievants was sufficient proof of misjoinder as the dates and reasons for termination for all three grievants were different and the cases ought to have been filed separately.

He urged the court to strike out the case.

Mr. Molenje relied on the following authorities; *Mukisa Biscuits Manufacturing Co. Ltd -Vs- West End Distributors Ltd [1969] E.A. 696; Indus Cause No. 1686/11 - Peter Musembi -Vs- Barclays Bank of Kenya Ltd; Kenya Power & Lighting Co. Ltd -Vs- Mutava Nzanu Nguu, NKR HCCA No. 65/05 (eKLR); Timothy M. Mukalo -Vs- Reuben Alubale Shiramba & 3 Others, Nrb HC. Misc. App No. 696/04 [2005] eKLR; Aggrey Amugune Akwiyanga -Vs- Inderpal Singh (K) Ltd, Nrb HCCA NO. 367/07 (eKLR); Julius Momanyi Ndege -Vs- Town Council of Keroka & Anor [2009] eKLR; Indus Cause No. 164(N) of 2009 - Ayub Asamba -Vs- Telkom Kenya Ltd; Indus Cause No. 2138 of 2012 - Rama Krishnarao -Vs- Saj Ceramics Ltd; Maria Machocho -Vs- Total Kenya Ltd, Indus Misc. App No. 2 of 2012 [2013] eKLR; Ngari & Anor -Vs- Odero, Civil Appeal No. 233/98 [1998] LLR 823 (CAK0 & Mbithi -Vs- Municipal Council of Mombasa & Anor, Civil Appeal No. 3 of 1992 at Nairobi [1992] LLR 2235 (CAK); Misc. App. No. 6/12 - Humphrey Nyagoe Makori -Vs- Kenya Airports Authority.*

Mr. Ogutu for the claimant opposed the preliminary objection. He relied on the Memorandum of Claim and submissions filed in opposition of the notice of preliminary objection.

Mr. Ogutu submitted that the claimant and respondent signed a recognition agreement which provides for trade disputes resolution framework. That before the dispute was filed in court it had to go through the process set out in the agreement. He referred to the recognition agreement filed as annexure No. 23 of the Memorandum of Claim. He stated that the procedure therein is long and tedious, and must be complied with. He admitted that the claim is out of time but stated that the process was started in time. He stated that the recognition agreement requires the respondent (employer) to convene the meeting and that the parties can only proceed to the next level after exhausting the grievance process. He submitted that the claimant tried to convene the meeting but the respondent kept changing dates of meetings. He submitted that the claimant started the process immediately.

On the issue of misjoinder, Mr. Ogutu stated that this was not fatal as this court has previously allowed such cases to proceed. He referred to Cause No. 183 of 2010 between *West Kenya Company and Kenya Union of Sugar Plantation and Allied Workers* where the court disallowed a preliminary objection in a case involving a driver and two security officers. He also referred to Cause No. 345(N) of 2009 between *Kenya Union of Plantation and Allied Workers and Sony Sugar Ltd* where the issue in dispute was termination of employment of a clerk and a driver/mechanic where a similar preliminary objection was rejected and the court directed that the case proceeds.

He urged the court to interpret the law taking into account the recognition agreement, dismiss the preliminary objection and allow the case to proceed to conclusion.

In a brief rejoinder, Mr. Molenje submitted that the recognition agreement deals with grievance handling within the organization and provides for grievances to be handled within 10 days, and further that the recognition agreement does not oust the Limitation of Actions Act and Section 90 of the Employment Act. On the authorities cited by Mr. Ogutu, Mr. Molenje stated that the judgment in Cause No. 183 of 2010 did not address the issue of misjoinder while Cause No. 346(N) of 2009 did not state the reasons for rejection of the preliminary objection. He urged that the court finds both authorities to be irrelevant to the determination of the issues raised in the preliminary objection.

I have considered the oral and written submissions of both parties. Section 4 of the Limitation of Actions Act provides for claims in contract to be made within 6 years from the date of accrual of action. Section 90 of the Employment Act provides that claims arising under the Act must be made within 3 years from date of the act or injury complained of.

In the present case, the 1st grievant's employment was terminated on 29th August 2007, the 2nd grievant's on 20th June 2008 and the 3rd grievant's on 14th September 2007.

The Employment Act 2007 came into operation on 2nd June 2008. This means that the claims for the 1st and 3rd grievants are covered by the Limitation period of 6 years as provided in the Limitation of Actions Act while the limitation period for the 2nd grievant whose employment was terminated after the Employment Act 2007 came into force is 3 years. The cases having been filed through the claimant, a trade union, are also covered by the Trade Disputes Act for the 1st and 3rd grievants, and the Labour Relations Act for the 2nd grievant.

Under both the Trade Disputes Act and the Labour Relations Act, disputes filed by trade unions must commence by reporting the dispute to the Minister for Labour under Section 4 of the Trade Disputes Act or Section 62 of the Labour Relations Act respectively.

Section 4 of the Trade Disputes Act provides as follows:-

**"(1) Subject to subsection (4) any trade dispute, whether existing or apprehended, may be reported to the Minister by or on behalf of any party to the dispute.**

**(2) Every report of a trade dispute shall be made in writing and shall sufficiently specify -**

**(a) the employers and employees, or the classes and categories thereof, who are parties to the dispute:**

**(b) the party or parties by whom or on whose behalf the report is made:**

**(c) the nature of the authorization given by the party or parties desiring the dispute to be reported on their behalf; and**

**(d) each and every matter over which the dispute has arisen or is apprehended.**

**(3) ---**

**(4) Any trade dispute involving the dismissal of an employee or the termination of any contract of employment shall be reported to the Minister within twenty-eight days of the dismissal or termination of employment:**

**Provided that the Minister may, if he considers that the circumstances of a particular case so warrant, accept the report of a trade dispute concerning a case of dismissal or termination not so reported to him within twenty-eight days.**

**(5) ---"**

Section 62 of the Labour Relations Act provides as follows:-

**"(1) A trade dispute may be reported to the Minister in the prescribed form and manner -**

- a. by or on behalf of a trade union, employer or employers' organization that is a party to the dispute; and**
- b. by the authorized representative of an employer, employers' organization or trade union on whose behalf the trade dispute is reported.**

**(2) ---**

**(3) A trade dispute concerning the dismissal or termination of an employee shall be reported to the Minister within -**

- a. ninety days of the dismissal; or**
- b. any longer period that the Minister, on good cause, permits.**

**(4) ---**

**(5) ---"**

The Trade Disputes Act provides for disputes to be reported within 28 days in the case of dismissal or termination of any contract of employment while the Labour Relations Act provides for reporting within 90 days. In both cases the process should not take more than the 6 years provided for under the Limitations of Actions Act or 3 years under Section 90 of the Employment Act. The labour Relations Act provides at Sections 69 and 73 (1) as follows:-

**"69 A trade dispute is deemed to be unresolved after conciliation if the -**

- a. conciliator issues a certificate that the dispute has not been resolved by conciliation; or**
- b. thirty day period from the appointment of the conciliator, or any longer period agreed to by the parties, expires."**

**"73(1) If a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the Industrial Court in accordance with the rules of the Industrial Court."**

I have also looked at the provisions of the recognition agreement relevant to resolution of disputes and the process does not take as long as the claimant would have the court believe.

I agree with the respondent that neither the recognition agreement nor the Trade Disputes Act provide for the ouster of the Limitation period once the dispute has been filed. Mr. Ogutu for the claimant admitted that the claims were filed out of time. As stated by **Mbaru J** in Cause Nos. 857, 858 and 859 of 2010 between **Joseph Mbasu Muthama V British American Tobacco Ltd**, failure to comply with a mandatory provision of the Law offends the Law. The fate of claims filed out of time have been pronounced in many suits. The position was aptly put in the decision of the Court of Appeal in **Divecon Ltd V Samani [1995 - 1998]** 1 EA 48 where the court stated as follows:-

**"No one shall have the right or power to bring an action after the end of six (6) 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 (6) 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 contract. In the 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'."**

In this case the 1st grievant's case should have been filed by 29th August, 2013, the 2nd grievant's by 20th June 2011 and the 3rd grievant's by 14th April 2013. The claim herein was filed on 14th March 2014, well out of time. I am bound by the mandatory provisions of Section 4(1)(a) of the Limitations of Actions Act and Section 90 of the Employment Act.

The result is that I have no jurisdiction to hear this case and must strike it out, which I hereby do.

Having struck out the suit, I do not have to make any determination on the second limb of the respondent's preliminary objection being that the claim for the 1st and 3rd grievants offend the provisions of Section 4(4) of the Trade Disputes Act.

Each party shall meet its costs.

Orders accordingly.

**MAUREEN ONYANGO**

**JUDGE**

**20/2/2015**

**Appearances:-**

Ogutu John for claimant present

Muthenya h/b for respondents

CC. Wamache