



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO 867 OF 2014

PHILIP GITONGA MBIRITICLAIMANT

VERSUS

EQUITY BANK LIMITEDRESPONDENT

RULING

Githinji Kimamo & C.Advocates for the Claimant

Wangai Nyuthe & Co.advocates for the Respondent

1. On 7th July 2014 the respondent filed Preliminary Objections to the suit as filed by the claimant on the grounds that;
 - a. *The plaintiff's suit against the defendant is time barred pursuant to section 90 of the Employment Act;*
 - b. *That section 90 of the Employment Act, 2007 expressly sets limitation at 3 years for all alleged injury claims arising out of employment;*
 - c. *The alleged cause of action herein is alleged to have arisen on 31st May 2006 and the suit was filed on 26th May 2014 which is 8 years after the alleged cause of action arose and long after the suit was statute barred, limitation having set in.*
2. Both parties agreed to file their written submissions with regard to the preliminary objections.
3. The respondent thus submitted that section 90 of the Employment Act, 2007 is specific as all suits on employment must be filed within 3 years from the date of cause of action. In this case the cause of action is alleged to have arisen on 31st May 2006 and the suit was filed on 26th May 2014 while the suit time lapsed as of 1st June 2009. At the time of filing the suit it was 8 years after the date when the cause of action arose. To file suit after the same is time barred is an abuse of the court process.
4. The respondent also submitted that the Court has expressed itself with regard to the application of section 90 of the Employment in several cases and urge the same to apply in this case like in **Maria Machocho versus Total Kenya Limited, Misc. Civil Cause No. 2 of 2012** where the court held that an express provision of the law cannot be circumvented by any other provision. In **Meshack Angeng'o Omondi versus Eldoret Municipal Council & Another, Cause No. 15(N) of 2010** where the court held that the suit was statute barred having been filed 6 years after the cause of action arose.

5. Section 90 of the Employment Act, 2007 gives the respondent a defence which has been raised in the memorandum of Reply in answer to the claim. There is not discretion to extend time that has lapsed based on the Limitations of Actions Act and the Employment Act, 2007 provisions. The objections raised should be upheld and the suit dismissed.

6. In reply, the claimant submitted that section 90 of the Employment Act, 2007 does not apply in this case as the cause of action herein is regulated by the repealed Employment Act, Cap 226 Laws of Kenya. The new Act does not take away the right of the claimant to sue. In this regard, limitation periods may be suspended or postponed in particular cases such as fraud or mistake as indicated in part III of the Limitation of Actions Act where as a result of a genuine reason and a person has not taken action, time can be extended. In this case the respondent should have waited for the ruling with regard to the claimant's criminal charges before they wrongfully dismissed him. The respondent failed to take into account the criminal charges and proceeded to dismiss the claimant without giving him a chance to defend himself. The respondent failed to observe their own discipline policy. In **Murgani versus Kenya Revenue Authority [2008] eKLR** the court held that the employer failed to follow their own code of conduct which formed the base for natural justice and fairness and thus the resultant dismissal was wrong.

7. The claimant also submitted that Article 159 of the constitution provides that justice shall be administered without undue regard to procedural technicalities. That the suit should proceed on merit and the objections raised be dismissed.

8. The issue in dispute in the claim is that the claimant was unlawfully, wrongfully and unfairly terminated by the respondent. The remedies sought are declaratory, seeking an order that the termination was unfair and thus the claimant should be compensated. The claim in its nature as couched by the claimant has its foundation under the Employment Act, 2007.

9. I have perused the Memorandum of Claim and at paragraph 4 and 5 the claimant avers;

4. That the claimant entered into employment with the respondent in July 2004 until 31st May 2006 when the respondent terminated the employment on the allegations of stealing by servant but the claimant was acquitted by the court.

5. That the claimant was charged with the offence of stealing by servant contrary to section 281 of the Penal Code, tried and acquitted on 29th July 2011 for lack of evidence by the chief Magistrate's Court at Milimani Case No. 995 of 2006.

10. Claims under the Employment Act, 2007 are regulated by mandatory provisions of section 90 of the Act. Claims under the repealed act, Employment Act, Cap 226 law of Kenya with regard to time were regulated by the 6 years rule under the Limitations of Actions Act, for claims based on contract as held by this court in the **Fred Mudave Gogo versus G4S Security Services (K) Ltd.**

11. As pleaded by the claimant at paragraph 4 of the claim, he was dismissed from employment on 31st May 2006. To rely on Employment Act, 2007 requires that he comply with section 90 as a mandatory provision. Where there was a genuine mistake or fraud as submitted, there is a specific procedure in law that addresses such scenarios but to file suit and then base time limitations of such a submission is not a matter that can be cured by simple application of Article 159 of the Constitution. The undue regard to technicalities envisaged under Article 159 should not be overstretched to matters already addressed by existing legal provisions such as time application of 3 years under section 90 of the Employment Act, 2007. The constitution does not oust the provisions of section 90 of the Employment Act, with regard to the operations of time and the Court reading of Article 159 of the Constitution is that where there is a legal procedure to be applied, then the Court is so guided. There is no room to exercise disregard on matter regulated by law.

12. Even where the cause of action arose during the operation of the repealed Employment Act, the provisions of section 4(1) of the Limitation of Actions Act, make provision for 6 years in claims arising out of employment contracts. Since 31st May 2006, the time lapsed is beyond the statutory allowed

period. Such time has not been extended as provided for under the Limitation of Actions Act for the claimant to enjoy the right to now file his claim as herein.

13. The claimant submission is that he faced criminal charges instituted by the respondent and this was never taken into account. In addressing a similar scenario in this Court in **Charles Manono Onchiri versus Kenya National Hospital & 2 others**, held;

The claimant herein was terminated on the 30th of November 2005 after the commencement of the criminal charges that were pending in court. These criminal charges though reported by the respondents, were not running parallel to any civil claim that had been filed in court noting that his position with the respondents was subject of these criminal charges. It was therefore the duty of the claimant to seek and protect his rights when the criminal charges commenced or immediately when he was terminated from his position with the respondents. Nothing prevented him from commencing his civil claim at any stage within the permissible time. Nothing was done by the respondent in admission of the claim or part of it to extend the legal time under which the claim fell, that is within the meaning of the Employment Act, 226 (now repealed).

[Emphasis added].

The upshot of these finding is that, the application of the Employment Act, 2007 is already overtaken in time and the provisions of Employment Act, Cap 226 as repealed is far out and equally overtaken in time which the claimant has not had extended. I find no justification for the lapses and thus the objections raised hold merit and are allowed and the suit herein dismissed save that each party shall bear their own costs.

Delivered in open Court dated and signed in Nairobi on this 19th day of May 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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