



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 138 OF 2014

GEORGE MUNGAI NGURUGWE.....CLAIMANT/RESPONDENT

VERSUS

NATIONAL BANK OF KENYA LIMITED....RESPONDENT/OBJECTOR

RULING

1. The Respondent/Applicant filed a preliminary objection dated 6th August 2014. The preliminary objection was to the effect that:-

- a. The present suit was statutorily time barred by virtue of the provisions of Section 90 of the Employment Act and Section 4(1) of the Limitation of Actions Act
- b. Leave to file the present suit was not exhibited
- c. Claim is *res judicata* as it raises issues that were raised in Cause 77 of 1999 between the Kenya Commercial Food and Allied Workers Union and the Respondent under Kenya Bankers Association.

2. The parties agreed to canvass the preliminary objection by way of written submissions. The Respondent filed submissions on 26th November 2014. In the submissions the Respondent asserted that the present suit was statutorily time barred by virtue of Section 90 of the Employment Act and Section 4(1) of the Limitation of Actions Act cap 22 of the laws of Kenya. No leave had been obtained and that the suit raised issues that are substantially the same as those raised in Industrial Cause No. 77 of 1999 between the Kenya Commercial Food & Allied Workers Union and the Kenya Bankers Association. The Respondent relied on the case of **Benjamin Wachira Ndiithi v Public Service Commission & Another [2010] eKLR**, **Boniface Inondi Otieno v Mehta Electricals Limited [2013] eKLR**, **Michael Chebii Toroitich v Peter Mogin Yatich Chebii [2013] eKLR**, **Peter Chepkochoi Mitei v Esther Jelagat Nge'ny & 3 Others [2013] eKLR**, **Hilarion Mwabolo v Kenya Commercial Bank [2012] eKLR** and **Thuranira Karauri v Agnes Ndeche [1997] eKLR** in support of the legal arguments taken in the submissions. The Respondent also relied on the Employment Act 2007, Limitation of Actions Act cap 22 laws of Kenya and the Civil Procedure Act 2010.

3. The Claimant filed submissions on 1st December 2014. In the submissions the Claimant submitted that the current case was not statutorily time barred as it was filed in the High Court of Kenya on 24th December 2004, a year after a decision by Cockar J. in cause 77 of 1999. He submitted that the accrual of the cause of action was 24th December 2003. The case at the High Court was case No. 1774 of 2004

between Sarah Gichuru & 26 others v Attorney General & 5 Others. He submitted that the case was transferred to the Industrial Court by Majanja J. for hearing but the presiding judge of the Industrial Court referred the file back to the Judicial Review Division of the High Court since the Industrial Court was the second Respondent in the suit. The Claimant decided to separate his claim from the 29 others and on 3rd February 2014 filed the present suit. He submitted that the separation and transfer of his claim from the Constitutional and Judicial Review Division to the Industrial Court should not make the claim time barred. He confirmed the termination of the Claimant took place on 5th August 1998 and the Kenya Union of Commercial Food & Allied Workers Union filed a case in the Industrial Court being Cause No. 77 of 1999 on behalf of the Claimant wherein the Court (Cockar J.) made a determination on 23rd December 2003. He contended that the date of accrual of the cause of action was 24th December 2003 and not 5th August 1998. He submitted that in the circumstances HCCC 1774 of 2004 was filed within the statutory limit of 6 years as required under Section 4(1) of the Limitation of Actions Act cap 22 Laws of Kenya. He submitted that since HCCC No. 1774 of 2004 was filed on 24th December 2004 it should not be subject to the Employment Act of 2007 or any other law enacted after 2004 and that the Claimant's case should be treated the same since it is part and parcel of HCCC No. 1774 of 2004. He submitted that the Trade Disputes Act Section 15(5) which was applicable to the claim provided that if a person is not compensated at the Industrial Court he/she had a right to proceed to any other court and file suit in respect of the same wrongful dismissal and it was on this basis that HCCC No. 1774 was filed at the High Court on 24th December 2004. He contended that his claim was therefore not *res judicata* as submitted by the Respondent. The Claimant submitted that his claim was as a result of the Respondent's actions which demonstrated arbitrariness and utter defiance of the rule of law and an abuse of the Claimant's basic constitutional human rights. He urged the dismissal of the preliminary objection with costs to the Respondent.

4. The matter before me is an interesting one. There was a claim filed under this Court when it was a tribunal in Cause No. 77 of 1999 where Saeed Cockar J. made a determination on 7th March 2001. The decision was subject of an interpretation on 24th December 2003 after parties had moved the Court for an interpretation of the award made on 7th March 2001.

5. The Respondent asserts that the cause of action accrued in 1998 while the Claimant asserts the cause of action accrued on 24th December 2004. The Respondent thus submits that the issues raised in the present claim are *res judicata*. **Black's Law Dictionary Ninth Edition** defines *res judicata* as *inter alia* an issue that has been definitively settled by judicial decision. *Res judicata* is a rule of law that, once a competent Court makes a determination on an issue between the parties in a suit on the matters litigated upon in that suit, it is not open for any of the parties to litigate upon those matters again. It is an absolute bar to litigation over the same issues.

6. In the Industrial Court, cause No. 77 of 1999, the Court award was very comprehensive. The Court gave a determination and indicated which parties were to benefit, there were some persons expressly named in the suit while others were classed together. The decision of the Court was not one that has been shown to have been set aside or appealed against. In the premises those who were to benefit under that decision ought to have done so.

7. The Limitation of Actions Act and the Employment Act have set limits on the accrual of cause of action. Under the Limitation of Actions Act there was provision as follows:-

4. (1) *The following actions may not be brought after the end of six years from the date on which the cause of action accrued -*

(a) *actions founded on contract;*

(b).....

8. Clearly, if the cause of action accrued in 1998, the applicable law would be this Act as the repealed

Employment Act cap 226 made no provision on limitation and the fallback on limitation was to the Limitation of Actions Act cap 22 of the Laws of Kenya. If the cause of action accrued on 24th December 2004, the same would apply meaning the cause of action would cease on 24th December 2010. If the cause of action accrued after passage of the Employment Act 2007 the limitation would be as per Section 90 of the Act which makes provision for limitation to 3 years. The cause of action in this suit was not after passage of the 2007 Act.

9. The Claimant readily concedes that his services were terminated on 5th August 1998. The Respondent confirms this. The cause of action therefore, in my considered view, would arise as a consequence of the dismissal on 5th August 1998. The limitation under the claim would have fallen 6 years thereafter in line with the Limitation of Actions Act. The union moved court on behalf of aggrieved members in 1999 and this was within the time competent for a suit to be mounted as per the applicable law at the time. There was a decision made by a competent Court and the decision is available to the beneficiaries under it.

10. The suit at the High Court being HCCC 1774 of 2004 had been transferred to this Court but was returned to the High Court for that Court to dispose of it as this Court is a party in the suit. There has been no demonstration that the suit was a conglomerate of individual suits. To my knowledge, that suit has not been split into individual cases for purposes of determination of the respective claims therein and any one peeling off from that suit does so at the risk of running afoul of limitation, jurisdictional and *res judicata* issues.

11. The suit presently before Court is an abuse of the Court process and is informed by poor legal reasoning. The decision of Cockar J. did not grant any of the parties before him an accrual of a cause of action. I don't buy the argument for one minute that the decision was the date of accrual of the cause of action. For the foregoing reasons and on the basis of persuasive and binding legal authorities, I am persuaded that the suit is fit for dismissal for being *res judicata* and hopelessly out of time. I accordingly strike out the suit with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 7th day of May 2015

Nzioki wa Makau

JUDGE