



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.574 OF 2013**

**NYABUTO ARAMBE ABUSA ..... CLAIMANT**

**VERSUS**

**KENYA POWER & LIGHTING CO. LTD ..... RESPONDENT**

**RULING**

1. On 9<sup>th</sup> July 2013 the respondent, Kenya Power & Lighting Co. ltd filed their statement of defence and raised preliminary objections to the suit as filed by the Claimant herein. The gist of the objections are that;

a) The claim is fatally defective as it is not accompanied by a competent Verifying Affidavit. The affidavit annexed to the claim has not been dated and it is not possible to ascertain when the affidavit was signed. This offends Rule 5(1) of the Industrial Court Rules. Failure to date an affidavit renders it incurably defective

b) The cause of action arose in June 2007 when the Employment Act, Cap 226 was in force, as well as the Trade Disputes Act. The Claimant ought to have followed the procedure laid down in the Trade Disputes Act by reporting the claim to the Minister. Section 4(4) of the Trade Disputes Act is couched in mandatory terms.

c) The Court is stopped from entertaining this suit by the provisions of Trade Disputes Act section 9(b), (e) and (f).

d) The Claimant did not apply the procedure laid down by law in force at the time when the cause of action arose, and as such, the Court lacks jurisdiction to entertain the suit.

e) The Claimant has alluded to provisions of the Employment Act, 2007, whose effective date is 2<sup>nd</sup> June 2008. In its memorandum of claim in paragraph 12, 15, 20 and 21 which relate to fair procedure and matters under the Act. To rely on the Employment Act, 2007, the claim offends the provisions of section 90 of the Employment Act. The Claimant was terminated on 25<sup>th</sup> June 2007. The claim was filed on 23<sup>rd</sup> April 2010 which is 5 years and 10 months from the date of termination. The claim is statute barred. The Court has no jurisdiction or discretion to extend time within which to file suit out of time.

f) The suit should be dismissed for being incompetent and fatally defective and for want of jurisdiction.

2. Both parties filed their written submissions. The Respondent submitted that the Claimant was employed by the Respondent on 1<sup>st</sup> July 1991 as an Artisan after completing training. By 2007 the Claimant was as Installation Inspector based in Nairobi. He was terminated on 25<sup>th</sup> June 2007. Suit herein was filed on 9<sup>th</sup> July 2013.

3. The Verifying Affidavit attached to the claim is defective as it offends the provisions of the Oaths and Statutory Declarations Act and Rule 5(1) of the Industrial Court Rules, order 4 Rule 1(2) of the Civil procedure Rules. The affidavit is not dated and it is not possible to know when it was signed. It is not possible to tell the truthfulness of the facts in the affidavit,

4. The Respondent also submitted that the cause of action arose in June 2007 when the Employment Act, Cap 226 and Trade Disputes Act, Cap 234 were in force and have since been repealed. The procedure then was to file a dispute with the Minister under section 4(4) of the Trade Disputes Act within 28 days and the Court is herein estopped from entertaining the claim as under section 9(b), (e) and (f) of the Trade Disputes Act which required the Court not to entertain any matter that had not been reported to the Minister and unless a Certificate signed by the Commissioner of Labour stating that the Minister had accepted the report of the dispute and all mechanisms of its settlement had been exhausted before reference to court. Further that before the matter could be filed in court, the Court had to ascertain that it was not solely based on the issue of dismissal or reinstatement unless the Court had received a certificate and written authority of the Minister. In this case the Claimant did not apply the procedure laid down in law and in force at the time when the cause of action arose and as such, the Court lacks jurisdiction to entertain the suit. There is no certificate from the Commissioner of Labour or written authority of the minister.

5. The Respondent also submitted that the basis of the claim at paragraph 12, 15, 20, and 21 rely on Employment Act, 2007. The Act came into force on 2<sup>nd</sup> June 2008. To thus bring the claim under the Employment Act thus, the same is statute barred under the provisions of section 90. It has taken 5 years and 10 months to file the suit and the Court has no powers to extend such time so as to have the claim filed after the due date.

6. The claim offends the provisions of section 4(4) of the Trade Disputes Act read together with Section 9(b), (e) and (f) which make it mandatory that any claim filed before the Court must comply with the same. The claim should be struck out. The Respondent relies on **Erastus Njoroge versus English Press Limited, Cause No.1378 of 2011**.

7. In response, the Claimant submitted that the claim as filed is seeking for orders that the suspension and termination of the Claimant by the Respondent were unlawful and against the rules of natural justice and contrary to the provisions of the Employment Act, 2007; orders of reinstatement without loss of benefits; payment of damages; special damages and costs. The claim is supported by the Verifying Affidavit that is signed by the Claimant and failure to date it is not fatal to the claim pursuant to the provisions of Rule 5(1) and 17 (1) of the Industrial Court Rules. An undated Verifying Affidavit does not negate a claim.

8. The Claimant also submits that he was employed on 1<sup>st</sup> July 1991; he was suspended on 20<sup>th</sup> March 2007 in accordance with clause 29(a) of the Collective Bargaining Agreement (CBA). The Claimant had been charged in Criminal Case No.132/37/07 Makadara Law Courts. While the criminal matter was pending, the Claimant was terminated on 25<sup>th</sup> June 2007. The case only came to conclusion on 23<sup>rd</sup> April 2012 when the Claimant was acquitted. The Respondent terminated the Claimant while his criminal case was still pending in Court and not determined. The Anti-Corruption and Economic Crimes Act provides for suspension on half pay and not a termination.

9. The Claimant also submitted that the cause of action arose in April 2012 and not June 2007. The claim herein arose when the Claimant was acquitted of his charges. He could not have instituted a claim against the Respondent when he still had a case pending in Court related to this matter. The preliminary objections therefore do not raise matters of law and the running themes are based on facts which should be heard in evidence. The objections raised should be dismissed with costs and allow a full hearing to

proceed.

## **Determination**

10. The Claimant in submissions does not contest the provisions of the Trade Disputes Act at section 4(4) and Section 9(b), (e) and (f). The Claimant reiterates that the claim is based on the provisions of the Employment Act, 2007. That the cause of action arose in April 2012 when the Claimant was acquitted of criminal charges levelled against him under the Anti-Corruption and Economic Crimes Act in Criminal Case No.132/37/07. Indeed the prayers in the Memorandum of Claim, page 3 at a) to d) are premised on the provisions of the Constitution and the Employment Act, 2007. With this affirmation, the Claimant thus does not make any submission with regard to the operations of the Trade Disputes Act or the Employment Act, Cap 226, both repealed.

11. It is however worth mention here that *time limitations* and the date when *a cause of action* arise are very fundamental requirements for any litigation. In employment and labour relations claims, the act complained of, the time that the complaint arose and the time such a complaint is resolved and where not resolved the time it is filed before this Court is crucial as with it, the entire jurisdiction of the Court to determine the same is important. Previously when the Court was constituted at the Industrial Court under the repealed legislation Trade Disputes Act, a detailed procedure on disputes resolution was outlined where it had to be reported to the Minister within a timeline before the Minister gave authority for such a matter to then proceed for the determination of the Court. Such disputes were filed to the Minister by trade unions under the Trade unions Act, now repealed. In matters that were filed before the High Court, such matters were governed under the Limitations of Action Act. With the repeal of the Trade Disputes Act, filing of claims before this Court is governed by the application of the Industrial Court Act, the Employment Act and the Labour Relations Act.

12. Therefore any complaint that arose before the repeal of the Trade Disputes Act or the Employment Act, Cap 234 and 226 respectively had a clear procedural guideline. Upon repeal, the Labour Relations Act makes provision for transitional measures in this regard thus;

**84.** (1) The Trade Union's Act and the Trade Disputes Act are repealed.

(2) *Transitional provisions dealing with the transition from the Trade Unions Act and the Trade Disputes Act to this Act are contained in Fifth Schedule.*

13. Under the 5<sup>th</sup> Schedule, such transitional provisions are outlined as follows;

(4) *Where any of the following matters commenced before the commencement of this Act, the matters shall be determined in accordance with the provisions of the Trade Disputes Act (now repealed)*

(a) *any trade dispute that arose before the commencement of this Act;*

(b) *any trade dispute referred to the Industrial Court before the commencement of this Act;*

(c) *any revision or interpretation of an award by the Industrial Court; and*

(d) *any summary dismissal that took place before the commencement of this Act;*

14. In this case, the facts of the matter before Court are that the Claimant was suspended on 20<sup>th</sup> March 2007. He was terminated on 25<sup>th</sup> June 2007. These are the labour and employment threads necessary here. The *cause of action* thus arose following the suspension or the termination. This being March and June 2007, the applicable law in regulation of *time limitation* was the Trade Disputes Act and the Employment Act, now repealed and Cap 234 and 226 respectively. The Claimant ought to have filed his claim under the Trade Disputes Act read together with the Employment Act at section 15 that offered the remedies of reinstatement and damages as claimed herein. To invoke the provisions of the Employment

Act, 2007 is to go way out of the limitation period under the provisions of section 90 that provide for *time limitation* at 3 years from the time the *cause of action* arose.

15. I further find The law cannot be suspended by the CBA. A CBA can only confer a legal benefit and not circumvent the law. It must be set within the realms of the law and not outside it. The law make it mandatory that claims must be lodged in Court within 3 years where the same is based under the provisions of the Employment Act, 2007. These mandatory provisions cannot be changed, amended, repealed or in any way be circumvented through a CBA or an agreement between the parties. Time for filing of claims under the Employment Act in regulated under section 90 and this can only be changed through Parliament in an amendment that is published.

16. A suspension by an employer is an employment practice. Where such a suspension affects an employee's labour rights, the same can be challenged before this court. A termination is equally an employment practice. Where such a termination is not based on valid grounds, is not just or reasonable or has failed to have substantive and procedural fairness, the same can be challenged before this court. A criminal process is a matter that requires evidence that has to be addressed by a different Court other than this one. Criminal proceedings are therefore not a bar in themselves to proceeding before this court. Employment and labour relations proceeding before this Court are filed as of right and criminal proceedings proceed before different courts based on various laws, and such proceedings have a lift of their own different from proceeding before this court. To therefore file an employment and labour case before this Court should not be based on criminal proceedings taking place elsewhere.

17. I therefore find, the provisions of clause 29(a) of the CBA between the parties herein is not a matter that legally stopped the Claimant from filing his claim within the time limitations outlined under section 90 of the Employment Act. Even where such a provision exists, the timelines for suspension under the CBA is not indicated and to thus wait until the legal timeline is exhausted and then rely on clause 29(a) of the CBA is not justified. The CBA does not oust the law that regulate time. Equally a person charged under the Anti-Corruption and Economic Crimes Act, does not oust the operations of section 90 of the Employment Act. The Act addresses crimes committed under it which are of criminal nature and not with regard to employment and labour relations. To therefore rely on the Anti-Corruption and Economic Crimes Act and fail to file an employment and labour matter within the required time period has no justification or legal basis.

18. There is objection with regard to the filing of the claim without a signed Verifying Affidavit. The Rules of the Court must be read together with the substantive law especially for this Court the Industrial Court Act and where a particular matter is not adequately addressed by the Rules of the operative Act, any other written law applicable in Kenya and that relate to the regulation of the matter at hand can be relied upon. In this case the challenge is with regard to the filing of a Verifying Affidavit that is not signed. Under the Rules of the Court, claims must be accompanied by a Verifying Affidavit, verifying the facts upon which the claim is based on. Affidavits are governed by written law that is the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya. The affidavit required under Rule 4 on the Industrial Court Rules must accompany the memorandum of Claim filed before this Court as verification that indeed the person subject to the suit/claim has given authority to the filing of the suit and this affidavit must comply with written law that is the Oaths and Statutory Declarations Act. Such an affidavit must be signed by the deponent, dated and note the place where the deponent is situated stated. These are not just mere technicalities that can be omitted and left to be addressed literally. There is a law the governs the making of affidavit, the Oaths and Statutory Declarations Act, such a law is intended to ensure that the facts deponed in an affidavit are true and based on the personal knowledge of the maker and hence the requirement to state where the affidavit was made, the date and the name of the deponent. By signing such a statement, the deponent is in essence giving evidence under oath that the contents of such a documents is correct to the best of his knowledge at the *time* such an affidavit was made as held in **Kenya Union of Employees of Charitable Organisations versus St. Joseph Catholic Church Parish, Cause No.745 of 2013**. Hence the failure to note the dates when such an affidavit is made becomes crucial to the facts stated as such facts may or could change based on the time the particular averments in the affidavit are made. To thus fail to state the time when the affidavit was made removes a very vital aspect of the same from the document, making it valueless and cannot be relied upon. The claim that has such an

affidavit that is undated is thus left exposed and without any Verifying Affidavit.

**The claim being statute barred renders a fatal blow to it as it must be struck out. Other factors considered are that the claim has no Supporting Affidavit in verification of the same. The preliminary objections herein have merit with the effect being; suit herein is struck out. Each party shall bear their own costs.**

**Delivered in open Court dated and signed at Nairobi on this 30<sup>th</sup> day of June 2015.**

**M. MBARU**

**JUDGE**

**In the presence of**

**Lilian Njenga: Court Assistant**

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