

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 76 OF 2015

JOSEPH OWINO.....CLAIMANT

VERSUS

RICHARD M. BENET.....RESPONDENT

J U D G M E N T

INTRODUCTION

1. The Claimant brought this suit on 18/2/2015 seeking terminal dues in respect of termination of his employment by the respondent in 2013. In response, the respondent denied any employment relationship with Claimant and averred that the Claimant was employed by Mida Butterfly Farm Ltd from 1996 to 2003 when he was dismissed for misconduct. He further averred that the Claimant was involved in theft at Mida Butterfly Farm and was arrested and charged in court with Criminal Case NO. 1704 of 2004 at Malindi. The Respondent averred that the Claimant was later employed by Chilli Crakers Design Ltd (now Pilipan Ltd.) as at 2008 and not Mida Butterfly Farm Ltd. The defence further raises a preliminary objection to the suit for being time barred.

2. On 27.3.2015, the respondent filed the Notice of Motion dated 20.3.2015 which is now before the court for consideration herein. The motion is brought under section 1A and 1B of the Civil Procedure Act and basically seeks for the striking out of the Claimant's suit for being time barred. The motion is supported by the affidavit sworn by the Respondent on 20.3.2015. The motion was not opposed by the Claimant despite being served.

ANALYSIS AND DETERMINATION

3. The respondent has deponed in his supporting affidavit that he was the Director of Mida Butterfly Farm Limited and the Claimant was employed by the said company from 1996 to 2003 when he was dismissed for gross misconduct. The foregoing factual allegation have not been contested by the Claimant by an affidavit or at all. Although the Claimant has pleaded that he worked for the respondent until 2013, he did not swear any affidavit to oppose the motion now before the court to confirm that he indeed worked for the respondent upto 2013. He did not in any way rebut the allegations, by the respondent in the motion and his defence. In fact, the statement filed by the Claimant dated 23/2/2015, corroborates the allegation by the Respondent to the effect that the employment of the Claimant by the Mida Butterfly Farm Ltd ended in 2003. By the said statement, the Claimant states that he worked for the Respondent for 8 years. Counting from 1996 when the employment relation started, 8 years ends in 2004, the year when the Claimant was charged with Criminal Case No. 1704 of 2004. The court therefore finds a balance of probability that the Claimant was dismissed in 2004 and not 2013.

4. The effect of the foregoing finding is to put the dispute herein under the provisions of the older Employment Act (now repealed) and the provisions of section 4 of the Limitation of Actions Act Cap 22 of Laws of Kenya. The said provisions limited the right to sue under a contract of Employment to 6 years. In this case the right to sue lasted upto year 2010. Consequently, as at 18.2.2015 when this suit was filed, it was already time barred by over 4 years. The corollary to the foregoing is that the court's jurisdiction over the dispute herein had already been extinguished before the suit was filed. Jurisdiction is everything to the court and if it is extinguished, like in this case, the court must down its tool.

DISPOSITION

5. For the reasons stated above, the respondent Notice of Motion dated 20/3/2015 is allowed to the extent that the Claimant's suit is struck out. Each party to bear his own costs.

Dated, signed and delivered this 19th day of June 2015.

O.N. Makau

Judge