

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1540 OF 2013

IRENE GACHIE.....CLAIMANT

VERSUS

JETLAK FOODS LIMITED.....RESPONDENT

RULING

1. The Claimant filed suit against the Respondent on 25th September 2013 and sought the resolution of a dispute she framed as unfair and wrongful termination of the Claimant from employment, failure by the Respondent to give or pay one month in lieu of notice, payment of damages for opprobrium and contempt in the eyes of the public that the Claimant's character was detestable besides any other relief's and costs. The Claimant averred that she was employed by the Respondent on 1st April 2013 as a general worker earning Kshs. 3,733/-. She averred that she worked diligently until 1st November 2005 when she was given a memo sending her on compulsory leave. On her return on 8th November 2005 she was told to just go, orally, by the Managing Director of the Respondent. She wondered if she was on compulsory leave still or whether she was dismissed. She averred that the Managing Director unfairly and wrongfully terminated her employment without notice and failed to pay her outstanding dues and terminal benefits. She averred that during her employ the Respondent failed to submit her NHIF contributions and NSSF dues. She did not go on leave on 2003 as the Respondent denied her the opportunity to go on leave. She claimed Kshs. 41,525/- being 8 days leave, leave pay for 2003, one month notice, unsubmitted NHIF contributions, unsubmitted NSSF contributions and company staff pension scheme contributions and expenses of following up the claim.
2. The Respondent filed a Statement of Response on 27th January 2014 and an Amended Statement of Response on 27th February 2015. In the response, the Respondent averred that the Claimant was sent on compulsory leave on 1st November 2005 and was to resume on 8th November 2005 and that she never resumed her duties. The Respondent denied that the managing director used abusive language as claimed by the Claimant. The Respondent averred that contribution to NHIF and NSSF were submitted as required by law. The Respondent averred that the Claimant went on annual leave during her service with the Respondent. The Respondent averred that the claim was statutorily barred as it ought to have been brought under the old Trade Disputes Act and Employment Act cap 226 (now repealed).
3. The Respondent filed a preliminary objection within the statement of response to the effect that the suit is time barred as per the provisions of Section 4(1) of the Limitation of Actions Act.
4. The Claimant and Respondent agreed to canvass the preliminary objection by way of written submissions in terms of Rule 21 of the Industrial Court (Procedure) Rules 2010. The Claimant filed submissions on 13th May 2015. In her submissions she stated that the Respondent had not opposed her application to amend dated 1st December 2014. She submitted that in her application to amend she had attached the letter evidencing conciliation before the Minister. The Claimant submitted that the negotiations before the Minister hit a deadlock hence the suit in Court.

5. The Respondent on its part filed submissions on 5th May 2015. In the submissions the Respondent submitted that the Claimant had filed the suit out of time in terms of Section 4(1) of the Employment Act without leave of the Court. The Respondent submitted that the suit is thus incompetent and bad in law and ought to be dismissed for being time barred and in violation of the law. The Respondent relied on the case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A. 696** on the issue of what constitutes a preliminary objection. The Respondent also relied on a decision of this court in **Causes No. 1981 of 2011 and 1996 of 2011 Tailors & Textiles Workers Union v Moi University and Rivatex E.A. Limited**. The Respondent further relied on **Cause 1686 of 2011 Peter Musembi v Barclays Bank of Kenya Limited** on the issue of limitation. The Respondent also relied on the cases of **Kenya Power and Lighting Co. Ltd v Mutava Nzanu Nguu [2005] eKLR** and **Timothy Mukalo v Reuben Alubale Shiramba & 3 others [2005] eKLR**, **Cause 2138 of 2012 Rama Krishnarao v Saj Ceramic Ltd**, **Cause No. 164(N) of 2009 Ayub Asamba v Telkom Kenya Ltd** and **Maria Machochi v Total (K) Ltd [2013] eKLR** among others. The Respondent submitted that the court should uphold the preliminary objection.
6. The Respondent raises what is clearly a preliminary objection as defined in the case of **Mukisa Biscuits** (above) and reiterated in **Tailors & Textiles v Moi University & Rivatex** (above). The Respondent seeks the determination of the issue of limitation. The Claimant on her part submits the matter was referred to the Minister for conciliation. If indeed the claim was filed out of time then the only remedy would be a dismissal as held in the authorities cited by the Respondent.
7. However there is an issue that needles the brain and that is the reference to the Minister. Under the Trade Disputes Act, a matter would only be ripe for Court after the steps therein were taken and in compliance with the dictates of the Trade Disputes Act a certificate has been issued. I have perused the pleadings and have seen the letter of 26th June 2006 referring the matter to the Minister. In the premises before the Court determines whether indeed the Claimant was non-suited due to limitation the Minister has to avail to Court the documents in respect of the matter. In the premises I direct that the Registrar of this Court to write to the Minister for Labour and to the Kenya Commercial Food & Allied Workers Union and enquire what became of the dispute referred by the Union in June 2006. The parties will return to Court in 40 days to confirm the outcome of the inquiry and for further directions.

Orders accordingly.

Dated and delivered at Nairobi this 18th day of June 2015

Nzioki wa Makau

JUDGE