



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 131 OF 2013

BETWEEN

SILVESTER NDENGA ONIANG'O.....CLAIMANT

VERSUS

1. CABLES AND PLASTICS

2. THE OFFICIAL RECEIVER, CABLES AND PLASTICS LTD.....RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Ms. Nyawinda Advocate holding brief for Ms. Sarah Essendi Advocate for the Claimant

No appearance for the Respondents

ISSUE IN DISPUTE: 1 UNFAIR AND UNLAWFUL TERMINATION

2. INSOLVENCY OF AN EMPLOYER

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed this Claim originally at the Industrial Court in Nairobi, registered as Cause Number 1736 of 2012. It was transferred to Industrial Court Mombasa on 14th May 2013, and assigned the current registration. The Claimant states he was employed by the 1st Respondent in January 1995 as a Machine Operator. He was placed on casual terms, but subsequently offered a letter of employment on regular

basis. He left employment in July 2005.

2. The Claim was filed on 13th October 2011. In paragraph 15 of the Claim and its Amendment, the Claimant states he has been out of work from July 2005. At paragraph 3, he alleges his contract was wrongfully terminated. In his evidence and submissions, there is confirmation termination took place in July 2005. He seeks the following orders against the Respondent:-

- a. Payment of all benefits including 2 months' salary in lieu of notice; accrued annual leave; gratuity; overtime; underpayments; and other allowances for the years of service with the Company as per agreement that existed between the Parties at the time.
- b. Costs.
- c. Interest and any other reliefs.

The Claimant was heard, and closed his case on the 12th March 2014. He called one other Witness, his former Co-Employee Mr. Albert Mwangi. There was no evidence on the part of the Respondents. The 1st Respondent was wound up through a winding up order issued by the High Court Milimani Commercial Court, while the current Claim was pending. The 2nd Respondent was added to this Claim with the consent of the Parties on 16th June 2014

3. The Claimant only filed the Claim in 2011 - 5 years after termination. In paragraph 19[8] of the Amended Claim, the Claimant charges that his Employer failed to adhere to Section 41 of the Employment Act 2007, in terminating his contract. In the Closing Submissions, he cites Section 45 of the Employment Act 2007. It is his position that the Employment Act 2007 applies to his Claim.

Is the Claim Time-barred?

4. Issue Number 2 formulated in the Submissions, is whether the Claim is time barred. Section 90 of the Employment Act 2007 – the law invoked in pursuing the Claim herein- places a ceiling of 3 years on filing of Claims under that Act. It is clear the Claimant did not file his Claim within the prescribed period, under the law he has invoked, if it is true that, that law applies to his Claim.

5. He cites ***Industrial Court at Nairobi case between KUDHEIHA v. Marsh Park Towers [2013] e-KLR***, where the Court ruled that the 3 year cap does not intend to lock out litigants who opt to seek justice through conciliation route, which is encouraged under the Constitution.

6. The argument on limitation under Section 90 of the Employment Act 2007 is misperceived. The Employment Act 2007 came into force in June 2008. It cannot apply to a cause of action which arose in 2005. It is not the substantive law which would apply to the Claim.

7. The applicable substantive law, in determining the Claimant's terms and conditions of service, would be the repealed Employment Act Cap 226 the Laws of Kenya, and the Regulation of Wages and Conditions of Employment Act Cap 229 the Laws of Kenya. In a Claim for unfair termination where compensation, reinstatement, or re-engagement are sought, the applicable substantive law, would be Section 15 of the repealed Trade Dispute Act Cap 234 the Laws of Kenya. The Claimant does not seek these remedies, and the Trade Disputes Act as a substantive law is inapplicable.

8. The correct procedure in approaching the Court, in a termination Claim which arose in 2005, is through the Trade Disputes Act. This law was repealed through Section 84 of the Labour Relations Act Number 14 of 2007. Schedule 5 of this law states that all termination Claims arising or pending, before the Act came into force [26th October 2007], are to be dealt with in accordance with the Trade Disputes Act.

9. Under Section 4 of the Trade Disputes Act, '*any dispute involving the dismissal of an Employee or the*

termination of any contract of employment shall be reported to the Minister within 28 days of the dismissal or termination of employment:

Provided the Minister may, if he considers that the circumstances of a particular case so warrant, accept the report of a trade dispute concerning a case of dismissal or termination not so reported to him within 28 days.’’

10. The Labour Relations Act has retained this Ministerial discretion on receipt of termination disputes, under Section 62 [3], while raising the limit to 90 days.

11. Once the Minister has exercised his discretion, the statutes of limitation would have no effect on subsequent adjudicatory process before the Labour Court. The adjudicatory mechanism of the Labour Court is seen as a continuation of a multi-tiered dispute resolution edifice, so that the cut-off point in time for the filing of the Claim, cannot be confined to the date of filing of the Statement of Claim in Court [or presentation of the Notification of Dispute in Court under the Trade Disputes Act]. Under this special dispute resolution regime, neither the Employment Act, nor the Limitation of Actions Act would tie down the hand of the Minister in late acceptance of disputes, or have effect on the subsequent referral of disputes to the Labour Court for adjudication.

12. The record shows the dispute was first reported to the Minister for Labour on 23rd October 2006 by the Kenya Chemical and Allied Workers Union. The Minister accepted the report of the dispute, consulted a Tripartite Committee, and appointed an Investigator under Section 7 of the Trade Disputes Act. The process started with the Trade Disputes Act, and should not have changed along the way. There were delays in the investigation and conciliation process. As late as 8th November 2012, the Union wrote to the Minister demanding for the release of the Investigation Report. No report was released. There was failure on the part of the Minister. The Claimant alongside other affected Employees sought the assistance of KITUO CHA SHERIA. This dispute was escalated to Court as a result of the failure of the lengthy investigation and conciliation process. The escalation did not result in a new process; it was a continuation of the dispute resolution process created by the law.

13. ***The Claim is not time-barred and has no relationship to the Employment Act 2007, or the Limitation of Actions Act Cap 22 the Laws of Kenya.*** The only fault with the Claim as filed is that the Claimant did not come to Court through a Notification of Dispute as would be required under the Trade Disputes Act, or through a Statement of Claim supported by an affidavit containing the history of conciliation, as would be required under Rule 6 of the Industrial Court [Procedure] Rules 2010. These are procedural lapses which cannot, in this constitutional era however, have a derailing effect on the Claim.

Insolvency

14. The second point raised by the 1st Respondent was by way of a Preliminary Objection. It was never argued, but is worthy of a cursory glance. It relates to the insolvency of the 1st Respondent. The 1st Respondent was declared dissolved through the orders of the High Court mentioned above. The 1st Respondent indicated in the Notice filed on 22nd May 2014, that it would raise objection based on its winding up.

15. Nothing of significant weight turns on this intimated objection. The Official Receiver joined the proceedings but has not responded to the Claim with any degree of energy. The dissolution should not result in the death of this Claim; delay and obfuscation perhaps, but, not in the defeat of the Claim. Even where a Company has obtained orders for dissolution, obligations owing to the Employees must be met. The Court must go on and determine what these obligations are. The Officers behind such failed Companies must be pursued. The assets of such Companies must be pursued.

16. The Respondent stated in the Notice of Preliminary Objection that in view of the winding up order, subsequent proceedings in the instant Claim would be offensive to Part 8 of the Employment Act 2007. As observed above, the Employment Act 2007 does not govern Claims which arose before its coming into

force. It is doubtful that the insolvency law under Part 8 of the Employment Act 2007 would apply to this dispute which arose in 2005.

17. The law on insolvency of Employers under Part 8 of the Employment Act relates to cases where an Employee has made an application to the Minister for Labour, for recovery of debts from the Insolvent Employer. This law allows the Minister, on application by the Employee, and upon the Minister's investigation, to pay limited number of the Employee's claims from the National Social Security Fund. It is a social security law, aimed at ensuring the Employee is cushioned against the effect of the Employer's insolvency. The law does not remove pending employment Claims from the Labour Court when, the Employer has been declared insolvent. It may be a useful law in enforcing aspects of the decisions of a Court made after the declaration of the Employers' insolvency. The Claimant in any case, has not applied to the Minister under Section 66 of the Employment Act; he has a Claim before the Court.

18. This law was not in place at the time this dispute arose, and has no effect on the Claim before the Court.

Termination and Terminal Benefits

19. The evidence of the Claimant on unfair termination was misplaced. He has not asked for compensation for unfair termination. He has not asked for any of the remedies under Section 15 of the Trade Disputes Act. His evidence about unfair treatment did not support any aspect of his prayers. The only outstanding issue is whether the terminal benefits sought, are merited.

20. The evidence of the Claimant and his Witness in Court went unchallenged. The two were able to demonstrate the Claim for terminal benefits is well-founded. There was a CBA in place, grounded on the minimum terms and conditions of employment prescribed in the applicable substantive law discussed above. There is an overabundance of material on record, gathered from the investigation and conciliation process that went on before the Ministry of Labour for over 6 years. These have assisted in the crystallization of the specific grievances the Employee has against his former Employer. They have assisted the Court in reaching the conclusion that the claim for terminal benefits, as particularized in paragraph 17 of the Claim is well-founded.

21. In short, the Court allows the claims for notice pay; annual leave; pro-rata leave; gratuity; overtime; and underpayments at Kshs. 497,772.91. The Claimant will have the costs of the Claim, together with interest calculated from the date of the delivery of this Award.

Dated and delivered at Mombasa this 19th day of June 2015

James Rika

Judge