



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

CAUSE NO 683'A' OF 2014

GEORGE HIRAM NDIRANGU.....CLAIMANT

VS

EQUITY BANK LIMITED.....RESPONDENT

RULING

Introduction

1. On 24th April 2014, the Claimant filed a Memorandum of Claim dated 23rd April 2014 seeking relief for unfair termination of employment. In the Respondent's Memorandum of Response dated 16th June and filed in Court on 18th June 2014, a Preliminary Objection on limitation of time was raised. The Respondent's Objection was confirmed by notice dated 16th June and filed in Court on 25th June 2014.

The Preliminary Objection

2. The Preliminary Objection taken by the Respondent is based on the following grounds:
- a. That the suit is time barred by the doctrine of limitation of actions;
 - b. That the Claimant has instituted the suit contrary to Section 90 of the Employment Act, 2007.
3. Mr. Mwangi for the Respondent told the Court that the cause of action herein arose on 6th April 2010 and the suit filed on 24th April 2014 was therefore time barred. In response to the Claimant's assertion that he had twelve months from his acquittal in the criminal case, Counsel submitted that the prayers in the Memorandum of Claim were based on termination of the Claimant's employment and not the criminal proceedings taken out against him. Further, remedies arising from criminal proceedings are well set out in the law of malicious prosecutions and the Claimant had in fact sued the Respondent for malicious prosecution in HCCC No 137 of 2014. Moreover, it is not unforeseeable for civil and criminal proceedings to run concurrently.
4. Mr. Mwangi went on to submit that Section 4 of the Limitation of Actions Act, on which the Claimant sought to rely, relates to enforcement of judgments while the Claimant's claim did not seek to enforce the orders made in the criminal court. According to Counsel, the law does not provide that an acquittal in a criminal court would give rise to liability against an employer in an employment dispute. These are distinct branches of law.

The Claimant's Reply

5. In reply, Mr. Walusala for the Claimant submitted that under Section 90 of the Employment Act, 2007 a claimant can bring a claim within twelve months of the cessation of a continuing injury. Following this argument, since the Claimant was acquitted on 25th May 2013, his claim filed on 24th April 2014 was within the twelve months' limitation set under Section 90 of the Employment Act.

6. In Mr. Walusala's view, the criminal proceedings in which the Respondent was the complainant and which were invoked to suspend the Claimant constituted a continuing injury within the meaning of Section 90. Making reference to Section 4 of the Limitation of Actions Act, Counsel told the Court that the Claimant had twelve years after the ruling in the criminal case within which to file the present claim.

Ruling by the Court

7. The issue for determination in this application is whether the Claimant's claim is properly before the Court. It is urged on behalf of the Respondent that the Claimant's claim is statute barred by dint of Section 90 of the Employment Act, 2007 which provides as follows:

*“Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained **or in the case of continuing injury or damage within twelve months after the cessation thereof.**” (emphasis added)*

8. This application turns on the meaning assigned to the phrase '*continuing injury or damage*'. According to the Claimant, the continuing injury in his case was made up of the criminal proceedings instituted against him. He therefore had twelve months after termination of the criminal proceedings to bring his claim before this Court.

9. The Court was referred to ***Andrew Maina Githinji & another v Attorney General and another [2015] eKLR*** in which **Ongaya J** held that in an employment dispute time does not begin to run against an employee facing criminal proceedings until the criminal case is finally determined.

10. I hold a different view. To my mind, a criminal trial and internal disciplinary proceedings at the work place are two distinct processes with different procedural and standard of proof requirements. Consequently, while an employer may rely on the outcome of a criminal trial to make an administrative decision on an employee, going against the outcome does not by itself render the employer's decision wrongful or unfair.

11. This Court has stated elsewhere that an employer cannot rely on the pendency of a criminal trial to hold an employee under discipline *ad infinitum*. An employer who commences internal disciplinary proceedings against an employee must have the ammunition to push the process to its logical conclusion and this responsibility cannot be abdicated to the investigator or the prosecutor in a criminal case facing the employee. (see ***Margaret Auma Ingwe v Kenya Power and Lighting Co. Ltd [2015] eKLR***)

12. I need to add that an employee who sits on their right to come before this Court cannot escape the limitation dragnet by waving criminal proceedings. At any rate as held by **Majanja J** in ***Republic v Public Service Commission of Kenya Ex Parte James Nene Gachoka [2013] eKLR*** and by the the Court of Appeal in ***Kibe v Attorney General (Civil Appeal No 164 of 2000)*** an acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer.

13. Further as held by **Rika J** in ***Kimatu Igecha v SBI International Holdings AG Kenya [2014] eKLR*** a criminal trial does not bar an employer from taking disciplinary action against an

employee, based on the employer's internal disciplinary processes. It is not for the police or the criminal court to absolve an employee from an employment offence.

14. What then does the phrase '*continuing injury or damage*' in Section 90 of the Employment Act, 2007 mean? I think that this phrase must be read within the purview of the jurisdiction of this Court. Section 12 of the Industrial Court Act grants jurisdiction to the Court to deal with employment and labour relations matters and the remedies available in this Court are set out in Section 49 of the Employment Act, 2007. It follows therefore that remedies arising out of criminal proceedings fall outside the province of this Court and the Claimant appears to be well aware of this fact seeing that he has filed a suit for malicious prosecution in the High Court.

15. The logical meaning of the phrase '*continuing injury or damage*' would therefore be violation of rights under an employment contract such as salary underpayment or failure to pay accrued dues. A typical memorandum of claim would normally contain a claim for compensation and payment of accrued dues. In my view, '*continuing injury or damage*' would connote such accrued dues.

16. The Court was also urged to consider the current claim as a claim under Section 4(4) of the Limitation of Actions Act which provides that an action may not be brought upon a judgment after the end of 12 years from the date on which the judgment was delivered.

17. This section deals with enforcement of judgments and according to the Claimant, the ruling in Criminal Case No 551 of 2010 is one such judgment. Stretching this argument further, it would appear that the Claimant deems his current claim as an enforcement of the ruling in the criminal case. In light of my finding that the criminal trial and the employment dispute constitute distinct legal processes, Section 4(4) of the Limitation of Actions Act is inapplicable.

18. That said, the Court finds that the cause of action in the current claim arose on the date the Claimant's summary dismissal took effect being 1st April 2010. The claim therefore ought to have been filed not later than 31st March 2013 as required under Section 90 of the Employment Act, 2007. Consequently, the claim filed 24th April 2014 was out of time and this Court lacks jurisdiction to entertain it.

19. The result is that the Claimant's claim is struck out with no order for costs.

20. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17TH DAY OF JUNE 2015

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JUDGE

Appearance:

Mr. Walusala for the Claimant

Mr. Mwangi for the Respondent