



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 740 OF 2014

GEORGE AMETIEKU OPOLLO CLAIMANT

VERSUS

GUARANTY TRUST BANK (K) LIMITED.. RESPONDENT

RULING

1. The Respondent, Guaranty Trust Bank (K) Limited filed a notice of Preliminary objection to the suit filed by George Amatieku Apollo.
2. The objection is as follows;
 - a. That this action is statute barred in view of the provisions of **Section 90** of the Employment Act, 2007 as read together with paragraph 6 of the Memorandum of Claim which paragraph shows that the Claimant's Cause of action arose on 26th October 2010.
 - b. That this action was filed out of time and without leave, **Section 4** and **27** the Limitation of Actions Act, Cap 22 Laws of Kenya do not contemplate the extension of time to file a claim based on contract out of time.
3. The suit was filed on 6th May 2014 and the three year period provided under **Section 90** of Employment Act.
4. **Section 90** reads 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 next after cessation thereof.” (emphasis mine)*

5. The Respondent filed a Memorandum of Response to the substantive Claim with a counter claim of Kshs.889,398.96 plus interest at the rate of 27.75 in respect of unsecured loan obtained by the Claimant on 16th June 2009 which loan the Claimant has not repaid.
6. A second Counter Claim is for Kshs.10,891.14 at the rate of 27.75%
7. Thirdly, the Respondent seeks for the surrender of a laptop in the custody of the Claimant and in the alternative payment of Ksh.73,250.00 being the value of the said laptop.
8. It is important to note that the Employment Act, 2007 reduced the limitation period provided under **Section 4** of the Limitation of Actions Act Cap. 22 on matters founded on contract from six (6) years to three (3) years.
9. Under **Section 90** however, is a proviso underlined above to the effect that, in case of continuing injury, or damage, the suit is to be filed within twelve (12) months next from the time the injury or

damage abated.

A plain interpretation of the wording of **Section 90** requires the following considerations:

- i. has the suit been filed outside the three years period?
 - ii. if so, has the Claimant suffered any continuous injury or damage?
 - iii. if the answer to (ii) above is in the affirmative has the continuous injury ceased?
 - iv. if the answer to (iii) above is in the affirmative, have twelve (12) months lapsed since the cessation of the continuous injury / damage?
10. The basis of the Claim is that the Claimant's constitutional right of a hearing before the summary dismissal was meted on him was violated by the Respondent and seeks a declaration that the summary dismissal on 26th October 2010 was unjustified, unprocedural and unlawful.
11. The Claimant also seeks payment of terminal benefits as follows:
- i. service gratuity for the three (3) years served at the rate of one month salary per each completed year of service;
 - ii. payment in lieu of 25 days, untaken leave days in the sum of Kshs.62,500.00;
 - iii. issuance of certificate of service in terms of the law;
 - iv. in the alternative unconditional reinstatement.
12. My reading of **Section 90** above in the context of the remedies sought by the Claimants is that; the Claim for reinstatement, payment in lieu of leave duly earned, payment of gratuity duly earned, and provision of a certificate of service by the Claimant constitute continuous injury within the meaning of **Section 90** of the employment Act, 2007.
13. In this light, the suit ought to have been filed within twelve (12) months from the date the injury / damage sought to be remedied ceased.
14. To my mind, the quest for reinstatement, has not abated; the non-payment in respect of accrued leave and gratuity and provision of a certificate of service being both statutory and contractual remedies remain continuous injuries until remedied by the employer.
15. These Claims remain alive and may be filed any time by the aggrieved employee.
16. However, since **Section 90** reads: "*notwithstanding the provisions of Section 4(1) of the limitation of Actions Act,*" it necessarily follows that the six (6) year Limitation period in respect of matters based on contract, kicks in, in respect of the continuous injury, if the suit is not filed within six (6) years from the date of termination of employment.
17. This particular suit was filed within three (3) years and six (6) months from the date of the summary dismissal.
18. Furthermore, the Counter Claim for the unpaid loans and the unreturned laptop is of a continuous nature.
19. Accordingly, the main Claim and the Counterclaim are not time barred.
20. The matter will proceed to full hearing and costs in the cause.

Dated and Delivered at Nairobi this 3rd day of July, 2015.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE