



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 551 OF 2014

PHILLIP MGHANGACLAIMANT

VERSUS

MUMI HOTELS & RESORTS LTD. T/A BAHARI BEACH HOTEL.....RESPONDENT

RULING

INTRODUCTION

1. On. 5/11/2014, the Claimant brought this suit against the Respondent for unfair termination and praying for damages. The Respondent filed her response on 12/3/2015 denying liability and contending that the dismissal of the Claimant was fair and all lawful benefits due to the Claimant were paid.
2. When the suit was mentioned for pretrial directions on 23/2/2015, it was consolidated with other related suits being ELRC No.552 of 2014, 553 of 2014, 554 of 2014 and 555 of 2014. Thereafter the Respondent filed a Notice of Preliminary Objection (P.O) dated 12/3/2015 objecting to suit on ground that the suit was time barred *vis-a-vis* Section 90 of the Employment Act. The Preliminary Objection was disposed of by way of written submissions.

RESPONDENT'S SUBMISSIONS

3. The Respondent submitted that the suit is time barred for being filed out of time and should be struck out. According to the Respondent, the Claimant has pleaded that he was dismissed from service on 31/1/2007. In that respect, filing the suit on 5/11/2014 was a span of 8 years from the date when the cause of action arose. The Respondent has relied on Section 90 of the Employment Act 207 to raise the Preliminary Objection, which provisions limits the period for filing a suit based on employment contract to 3 years from the time it arose. She has also cited several decisions of this court showing that suits filed after the 3 years statutory time bar have all been struck out for offending Section 90 *supra*.

CLAIMANT'S SUBMISSIONS

4. In response to the Preliminary Objection, the Claimant has admitted that he was dismissed from service on 31/1/2007 and reported to his Trade Union who reported the dispute to the Minister for Labour on 15/2/2007 under the now repealed Trade Disputes Act (TDA). The Minister then appointed an Investigator under Section 7 of TDA on 15/3/2007. The Investigator compiled his investigations report dated 7/7/2011 whereby he found that the dismissal of the Claimant was

unlaw and unfair and recommended for payment of wages in lieu of notice, *Pro-rata* leave days due and compensation for 3 months wages for wrongful loss of employment. The union accepted the report and recommendation but the Respondent disputed the report. Consequently the Union gave a Notification of a dispute under Section 14(7) of the Trade Disputes Act which notice was referred to the Industrial Court under Section 14(9) of the Trade Disputes Act and the notification was served upon the Respondent by the Minister on 5/8/2013. Thereafter the Claimant served the Respondent with a demand letter on 6/8/2014 and the Respondent on 17/9/2014 denying liability hence the filing of this suit on 5/11/2015 and present Preliminary Objection.

5. The Claimant has in view of the foregoing background submitted that the Preliminary Objection must fail because time stopped running when dispute settlement Mechanism under the Trade Disputes Act was initiated. He cited Court of Appeal decision in ***OFFICE RESTAURANT VERSUS KENYA HOTELS & ALLIED WORKERS UNION [2014] eKLR*** to buttress the foregoing submission. In addition, he cited the transitional provision under Section 84 of the Labour Relations Act (LRA) and Rule 4 of the 5th Schedule to the Labour Relations Act which is to the effect that disputes involving summary dismissal which took place before commencement of the Labour Relations Act, shall be determined under the provisions of the repealed TDA.
6. As a consequence of the said transitional provision the Claimant submits that Section 90 of the Employment Act, 2007 does not apply to this case. According to the Claimant, the Employment Act 2007 came into force on 2/6/2008 and as such Section 90 of the Act cannot apply retrospectively to a cause of action which occurred in January 2007. He cited High Court decision in ***ESTHER KAHU KIHIMA -VS- TRIDENT INSURANCE CO.LTD [2013] eKLR*** where the court held that Section 90 of the Employment Act 2007 only applies to claims that arise after the commencement date of the Act being 2/6/2008. Based on the foregoing submissions, the Claimant prayed for the Preliminary Objection to be dismissed with costs.

ANALYSIS AND DETERMINATION

7. There is no dispute that the Claimant in this suit and the 4 other Claimants in ELRCC 552, 553, 554 and 555 of 2014 were employed by the Respondent until 31/1/2007 when they were summarily dismissed. There is also no dispute that the Claimants initiated proceedings through their Trade Union, under the Trade Disputes Act before the Minister for Labour on 15/2/2010. There is further no dispute that the Respondent participated in the said proceedings which culminated in the report and recommendation by the investigator dated 7/7/2011. It is further not disputed that the Respondent disagreed with the said report and recommendation leading to the referral of the dispute to the Industrial Court, the predecessor of this court, under Section 14(9) of the Trade Disputes Act, *vide* a Notification given by the Claimant's union under Section 14(7) of Trade Disputes Act on 1/7/2013. The only issue for determination is whether the suit filed on 5/11/2014 is time barred.

Time Bar

8. The Claimant has contended that the suit herein is governed by the provisions of Trade Dispute Act by dint of Section 4 of the 5th schedule to Labour Relations Act which flows from Section 84 of the Labour Relations Act. The said Section 4 provides that where any dispute related to any summary dismissal, were commenced before the commencement of the Labour Relation Act, the same shall be determined in accordance with the provisions of the Trade Disputes Act (repealed). The said position was upheld by the Court of Appeal in the ***Office Restaurant Case*** which involved termination of employment contract through redundancy. The said court went ahead to hold that time stopped running for purposes of statutory limitations when the dispute settlement mechanism under the Trade Disputes was commenced by the formal reference of the dispute to the Minister of Labour. The Court of Appeal therefore confirmed the decision of this court in a similar Preliminary Objection by stating thus:

“This process continued and sustained the Respondent cause of action

until the matter was referred to the Industrial Court in accordance with Section 14(7) of the Trade Disputes Act (repealed).”

9. This court is bound by the law and the said Court of Appeal decision. Without going to the facts of the case, the court is alive to the fact that the dispute herein was commenced under the Trade Disputes Act on 15/2/2007 before Labour Relations Act came into force. The said process continued until the dispute was referenced to this court in July 2013 under Section 14(7) of the Trade Disputes Act (repealed). Consequently the court finds that the suit is properly before the court. The only issue one can raise relates to the kind of documents filed. The Court expects that instead of what seems to be a fresh suit, the Minister of Labour should just have forwarded the record of the dispute from his office. This court will however not major on the form of the suit but the substantial justice under Article 159 of the Constitution.
10. In view of the holding of the Court of Appeal in the **Office Restaurant Case**, the court finds that the suit by the Claimant is not time barred. The dispute settlement mechanism having been commenced within 28 days as required under section 4(4) of Trade Disputes Act and continued by the process before the Minister under until it was referred to this Court in July 2013, meant that the suit could never become time barred.

DISPOSITION

11. For the reason cited above the Preliminary Objection by the Respondent is dismissed with costs. This ruling shall apply to ELRC 552, 553, 554 and 555 of 2014 which were consolidated with this suit.

Dated, signed and delivered this 3rd day of July 2015.

O. N. Makau

Judge