REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

INDUSTRIAL CAUSE NO. 333 OF 2013

BENSON WILLIS OKELLO.....CLAIMANT

VS

IMPERIAL HOTEL LTD .....RESPONDENT

R U L I N G

By a Memorandum of Claim dated 5th December, 2013 and filed on 10th December, 2013 the Claimant states that he was employed by the Respondent as cashier at the Imperial Hotel Kisumu. He was earning a salary of Shs.12,548 per month together with house allowance. He was illegally and unlawfully terminated from employment. He alleges the termination was in violation of the Constitution and Labour Statutes. He seeks payment of Shs.147,277 made up of severance pay, leave accrued and 3 months salary in lieu of notice.

The Claimant further states that there was a suit of a similar nature which was withdrawn.

The Respondent filed a Reply to the statement of claim on 6th February, 2014 denying that the termination of the Claimant's employment was illegal. The Respondent averred that the termination was lawful and the Claimant was paid his terminal dues. The Respondent denies owing the Claimant the sum claimed and states the Claimant was the author of his misfortunes.

On 3rd November 2012 the Respondent filed a Preliminary Objection on the following grounds:-

1. *That this matter is res judicata the Claimant having filed WINAM PMCC NO. 123 of 2008 which was dismissed for want of prosecution*

2. *That the claim herein is statute barred under the Provisions of Section 90 of the Employment Act and the court lacks jurisdiction to entertain the present sui*t.

The Preliminary Objection was fixed for hearing on 10th June, 2015. On the hearing date the parties agreed to canvass the Preliminary Objection by way of written submissions. They subsequently filed and exchanged written submissions.

The Respondent submitted that the claim is *res judicata* the prayers having first been made in WINAM PMCC NO. 123 OF 2008 which was dismissed for want of prosecution. The Respondent relied on Section 7 of the Civil Procedure Act and the case of *Douglas Kimemia Mukono v Equity Bank Limited & Another [2015] eKLR* where the court stated

"Suits can be determined in several ways.....cases can also be determined through applications such as those striking out pleadings or those seeking summary judgement. When a case is determined through

those ways, some parties may not feel that they had been accorded every opportunity to make their cases. But such determination remains legitimate. The single most important consideration is that the court would have given the parties an opportunity for a fair hearing."

The Respondent further relied on the decision of the court in *Nancy Mwangi T/A Worthlin Marketers vs Airtel Networks (k) Ltd (Formerly Celtel Kenya Ltd) & 2 others [2014] eKLR* in which the court made reference to *E.T.v Attorney General & Another [2012] eKLR* wherein the court stated:-

"*The courts must be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court".*

The Respondents second ground is that the claim is time barred under Section 90 of the Employment Act as it was filed more than 3 years after the cause of action accrued. The Respondent relied on the court's decision in *Fred Mudave Gogo vs G4S Security Services* in which the court stated;-

"*This is not a mere technicality as it touches on the substances of the claim and a fundamental flaw if not addressed before parties file their claims. This time can be extended upon the court being moved by a party who on good grounds finds themselves under this circumstances...*

The claim therefore does not conform to the mandatory time limitations.

It must fail..."

The Respondent submitted that the Claimant's case must fail on these two grounds and urged that the claim be dismissed with costs.

For the claimant it was submitted that the rules of natural justice are quite clear in respect of a dispute, with the cardinal rule being the right to be heard. The Claimant relied on Article 2(4) as read with Article 2(1) of the Constitution to the effect that the Constitution is the supreme law and any law that is inconsistent with the constitution is void to the extent of the inconsistency. The Claimant submitted that Section 90 of the Employment Act and Section 7 of the Civil Procedure Act are ultra vires the provisions of Article 22(1) and (2) and Article 258(1) and are therefore invalid. He further relied on Article 159 (1) (d) which provides

"Justice shall be administered without undue regard to procedural technicalities."

The Claimant relied in the decision in USA case of *Marbury v Madison 5 US. 137 (1803)* where the court when faced with the dilemma of applying either the constitution or an Act of legislation ruled :-

"...so if a law be in opposition to the constitution if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law disregarding the constitution, disregarding the law, the court must determine which of the conflicting rules govern the case. This is the very essence of judicial duty. If, then, the courts are to regard the constitution and not such ordinarly act, must govern the case to which they may both apply."

On the issue of *res judicata* the Claimant submitted that it was never heard at the lower court and that the case was withdrawn by the Claimant before filing the present case. The Claimant argued that according to Section 7 of the Civil Procedure Act, the doctrine of *res judicata* is not applicable as the case was not finally determined.

The issue arising out of the submissions of the Respondent and the Claimant are the following:-

1. Is the Claimant's suit time barred
2. Is the Claimants' suit *res judicata*
3. Is limitation a procedural technicality which the court should overlook in the administration of justice

4. Are Sections 7 of the Civil Procedure Act and Section 90 of the Employment Act void for being inconsistent with the constitution.

The Claimant's employment with the Respondent was terminated on 29th January, 2005. At the time the law applicable for purposes of employment dispute was the Employment Act (1976) now repealed. Under the Act, limitation period was as provided under Section 4(1) of the Limitation of Actions Act Cap 22 which for contracts is 6 years. The Employment Act 2007 came into force on 2nd June, 2008 and is therefore not applicable to the Claimant's claim.

This being the case the Claimant should have filed his case on or before 29th January, 2011. He indeed filed a claim being WINAM PMCC Nbi 123 of 2008. The Respondent alleges the claim was dismissed for want of prosecution while the Claimant alleges it was withdrawn. No evidence has been tendered by either party to prove that the case was either dismissed for want of prosecution or withdrawn.

This means that the plea of *res judicata* cannot be settled by way of Preliminary Objection as the Respondent would require to submit evidence to prove its allegation that the Claimant';s suit in WINAM PMCC NO. 123 of 2008 was dismissed for want of prosecution.

The only ground I have to consider is therefore limitation.

The Claimant does not deny that the claim is according to the Limitation of Actions Act, time barred. He has relied on Articles 159, 2(1), 2(4) and 159 to argue that limitation is a procedural technicality that cannot be used to defeat justice and that any provisions of the law conflicting with the constitution are void.

It is instructive that the Claimant was terminated in 2005 before the Constitution 2010 was enacted. He can therefore not use the constitutional provisions to avoid the provisions of the Limitation of Actions Act. Secondly, limitation is substantive law provided for both under common law and the Limitation of Actions Act. This was the decision of the court of Appeal in *Thuranira Karani v Agnes Ncheche* where the court stated that limitation goes to jurisdiction. And in *Divercon Limited v Samani [1995-1998] I A E* the court of Appeal stated

"*No one shall have the right or power to bring an action after the end of six years from the date on which a cause of action accrued, an action founded on contract."*

As was stated by Nyuarangi J.A. in *Owners of Motor Vessel 'Lilian S' v Caltex oil (Kenya) Limited [1998] KLR I "jurisdiction is everything, without it, a court has no power to make one more step."* The case further established that jurisdiction flows from the law and is not a matter of procedure.

For these reasons, I find that the claim herein is statute barred and this court has no jurisdiction to hear and determine it. The consequence is that I strike out the claim with no orders for costs.

Dated, Signed and Delivery this 25th day of September, 2015

MAUREEN ONYANGO

JUDGE