



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2064 OF 2014

PAUL CHIURI MURIUKI CLAIMANT

VERSUS

KENYATTA NATIONAL HOSPITAL RESPONDENT

RULING

1. On 27th January 2015 the Respondent filed the notice of objections to the suit was filed on the grounds that the same is time barred by statute as it offends the provisions of section 90 of the Employment Act; it is incompetent; and that employment was terminated on 29th July 2011. Each party filed their written submissions.

2. The Respondent submitted that the Claimant Paul Chiuri Muriuki filed the suit herein 18th November 2014 based on a claim of termination that arose on 19th July 2011. That under the provisions of section 90 of the Employment Act and noting the provisions of section 4(1) of the Limitation of Actions Act, the claim is statute barred. The Claimant has not sought leave to file his claim out of time and therefore he has no capacity to lodge the claim as herein. The time limitation is regulated in law and not a procedural issue that the Claimant can claim the protection of article 159 of the constitution. The court's jurisdiction is thus ousted by operation of mandatory provisions of the law under section 90 of the Employment Act. The suit should be dismissed with costs. The Respondent has relied on the case of **Peter Nyamai & Others versus M J Clarke Limited [2013] eKLR**.

3. The Claimant submitted that the claim herein related to the illegal and unlawful termination of the Claimant employment by the Respondent who served from 6th December 1999 to 23rd August 2010 when he was suspended and then he was summarily terminated without notice. That this Court is bound article 2(4) of the constitution to apply customary law and any law that is inconsistent with the constitution is invalid. The Respondent has invoked section 90 of the Employment Act without reference to article 47(1) of the constitution. That section 43(2) of the Employment Act, an employer can only terminate an employee on reasons that genuinely existed at the time and where the employee is aggrieved, recourse is to this court. When the Claimant was suspended, he was not given any reasons, he was not given a hearing and this was followed by summary dismissal. In the interests of justice and equity, the Claimant should not be denied his rights, which is core to fair labour practices as held in **Elizabeth Washeke & 62 Others versus Airtel (K) Ltd & Another, Cause No.1972 of 2012**.

4. The Claimant also submitted that he had instructed the firm of Oundu Nelson Hezron Advocate to act for him but the advocate acted unprofessionally by taking the Claimant in circles which matter was reported to the Law Society of Kenya. The delay herein is excusable and the mistake of advocate should not be visited upon the claimant. This procedural technicality should not be a bar to the Claimant as under article 159(2) of the constitution.

Determination

5.The Employment Act, 2007 has now created many protections in employment and labour relations. Such can be found in sections 43 and 47 of the Employment Act which requires an employer, before terminating an employee to give reasons for the same but where there is summary dismissal, the employee has the right to demand the justification of the same and to be given the reasons. Such a complaint for summary dismissal is to be presented before the Labour Officer within 3 months. Where such a process is not adhered to, all is not lost as the employee has up to 3 years to challenge the same before this Court pursuant to section 90 of the Employment Act.

6. Section 90 of the Employment Act, as rightly held by the Court in **Peter Nyamai & Others versus M J Clarke Limited**, is not a procedural matter. It is a statutory requirement. The Court is bound by the law in this regard. A claim based on violation of rights under the Employment Act should be filed before the lapse of 3 years. The Claimant has admitted that he was suspended without any good cause and later summarily dismissed on 19th July 2011. Any complaints therein as to due rights of notice, hearing, unfair labour practice should have been asserted before this Court on or before the 20th July 2014. The suit herein is filed way after the fact. It is not sustainable in law. This is not a procedural issue that can be cured by the mere application of article 47 and 159 of the constitution.

7. Where the Claimant had good reasons as to why he was unable to file his claim in good time, he ought to have moved the Court in that regard first before filing the current suit, and where appropriate, the Court would have given appropriate direction. But filing the suit as herein, knowing well that the claim is filed out of time and then apply and invoke the constitution is a misapplication of the same as article 47 and 159 were not intended to cure time lapse.

The objections by the Respondent herein must therefore succeed. The suit herein is dismissed. Each party shall bear their own costs.

Orders accordingly.

Delivered in open Court at Nairobi this 30th day of November 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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