



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1585 OF 2013

JOSEPH SEBASTIAN RINGO CLAIMANT

VERSUS

KENYA RAILWAYS CORPORATION RESPONDENT

RULING

1. On 14th October 2013 the respondent filed notice of preliminary objections to the claim on the grounds that;

1. the claim was filed herein is time barred and does not lie in law by virtue of section 87(b) of the Kenya Railways Act Chapter 397 of the laws of Kenya and section 90 of the Employment Act, No.11 of 2011.

2. This honourable court lacks the requisite jurisdiction to entertain, hear and/or determine this matter.

2. The respondent submitted that the claim was filed on 2nd October 2013. That the services of the claimant were transferred after a concession agreement between Rift Valley Railways (Kenya) Limited pursuant to section 11A of the Kenya Railways Corporation Act to Rift Valley Railways which took over operations of the respondent with effect from 1st November 2006. Following the concession and transfer of the claimant's services to Rift Valley Railways (Kenya) Limited on 1st November 2006 the claimant was appointed as Principal Accountant. The claimant thus ceased being an employee of the respondent from 25th October 2006 when he accepted letter of transfer to Rift Valley Railways (Kenya) Limited from 1st November 2006 when he reported. All liabilities and contractual obligations were thus transferred to the new employer. Such transfer has been admitted in the Claim.

3. It has been 7 years since the claimant ceased employed with the respondent when he filed the suit. This is contrary to section 90 of the Employment Act. The suit is also filed contrary to the provisions of section 87 of the Kenya Railways Act. Upon the claimant transfer to the new employer there ceased to be private of contract with the respondent. The claim should be dismissed with costs.

4. The respondent has relied on the following cases – **Benson Asiego Mocheo versus Kenya Railways Corporation, Cause No.487 of 2011; Langat versus Kenya Posts and Telecommunications Corporation [2000] 1 EA.**

5. The claimant submitted that the pleadings as set out by the respondent are not correct. The transfer to

Rift Valley Railways limited ought not to have been done because of pending disciplinary matter between him and the respondent which matter led to the claimant being arraigned in court in Criminal Case No.2228 of 2006. Under paragraph 8 of the Amended Claim the claimant states that he was acquitted of the charges brought against him in Criminal Case No.2228 of 2006 and his balance of retrenchment dues which according to the respondent amounted to Kshs.772, 751.00 have not been paid to date and the claimant continues to be an employee of the respondent.

6. The claimant further submitted that due to these facts, he is still an employee of the respondent. That upon his termination by Rift Valley Railways (Kenya) Limited, the claimant employment reverted back to the respondent for retrenchment and payment of his terminal dues wrongly computed by the respondent. This is in accordance with the Pensions Act section 16A. Redundancy dues have not been paid as under section 40(1) (g) and hence employment with the respondent has not ceased. The claimant has relied on the case of **Charles M Shitiavai versus City Council of Nairobi, Cause No.2028 of 2011.**

Determination

The following issues emerge for determination;

Whether the suit is statute barred under the provisions of section 90 of the Employment Act and section 87 of the Kenya Railways Corporation Act

Whether the court has jurisdiction herein.

7. Section 90 of the Employment Act provides as follows;

90. 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 the cessation thereof.

8. Section 87 of the Kenya Railways Corporation Act on the other hand provides as follows;

87. *Limitation*
Where any action or other legal proceeding is commenced against the Corporation for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect—
(a) the action or legal proceeding shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the Managing Director by the plaintiff or his agent; and
(b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof. [Emphasis added].

9. Under section 90 of the Employment Act all actions on employment and labour relations, based on a contract of service should be instituted within 3 years after the act, neglect or default subject of claim. Where there is continuous injury, suit should be filed within 12 months after cessation. Such provisions are mandatory. With regard to claims based on the Kenya Railways Corporation Act, as set out under section 87(2) any action, claim, complaint therefore should not be instituted unless it is commenced within 12 months after the act, neglect or default complained of or in cases of continuing injury, within 6 months.

10. In both statutes, time limitations are mandatory. That set out, I note Section 93 of the Employment Act, 2007 sets out the transitional provisions relating to continuance of valid contracts of service and

foreign contracts of service entered into before its commencement. This then ensures that where parties have valid employment contract/contracts of service, prior to the enactment of the Employment Act, 2007, such contracts continue in force to the extent that the terms and conditions thereof are not inconsistent with the provisions of this Act. This is unless parties have agreed to the contrary but in due recognition of the provisions of the law in force. See **Francis Mwamburi Mudegu versus African Boot Company Limited, Cause No.695 of 2012.**

11. The Amended Statement of Claim was filed on 17th November 2014. Even though the claim does not comply with the provisions of Rule 4(e) of the Court Rules, the claimant at paragraph 3 states that;

By a letter dated 30th October 2006 the respondent, without the necessary conclusion of a pending disciplinary matter against the claimant, transferred the services of the claimant to Rift Valley Railways pursuant to a Concession Agreement in which Rift Valley Railways was to take over the operations of the respondent with effect from 1st November 2006. At the time of the transfer the claimant was in job group RS6, management and non-unionisable.

12. The claim is also that under the respondent regulations, the claimant had an ongoing disciplinary case and he should have been interdicted instead of being transferred to the new employer. He was charged in court in Criminal Case No.2228 of 2006. On 15th December 2006, Rift Valley Railways (Kenya) Limited terminated the claimant upon learning of the criminal charges against him. His retrenchment dues have never been paid as the claimant had with his termination by Rift Valley Railways (Kenya) Limited reverted back to the respondent. The claim is for terminal benefits and or retirement dues.

13. From these averments and pleadings, two issues emerge. First, the claimant's employment was transferred from the respondent to Rift Valley Railways (Kenya) Limited vide letter dated 30th October 2006. He thus effectively became the employee of the Rift Valley Railways (Kenya) Limited following the Concession Agreement taking effect from 1st November 2006 read together with the transfer letter. These, the claimant has admitted to. Secondly, Rift Valley Railways (Kenya) Limited terminated the services of the claimant on 15th December 2006 after he was charged in Criminal Case No.2228 of 2006.

14. On the background of the two issues as above, the claim herein is that the claimant upon his termination reverted back to the respondent employment for payment of his terminal benefits and or retirement dues. These claims are based on the grounds that such claims are still owing by operation of the section 16A of the Pensions Act and section 40(1) (g) of the Employment Act.

15. The terminal dues the claimant is seeking are set out under paragraph 11 of his Amended Statement of Claim to include;

Computation of service period in months

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Computation of retrenchment package

...

Computation of advance pension payable

16. Under section 16A of the Pensions Act it provides that;

Section 16A

A person to whom a pension or other allowance is payable under this Act shall be entitled to be retained in the service until the payment in full of the gratuity payable to him consequent upon the exercise by him of his option to receive such gratuity under the provisions of this Act.

17. Therefore, an employee such as the claimant was to be retained in employment under the Pensions Act, Cap 189, until the payment in full of due gratuity payable to him. I however find, with the transfer and concession agreement between the respondent and Rift Valley Railways as set out above, his employment was transferred to a new employer. Retention of in the service of the respondent was thus broken by the transfer. The Pension Act is therefore not applicable to the claimant.

18. With regard to provisions of section 40(1) (g) of the Employment Act, the nature of claims set out in the Amended Statement of Claim does not outline any claim of the claimant being declared redundant. Even where such a claim were to exist, the provisions of section 40 of the Employment Act are subject to the provisions of section 90 of the Employment Act that any claims whose basis is any right under the Employment Act, the same must be commenced within 3 years from the date the cause of action arose. Where transfer and concession agreements took effect in 2006, for the claimant to claim under section 40 of the Employment Act, the same has abated.

19. The claimant has relied on the case of Charles M Shitiavi cited above. This was a case where the employee remained in the employment of one employer until termination. There was no transfer of such employment to a third party as herein. The facts in that case are therefore fundamentally different from this case. To rely on the provisions of section 16A of the Pensions Act or section 40 of the Employment act as in that case would be a misapplication of the same. The basis and application of section 16A was thus set out in the case of Francis Mwangi and Others versus The City Council of Nairobi & Others, Cause No.561 (N) of 2009.

20. What was the effect of the claimant employment transfer on 30th October 2006? Even though the Employment Act does not define what employment transfer is, the jurisprudence of the court built around such a matter is clear. In the case of Wrigley Company (EA) Limited versus the AG & 3 others, petition No.22 of 2012 held that;

An employer would not be permitted to transfer the services of its employees to an outsourcing agency without the express acceptance of each affected employee and in all such cases, the employer had to settle all outstanding obligations to its employees before any outsourcing arrangement could take effect.

21. In this regard therefore, to transfer an employer is to terminate employment with the principal employer and the taking over by a new employer. With the termination by the principal, all terminal dues owing and due must be settled before the takeover by the new employer. This position was also taken in the case of Elizabeth Washeke & 62 others versus Airtel Networks (K) Limited & Another, Cause No1972 of 2013 held;

Equally, an employee who upon due process being followed moved with the whole or part of a business that had been outsourced or transferred also took the subsisting liabilities with him or her. Personal liabilities moved with the person. Any loans, money advanced or overdrafts moved with the employee to the new employer in the outsourced or transferred business in whole or in part.

22. Therefore, a transfer of employment ceases any other employment. Any liabilities the previous employer may have move with the transfer of such employment. In this case, with the admission by the claimant that his employment was transferred by the respondent to Rift Valley Railways and he commenced employment under the Rift Valley Railways (K) Limited on 1st November 2006, he effectively ceased employment with the respondent. Any claims due or owing from the respondent moved with the transfer. Where the claimant was dissatisfied with the transfer, any claim due may have been lodged against the new employer and where necessary with the respondent as an interested party but claims for employment contract or his contract of service lie with the new employer.

23. That as the case may be, even where there was a claim against the respondent, where employment ceased on 30th October 2006, and the applicable law at the time was not the Employment Act, 2007. The

repealed law, Employment Act, Cap 226 was in force as at 30th October 2006. Any claims due under that law ought to have been lodged in the relevant court within 6 years by application of the Limitations of Actions Act as the claimant was under a contract of service. To apply the Employment Act, 2007 for a cessation of work and owing terminal dues that arose on 30th October 2006 or based on the termination letter of 15th December 2006 as issued by the new employer, Rift Valley Railways (K) Limited would be a misapplication of the law.

24. I therefore find that, the claim herein, all considered is filed out of time. The suit cannot survive the test of section 90 of the Employment Act or any other law. In view of the time limitations herein terminating the suit, the application of section 87 of the Kenya Railways Corporation Act is of no effect. Time cannot be extended for the benefit of the claimant by the use of such provisions as its give less time to file suit or complaint than under the Employment Act, 2007 or the repealed Employment Act, Cap 226.

The objections by the respondent with regard to the suit being time barred is allowed. The suit is hereby dismissed. Costs to the respondent.

Delivered in open court at Nairobi this 25th day of November 2015.

M. MBARU

JUDGE

In the presence of:

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