



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 718 OF 2015**

**JOSEPH CHEGE KAMAU.....CLAIMANT**

**VS**

**JAMII BORA BANK LIMITED.....RESPONDENT**

**RULING**

**Introduction**

1. This ruling is on the preliminary objection raised by the Respondent by notice dated 24th September 2015. The substance of the objection is as follows:

- a. That this Court lacks jurisdiction to entertain the Claimant's claim;
- b. That the suit is time barred and therefore an abuse of the court process;
- c. That the Court lacks jurisdiction to extend time for filing of the suit.

2. When the parties appeared before me on 11th November 2015, they agreed to dispense with the preliminary objection by way of written submissions.

**The Respondent's Submissions**

3. In its submissions filed on 19th November 2015, the Respondent submits that the Claimant was dismissed on 16th October 2008 and his claim filed almost eight (8) years later is therefore statute barred by dint of Section 90 of the Employment Act, 2007. The Court therefore lacks jurisdiction to hear and determine the claim. Indeed, the Court has no jurisdiction to extend time in favour of the Claimant.

4. The Respondent adds that to extent time for claims falling under the Employment, Act 2007 amounts to the Court conferring jurisdiction upon itself where none exists.

**The Claimant's Submissions**

5. In his submissions filed on 7th December 2015, the Claimant submits that he was granted leave on 23rd April 2015, to file his claim out of time. According to the Claimant, this Court has no jurisdiction to rule on the preliminary objection raised by the Respondent since a ruling has already been made in favour of the Claimant, granting him leave to file his claim out of time. The Claimant maintains that the Court has no power to overrule a decision granted by another court of concurrent jurisdiction.

6. The Claimant further submits that the law on limitation of actions should not be applied so as to extinguish legitimate claims. Additionally, Article 159 of the Constitution of Kenya, 2010 provides that justice shall be administered without undue regard to procedural technicalities.

## **Determination**

7. The issue for determination before the Court is whether the Claimant's claim is properly before the Court. From this broad issue, I have distilled the following sub issues:

a) Whether this Court has jurisdiction to entertain the Respondent's preliminary objection in light of the *ex parte* order for extension of time granted to the Claimant by **Wasilwa J** on 23rd April 2015;

b. Whether the claim is statute barred.

## **Order Dated 23rd April 2015**

8. The Claimant produced an order granted by my sister **Wasilwa J** on 23rd April 2015. I find it necessary to reproduce the entire order in this ruling. It states as follows:

### **“IN COURT ON 23RD APRIL 2015 BEFORE LADY JUSTICE WASILWA**

#### **ORDER**

#### **APPLICATION FOR ORDERS**

1. *That the claimant Joseph Chege be granted leave to extend time of bringing this suit against the defendant out of time*
2. *That upon grant of prayer (1) above the plaint filed in this suit be deemed to have been duly filed*
3. *That the costs of this application be provided for.*

*UPON READING the application dated 16th January 2015 presented to this court on 19th January 2015 by counsel for the plaintiff/claimant AND UPON READING the supporting affidavit by Joseph Chege sworn on 16th January 2015 and UPON hearing counsel for the applicant ex-parte;*

#### **IT IS HEREBY ORDERED:**

1. *THAT the application dated 16th January 2015 be allowed.*
2. *THAT the claimant be granted leave to extend time of bringing this suit against the defendant out of time.*
3. *THAT a suit be filed within thirty (30) days.*

*GIVEN under my hand and the seal of the court at Nairobi this 23rd day of April 2015*

*ISSUED at Nairobi this 6th day of May 2015*

**DEPUTY REGISTRAR**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI”**

9. I did not see a formal ruling by my sister Judge and did not therefore have the advantage of reading the *ratio decidendi* for her decision. It is however apparent from the order reproduced above that the Claimant was heard and granted orders *ex parte*, meaning that the Respondent was not heard. In my view, a party who is aggrieved by orders granted *ex parte* cannot be barred from contesting those orders and the doctrine of *res judicata* cannot be used to defeat this right. I will therefore proceed to consider the preliminary objection on merit.

## **Preliminary Objection on Merit**

10. It is not in contest that the Claimant's employment was terminated on 16th October 2008. His claim for termination is therefore based on the Employment Act, 2007 which came into effect on 2nd June 2008.

11. Section 90 of the 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 twelve months next after the cessation thereof.*

12. As held by **Radido J** in ***Peter Nyamai & 7 Others v M.J Clarke Limited [2013]*** this Court has no jurisdiction to extend time for claims arising out of employment contracts governed by the Employment Act, 2007. Further, the issue of limitation of actions is substantive and not merely procedural as it goes to the jurisdiction of the Court to hear and determine claims brought before it.

13. The cause of action in the instant case arose on 16th October 2008 and the suit therefore ought to have been filed on or before 17th October 2011. That being the case, the current claim is way out of time and the Court has no jurisdiction to entertain it nor extend filing time. The result is that the preliminary objection taken by the Respondent is upheld and the Claimant's claim is struck out with no orders for costs.

14. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF DECEMBER 2015**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Kimandu Gichohi for the Claimant

Mr. Mwaniki Gachoka for the Respondent