



**REPUBLIC OF KENYA**

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

**CUASE NO.811 OF 2015**

**ALEX ODHIAMBO OMITI ..... CLAIMANT**

**VERSUS**

**MAGNATE VENTURE LIMITED .....RESPONDENT**

**RULING**

1. On 27<sup>th</sup> May 2015, the Respondent filed notice of preliminary objection to the suit. On 26<sup>th</sup> June 2015, the Claimant filed a reply to the objections filed by the respondent.
2. The objections by the Respondent are that the suit is filed out of time and thus statute barred under the provisions of section 90 of the Employment Act. In reply the Claimant stated that the time limitations under section 90 of the Employment Act do not apply to his case as the Respondent filed a complaint with the police on 8<sup>th</sup> April 2011 causing him to be arrested and charged on 19<sup>th</sup> April 2011 in Criminal case No.1765 of 2011 Makadara Magistrate's Court. The Respondent later withdrew the criminal complaint and the delay to file suit herein was caused by the respondent.
3. Both parties filed their written submissions.
4. The Respondent submitted that the Claim herein was filed on **12<sup>th</sup> May 2015** where the Claimant is seeking to be reinstated due to unfair termination and that his benefits should be paid and in the alternative that he should be paid compensation and terminal dues. That the basis of the claim is that on **27<sup>th</sup> April 2011** the Claimant was summarily dismissed by the respondent.
5. The Respondent submitted that by application of the provisions of section 90 of the Employment Act, the claim herein is filed out of time as the cause of action arose on 27<sup>th</sup> April 2011 and the Claimant was supposed to file suit within 3 years which he failed to do. As held in **Fred Mudave Gogo versus G4S Security Services (K) Ltd [2014] eklr** a Claimant seeking to apply the provisions of the Employment Act, 2007 must file suit within 3 years since the time the cause of action arose. That in this case, the defence that the Claimant had a criminal case ongoing is not a defence or sufficient reason not to comply with section 90 of the Employment Act. Also in **Stephen Kamau Karanja & Another versus Family bank Ltd [2014] eklr** the Court held that the criminal process has its own momentum, objectives and purposes and thus cannot be used to justify non-compliance with the provisions of section 90 of the Employment Act. Also in **George Musyoki versus Sarova Hotels [2014] eklr** the Court held that the law on limitation is intended to protect defendants against unreasonable delay in bringing suits against them. That the claim should be dismissed with costs as it is filed out of time.
6. The Claimant on his part submitted that on 27<sup>th</sup> April 2011 he was summarily dismissed after being charged with a criminal offence upon a complaint by the respondent. He was later released in

February 2015 for lack of evidence. That the summary dismissal was premature because it came before the judicial process on the criminal trial. Section 88(3) of the Employment Act provides that no employer should be punished twice for the same offence. The Respondent should have waited for the completion of the criminal proceedings.

### **Determination.**

7. Both parties admit that the Claimant was summarily dismissed on 27<sup>th</sup> April 2011. The suit herein was filed on 12<sup>th</sup> May 2015.

8. The Employment Act, 2007 repealed the Employment Act Cap 226 laws of Kenya. Claims under the Employment Act, 2007 have time limitation unlike claims under the repealed act that were based on the application of the Limitations of Actions Act Cap 22 Laws of Kenya. Section 90 of the Employment Act, 2007 is couched in mandatory terms. A claim should be filed within three (3) years since the time the cause of action arose. The provisions of section 90 do not give the Court discretion to extend time to file suit out of time.

9. In the case of **Maria Machocho versus Total Kenya Limited, Misc. Civil Cause No. 2 of 2012** where the Court held that an express provision of the law cannot be circumvented by any other provision. I also agree with the respondent's submissions with regard to the case of **George Musyoki versus Sarova Hotels** where the Court relied on the Court of Appeal decision in the case of **Gathoni versus Kenya Co-operative Creameries Ltd, Civil Appl. No.122 of 1981** that;

*The law on limitation is intended to protect the defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.*

10. In this case, the Claimant submits that on 19<sup>th</sup> April 2011 the Respondent made a complaints against him to the police causing him to be arrested and charged in criminal proceedings. That the criminal case was withdrawn and in February 2015 he was released. This Court has had occasion to deal with matters similar as herein in the case of **Charles Manono Onchiri versus Kenya National Hospital & 2 others**, and the Court held;

*The Claimant herein was terminated on the 30<sup>th</sup> of November 2005 after the commencement of the criminal charges that were pending in court. These criminal charges though reported by the respondents, were not running parallel to any civil claim that had been filed in Court noting that his position with the respondents was subject of these criminal charges. It was therefore the duty of the Claimant to seek and protect his rights when the criminal charges commenced or immediately when he was terminated from his position with the respondents. Nothing prevented him from commencing his civil claim at any stage within the permissible time. Nothing was done by the Respondent in admission of the claim or part of it to extend the legal time under which the claim fell, that is within the meaning of the Employment Act, 226 (now repealed).*

[Emphasis added].

11. Therefore, as held by the Court in the case of **Stephen Karanja & Another versus Family bank Limited**, and I agree with the findings, criminal proceedings is not a bar to the commencement of civil proceedings particularly with regard to employment and labour relation claims based on the application of Employment Act, 2007. Such claims should be lodged 3 years from the time the cause of action arose. In this case the cause of action under the Employment Act was the summary dismissal of the Claimant on 27<sup>th</sup> April 2011 and not his criminal discharge in February 2015.

The claim filed on 12<sup>th</sup> May 2015 if therefore filed 4 years after the cause of action arose. This is time way after the statutory period allowed under section 90 of the Employment Act, 2007.

**For the non-compliance with mandatory provisions of the law in accordance with section 90 of the Employment Act, 2007, the objections raised by the Respondent succeed. The result is that the suit is hereby dismissed. Each party shall meet their own costs.**

Orders accordingly.

Delivered in open court at Nairobi this 16<sup>th</sup> day of December 2015.

**M. MBARU**

**JUDGE**

In the presence of

Lilian Njenga: Court Assistant

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