



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

MISC.CAUSE NO 8 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

DICKSON ORUKO NYAKACH.....1ST APPLICANT

PATRICK OTIENO MAGANA.....2ND APPLICANT

VRS

CHEMILIL SUGAR CO. LTD.....RESPONDENT

RULING

On 10th June, 2015 the Applicants Dickson Oruko Nyakach and Patrick Otieno Magana filed the Notice of Motion herein seeking leave to file suit out of time. The grounds in support of their application are that;

- a) The Applicants have an arguable case against the Respondent for terminal benefits which the Respondent has till now failed to pay the applicants and all other union members of Kenya Union of Sugar Plantation and Allied Workers.
- b) The Respondent herein was making payments in installments to the Union members and hence it was impossible for those that were first paid to come for redress in Court.
- c) That the Respondent intentionally delayed their payments and being lay men they continued waiting for the Respondent who continuously promised to clear them and compensate them but all in vain.
- d) The Applicants could not file the suit in time as they had to wait for fellow union members to be cleared by the Respondent.
- e) That it is the interest of justice that this application is heard and leave granted for the sake of these poor and uneducated employees whom the Respondent used and then disposed off or terminated their employment without notice.

The application is supported by the affidavit of Dickson Oruko Nyakach the 1st Applicant sworn on 9th June, 2015 on his behalf and on behalf of the 2nd Applicant. He states in the affidavit that he was employed by the Respondent in 1994 and his employment and that of the 2nd Applicant was terminated in 2010. They lodged a complaint with the Ministry of Labour in 2011. The Ministry made a determination that payment be made to them and the Respondent paid only part of the terminal benefits with a promise to pay the balance at a future date which payment has not been made.

The 1st Applicant deposes that as a union leader he could not file the suit in time as some union members were still waiting to be paid.

The Respondent filed a replying affidavit of E.K. Ngala, the Legal Services Manager of the Respondent opposing the application.

Mr. Ngala deposes in the affidavit that the claim is time barred as the Applicants services were terminated in 2010 and under Section 90 of the Employment Act the claim became Statute barred in 2013. Mr. Ngala states through his affidavit that there is no provision of Extension of Limitation period either under the Employment Act or the Limitation of Actions Act.

He states that the application is devoid of merit, is an abuse of due process of court, misconceived, misdirected and ought to be dismissed with costs.

The application came up for hearing on 16th July, 2015 when I directed the parties to proceed by way of written submissions.

In the submissions filed on behalf of the Applicants it is submitted that the Applicants were employed by the Respondent as casual workers and their services were terminated together with 29 others in the year 2010. They lodged a complaint with the Ministry of Labour and their terminal dues were tabulated. The Respondent paid only half of the terminal benefits with a promise to pay the balance in due cause.

It is submitted that although the limitation period expired in 2013, the Respondent interrupted the limitation period by the part payments of 2011. Relying on Section 39(1) of the Limitation of Actions Act the Applicants state that limitation of action does not run if there is a contract not to plead limitation and that the Respondent is estopped from pleading limitation by both equitable and promising estoppel.

The Applicants rely on the decision in the case of Joseph Tinga Janga -vs- Kenya Marine & Fisheries Research Institute [2014] EKL R where Radido J stated as follows:-

"When one party, has by his words or conduct, made to the other a promise or assurance which was intended to effect the legal relations between them and to be acted on accordingly, then once the other party has taken him at his word and acted to it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced."

The applicants submit that in view of the Respondents conduct it cannot plead limitation, having failed to honour an award of the Ministry of Labour.

On its part the Respondent submits that the claim is statute barred, having accrued in 2010 when applicants employment was terminated. The Respondent relies on the case of Josephat Ndirangu .v. Henkel Chemicals (E.A) Ltd [2013] eKLR. Relying on the same authority and the decision in Boniface Inondi Otieno .v. Mehta Electrical Ltd [2013] eKLR and Peter Nyamai & 7 others -v- M.J.Clarke Limited [2013] eKLR., the Respondent submits that this court has no jurisdiction or discretion to extend time or grant leave to file claim out of time in respect of cause of action on breach of employment contract.

The Respondent further submits that there is no evidence that there was ever a complaint lodged with the Ministry of Labour and further that such complaint would not stop time from running. The Respondent relies on the case of Peter Nyamai & 7 others v. M.J. Clarke Ltd (2013) eKLR. The Respondent submits that the application has no merit, is misconceived and is an abuse of court process.

Determination

The Respondent has extracted issues in their submissions as follows;

1. Whether the Applicant services were terminated by the Respondent in the year 2010?
2. Whether the Claim for wrongful termination of Employment Under Employment Act 2007, can be brought on expiry of 3 years from the date of termination of services?
3. Whether time for filing suit can be extended if not expressly provided for by the statute?
4. Whether time stop running during conciliatory or lodging complain to the Ministry of Labour?
5. Whether the Applicants are entitled to the prayers sought for in the orders sought for?
6. Who is entitled to the costs of this application?

The Applicants on the other hand rely on the doctrine of estoppel as set out in Section 39(1) of the Limitation of Actions Act.

I do not agree with both parties' submissions. I think the claim before court is one of acknowledgement and part payment as provided in part B of the Limitation of Actions Act. Section 25 (5) and (6) under the part provide that an acknowledgement and a part payment is binding on the acknowledger or payer. In the present case there is a list of names of the applicants together with the people on whose behalf the application has been brought. The list has handwritten endorsements in the following words "***please pay each person 1/2 of their entitlement.***" It is signed and dated 1st February, 2011. It contains the full figure, and the amount paid representing 50% of the amount on the form. All these workings are handwritten. There is a "**PAID**" stamp of Chemilil Sugar Co. Ltd indicating payment was made on 2nd February, 2012. The title of the Form reads.

"Chemilil Sugar Company Limited. Pending Cases at the Ministry of Labour for Former Casual Employees"

I find that there was an acknowledgement and part payment of the debt owed to the persons whose names appear in the form.

According to **Section 23 of the Limitation of Actions Act**, there is a fresh accrual of cause of action upon acknowledgement or part payment. The section provides as follows;

(1) *Where*

(a) *a right of action (including a foreclosure action) to recover land; or*

b) *a right of a mortgagee of movable property to bring a foreclosure action in respect of the property, has accrued, and*

(i) *the person in possession of the land or movable property acknowledges the title of the person to whom the right of action has accrued; or*

(ii) *in the case of a foreclosure or other action by a mortgagee, the person in possession of the land or movable property or the person liable for the mortgage debt makes any payment in respect thereof, whether of principal or interest, the right accrues on and not before the date of the acknowledgement or payment.*

2. *Where a mortgagee is, by virtue of the mortgage, in possession of any mortgaged land and either receives any sum in respect of the principal or interest of the mortgage debt or acknowledges the titles of the mortgagor, or his equity of redemption, an action to redeem the land in his possession may be brought at any time before the end of twelve years from the date of the payment or acknowledgement.*

(3) *Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a*

claim to movable property of a deceased person, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment:

Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt.

There having been a fresh cause of action arising from the acknowledgement and part payment, the issue in dispute is no longer governed by Section 90 of the Employment Act. It is a liquidated debt and since there was a fresh cause of action under Section 4(1)(e) of the Limitation of Actions Act, the time started running on the date of acknowledgement and payment on 2nd February, 2011. This being the case, the Limitation period for the debt is six years from that date being 2nd February, 2011. The claim by the applicants is therefore not time barred.

For these reasons, I allow the application, not on the grounds set out in the application, but on grounds that there was a fresh debt accruing on 2nd February, 2011 whose limitation period has not expired.

There shall be no Orders for costs for this application.

Date, signed and delivered this 11th Day of December, 2015

MAUREEN ONYANGO

JUDGE