



**REPUBLIC OF KENYA**

**INDUSTRIAL COURT AT NAIROBI**

**CAUSE NO. 846 OF 2013**

**FRED MUDAVE GOGO ..... CLAIMANT**

**VERSUS**

**G4S SECURITY SERVICES (K) LTD ..... RESPONDENT**

**RULING**

On 5<sup>th</sup> June 2013, the claimant filed a Memorandum of Claim against the respondent for wrongful dismissal and non-payment of his terminal dues after his termination on 8<sup>th</sup> August 2008. On 25<sup>th</sup> July 2013, the respondent filed a Notice of Preliminary Objection against the claimant's claim on the following grounds:

- a. *The cause of action having accrued on 8<sup>th</sup> August 2008, this claim is time barred, under the provisions of section 90 of the Employment Act*
- b. *Even after assuming that the cause of action accrued on 13<sup>th</sup> February 2009 when the Minister of Labour gave its recommendations on the matter, the claim became time barred on 13<sup>th</sup> February 2012.*
- c. *The claimant's rights to sue for alleged unfair and/or wrongful termination having lapsed at the latest on 13<sup>th</sup> February 2012; he lacks capacity to agitate any cause against the respondent. This claim is therefore an abuse of the court process.*
- d. *The court therefore has no jurisdiction to entertain this claim and the same ought to be struck out with costs to the respondent.*

Both parties agreed to file their written submissions with regard to the preliminary objections raised by the respondent.

**Submissions**

The respondent submitted that the suit was filed seeks a total payment of Kshs.284, 548.70 as terminal dues following a cause of action that arose on 8<sup>th</sup> August 2008 but this claim is time barred as the same lapsed on 8<sup>th</sup> August 2011 and thus lacks the capacity to agitate any claim against the respondent and the court lacks the jurisdiction to entertain the claim. Under section 90 of the Employment Act, a claim must be lodged within 3 years and in this claim the cause of action arose on 8<sup>th</sup> August 2008 and hence lapsed on 8<sup>th</sup> August 2011. That in *Peter Nyamai & 7 others versus M. J. Clarke Limited [2013] eKLR*, this claim has lapsed and cannot be sustained.

That even in case where the Minister for Labour gave his recommendations on the matter, the same is time barred as of 13<sup>th</sup> February 2012 and the same remains time barred. Section 90 of the Employment

Act is mandatory as held in *Kenya Scientific Research International & Allied Workers union versus T.N.S. Research International limited, Cause No. 27(N) of 2010* and thus the court lacks the power to extend the time and thus should be dismissed with costs to the respondent.

In reply, the claimant submitted that the cause of action arose on 8<sup>th</sup> August 2008 where he had been under an *Employment Contract* and not as under a *Contract of Service* that is addressed by section 90 of the Employment Act. That in this case, the claimant section 2 of the Employment Act, define what is *contract of service* similar to what is referred to under section 90, but the claimant was not employed under such a contract, rather his was an *Employment Contract*. That in *Maurice Oduor Oketch versus Chequered Flag Ltd [2013] eKLR*, the court held that there was a difference between a *contract of service* and an *employment contract* where the former relates to independent contractors who are normally given contract of services for specific periods while the latter provides for long term contract which direct services by the employee. That in this case the claimant was under an *employment contract* and therefore, section 90 of the Act does not apply to him and therefore section 4(1) of the Limitation of Actions Act is the correct law to apply in this case as 6 years had not lapsed.

That the preliminary objection raised here relate to form and not substance of the claim contrary to Article 159(2) and (d) of the Constitution and thus should be dismissed. That the technicality raised is meant to stifle the claim whereas the claim should be determined on merit.

### **Findings and determination**

The preliminary objection relate to the provisions of section 90 of the employment Act in that the claim as filed is time barred and cannot be sustained in its current form. To this the claimant submitted that his was an *employment contract* as against a *contract of service* and hence section 90 does not apply. Section 90 of the Employment Act states thus;

*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.*

Section 90 outline mandatory provisions that must be complied with by claimants seeking to apply the provisions of unfair Labour practices as under the Employment Act, 2007 as against claims that can be lodged under the repealed Employment Act, Cap 226 and Trade Disputes Act, Cap 234, which Acts [now repealed] did not provide for claims for unfair termination. Claims premised under the provisions of Employment Act, 2007 must be lodged in court within 3 years.

However, the claimant's assertion here is that his was not a *contract of service* governed under the Employment Act section 90, his was an *employment contract* that was governed as under section 4(1) of the Limitation of Actions Act and thus he had 6 years within which time to lodge his claim for wrongful dismissal and non-payment of his terminal dues. Is there therefore a difference between a *contract of service* and an *employment contract* to justify the claimant application of section 4(1) of the Limitation of Actions Act as against section 90 of the Employment Act, 2007?

A fundamental element of a contract of employment is that the employee renders his services for remuneration at the employer's business. If the employer fails to pay the employee this is considered a breach of the employment contract. If the employee fails to render his services the contract of employment is breached. Invariably therefore an *employment contract* is one that create rights and responsibilities between parties to an employment relationship Whereas a *contract for service* imply someone who is self-employed where work is under their own terms as against a person who is employed and is under specified terms with legal protections and defined remuneration.

There is a thin line therefore where an employee is under an *Employment Contract* or under a *contract of service* as against an employee who is employed under a *contract for service*. The first two types of

contract [employment contract and contract of service] entail an employee undertaking work with rights and duties for specified remuneration and in a *contract for service*; the same indicate independence, lack of control and an employee who is not integrated into the workforce of an employer for purposes of acquiring certain rights and responsibilities. This is what would relate to a piece-meal employee or one taken in for a specific task.

The distinction therefore that the claimant wishes to outline in response to the respondent's preliminary objection does not give any distinction herein as the definition outlined under section 2 of the Employment Act with regard to what a *contract of service* is invariably one and the same where an *employment contract* is referred to. The claimant relied on the case of *Maurice Oduor Oketch versus Chequered Flag Ltd [2013] eKLR*, which is clearly distinguishable from this case as this case related to a person under a *contract for service* as against the claimant herein who is stated to have been under an *employment contract* or what the court finds to be equivalent to a *contract of service*. The claimant while in the employment of the respondent was solely under their control, he was not an independent employee and thus the intentions of the parties was to have him as an employee.

At paragraph 3 of the claim, the claimant state that there was a change of his employment status from casual to permanent status, however this contract is not attached for the court to assess what terms were spelt out for the claimant. This however is not the issue at hand, the objections to the claim relate to the application of section 90 of the Employment Act.

Thus having established there is no difference as between an *contract of service* with an *employment contract*, and Looking at the issues raised in the preliminary objections, I note the law applicable at the time of the termination of the Claimant's services as of 8<sup>th</sup> August 2008, was the Employment Act; Cap 226. This law was repealed by the Employment Act, 2007. A pertinent question to the determination of the issues herein is therefore whether the limitation provisions in section 90 of the Employment Act, 2007 is applicable to contracts of service terminated before its commencement, in other words if the Employment Act, 2007 extinguished the Claimants right to bring the Claim. My reading of the Employment Act 2007 has not found any provision in the Act which states that it shall have retrospective application. The only respect in which the Employment Act, 2007 applies to contracts of service entered into before its commencement in 2008 is its amendment of the terms of such contracts which were still subsisting to be construed as if they were made in accordance with it.

It cannot be denied that the cause of action herein is based on a *contract of employment*. The Claimant's employment was terminated on 8<sup>th</sup> August 2008, a period over 3 years from the date of filing this claim in the Industrial Court on the 5<sup>th</sup> June 2013 and therefore by operation of the law, the claim had already lapsed. There are no good grounds advanced for the delay in causing the claimant/applicant from filing the claim in good time.

This is not a mere technicality as it touches on the substance of the claim and a fundamental flaw if not addressed before parties file their claims. This time can be extended upon the Court being moved by a party who on good grounds finds themselves under this circumstance. That is why the law exists to assist parties who for good reasons are unable to come to court in good time. This was not the case here.

The claim therefore does not conform to the mandatory time limitations. It must fail. **The preliminary objection is upheld. With that I dismiss the claim dated 5<sup>th</sup> June 2013. The respondent had not filed their defence and thus each party to bear their own costs.**

Delivered at Nairobi this 16<sup>th</sup> day of January 2014.

M. Mbaru

Judge

Parties present

.....

.....