



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
MISCELLANEOUS APPLICATION NUMBER 9 OF 2014

BETWEEN

SUSAN NYANCHAMA OMBATI.....
CLAIMANT

VERSUS

STANDARD CHARTERED BANK LTD.....
RESPONDENT

RULING

Ex parte

The Applicant filed an Application titled ‘Originating Summons’ on 21st January 2014, seeking to be granted leave to file her Statement of claim, outside the period set out under Section 90 of the Employment Act 2007.

The Application is brought principally under Section 12 of the Industrial Court Act 2011, and is supported by the Affidavit of Mr. P. M. Kamaara, Advocate for the Applicant.

The Applicant was employed by the intended Respondent in September 1995. Her contract of employment was terminated on 11th January 2010, in circumstances she considers to amount to unfair and unlawful termination.

She filed a Plaint in the High Court of Kenya at Nairobi (Milimani Commercial Courts) Civil Suit No. 277 of 2010, seeking a total sum of Kshs.4,116,765 from the Defendant/Respondent Bank in damages.

Then Defendant, objected to the validity of the High Court Suit, arguing that exclusive jurisdiction in employment disputes is vested with the Industrial Court of Kenya.

The Applicant only realized the law gave the Industrial Court exclusive jurisdiction, when the Defendant/Respondent filed an Application at the High Court dated 31st October 2013, seeking to have the Suit struck out for want of jurisdiction. This Application was filed on 5th November 2013.

The Applicant applied for withdrawal and discontinuance of the High Court Suit on 10th December 2013.

By the time the Defendant/Respondent filed the Application to strike out the suit on 5th November 2013, the three year limitation period given under the Employment Act 2007 had expired.

Mr. Kamaara explains that the High Court, once it finds it has no jurisdiction, could not give an order for transfer.

This Court Finds and Orders:-

1. Section 90 of the employment Act provides that no action or proceedings, based or arising out of the Employment Act 2007, or a contract of service in general, shall lie or be instituted unless it is commenced within 3 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.
2. The Applicant brought a Civil Action against her former employer on 4th May 2010. Termination of her contract was on 11th January 2010. Her Civil Action was instituted within four months from the date of termination, the only problem being that it was instituted at the wrong judicial forum.
3. The Court views this mistake, inadvertence or error on the part of the Applicant's Advocate in proceeding before the High Court as a misapprehension of rapidly changing laws, that ought not to prejudice the Applicant's right to substantive justice.
4. Employment and Labour disputes filed at the Constitutional and Human Rights Division of the High Court Nairobi have routinely been transferred to the Industrial Court on account of jurisdiction. The Industrial Court has also received such disputes from the High Court Civil Division. It is not proper that the Applicant should be handicapped in pursuing her Claim before the Industrial Court based on Section 90 of the Employment Act 2007.
5. The Industrial Court has ruled on many occasions that it does not have jurisdiction to extend time given under Section 90. The Court has also ruled that adequate attention must be given on the running of time, particularly because most trade disputes are resolved through multi-tiered mechanisms. Although the Industrial Court (Procedure) Rules 2010 have no provision for 'Originating Summons,' Section 12 of the Industrial Court Act cited by the Applicant enables this Court to grant a party any appropriate relief.
6. In this Application, the Court is prepared to find time stopped running between the date the Claimant filed and withdrew her Claim at the High Court. Judicial Proceedings were instigated through innocent error on jurisdiction. Furthermore the Suit at the High Court may, like numerous other Suits, have been transferred to the Industrial Court, without prejudicing the Applicant's right to be heard on the merit. The limitation imposed on Section 90 aims at barring Claimants who, upon the accrual of the cause of action, dither and take out no proceedings within the stipulated period. Proceedings taken out in error in a Court of Law, cannot be said to comprise no action at all. The Applicant filed a Suit in the High Court four months after termination. The Defendant/Respondent filed its defence, and only filed the Motion to strike out the Suit, after 3 years had lapsed from the date of termination.

Against this backdrop the Court Orders:-

(a) The time between the date the High Court Suit was filed and withdrawn by the Applicant shall, for the purpose of the intended Claim at the Industrial Court, be deemed to have stopped running.

(b) The Applicant may file and serve her Statement of Claim within 2 years and 8 months from the date she withdrew her Suit at the High Court.

Dated and delivered at Nairobi this 10th day of February 2014

James Rika

Judge