



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 1024 OF 2010

LEONIDA MAKOKHA & 3 OTHERS.....CLAIMANTS

VS

MUNENE ESTATE LIMITED.....RESPONDENT

RULING

Introduction

1. This ruling flows from a Preliminary Objection taken by the Respondent in its Statement of Defence filed on 1st February 2011 and amended on 10th July 2013 on the following grounds:
 - a. That the Claimants' claims which were lodged at the Labour Office in Kiambu could not lie in the Industrial Court;
 - b. That the claims were statute barred by dint of Section 90 of the Employment Act, 2007;
 - c. That by the amended Memorandum of Claim, the Claimants had introduced new claims.

The Respondent's Submissions

2. Mr. Gachie for the Respondent submitted that under Section 87 of the Employment Act, 2007 a party could elect to lodge a complaint either before a Labour Officer or at the Industrial Court. In light of this, since the Claimants had lodged their claims at the Labour Office in Kiambu, the same claims could not be entertained by the Industrial Court. According to Counsel, the only recourse available to a party who is aggrieved at the Labour Office level is either judicial review or appeal.
3. On limitation, Counsel submitted that since the Claimants' employment contracts were terminated between 17th October 2006 and 4th January 2007, their claims which were initially filed on 3rd September 2010 were outside the 3 year limitation period set by Section 90 of the Employment Act, 2007.
4. It was further submitted on behalf of the Respondent that in seeking to amend their Memorandum of Claim, the Claimant's had gone beyond the parameters for amendment of pleadings, by introducing new claims.

The Claimants' Reply

5. In reply, Mr. Gatitu for the Claimants submitted that the increased sums of money in the amended Memorandum of Claim did not amount to an introduction of new claims. At any rate,

under Rule 14(6) of the Industrial Court (Procedure) Rules, 2010 there was no prohibition against introduction of new claims in an amended statement of claim.

6. Counsel asked the Court to bear in mind the provisions of Article 159(2)(d) of the Constitution which enjoin the Court to administer justice without undue regard to procedural technicalities as well as the overall objective of the Industrial Court as set out in Section 3 of the Industrial Court Act, 2011.

7. Counsel further submitted that the Claimants cannot be barred from coming to the Industrial Court because they had lodged a complaint at the Labour Office. This was especially so since no decision had been rendered by the Labour Office.

Ruling by the Court

8. The first issue for determination is whether by lodging their claims at the Labour Office in Kiambu, the Claimants divested themselves of the right to bring the same claims to the Industrial Court.

9. Section 87 of the Employment Act, 2007 which was relied on by Counsel for the Respondent provides as follows:

87. (1) Subject to the provisions of this Act whenever-

(a) an employer or employee neglects or refuses to fulfill a contract of service;
or

(b) any question, difference or dispute arises as to the rights or liabilities of either party; or

(c) touching any misconduct, neglect or ill treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.

10. Kenyan employment law provides litigants with an opportunity to refer disputes to conciliation before a labour officer. Referral of a matter to conciliation does not however bar parties from seeking justice at the Industrial Court. Even in cases where a conciliator has filed a final report, the Court has power to inquire into the same issues addressed at the conciliation stage.

11. The Claimants' claims as per the amended Memorandum of Claim are for compensation for unfair termination and payment of outstanding dues. Section 47(3) of the Employment Act, 2007 on complaints of unfair termination provides that:

(3) The right of the employee to present a complaint under this section shall be in addition to his right to complain to the Industrial Court on the same issue and to the right to complain of any other infringement of his statutory rights.

12. In light of the foregoing, the Court finds no basis for the Respondent's submission that the Claimants are barred from coming to this Court because their dispute was referred to the Labour Office.

13. The second issue for determination is whether the Claimants' claims are statute barred. In advancing his argument on this score, Counsel for the Respondent relied on Section 90 of the Employment Act, 2007 which provides that:

(90) Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based on 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 of or in the case of continuing injury or damage within twelve months next after the cessation thereof.

14. The Employment Act, 2007 came into effect on 2nd June 2008 and according to the Claimants' Memorandum of Claim, the respective causes of action arose between 17th October 2006 and 4th January 2007. Assuming that the facts as pleaded by the Claimants are correct, the applicable limitation law would be the Limitation of Actions Act and not the Employment Act, 2007.

15. Moreover, from the documents submitted by the Claimants, the Court observed that the Claimants made a complaint at the Labour Office as far back as early 2007 and as held by Abuodha J in the case of ***Kenya Plantation and Agricultural Workers Union Vs Mununga Leaf Base [2013] EKLK*** once a dispute is referred to conciliation, accrual of the cause of action is suspended until the outcome of the conciliation process is rendered. There was no evidence that any decision from the Labour Office was ever given. In light of the foregoing, the objection on account of limitation is overruled.

16. The final issue has to do with the effect of the amendments introduced by the Claimants in their amended Memorandum of Claim filed on 11th July 2013. Counsel for the Respondent told the Court that these amendments amounted to introduction of new claims.

17. According to the amended Memorandum of Claim, the amendments are on account of outstanding salary arrears, gratuity and unpaid NSSF dues as well as respective tabulation thereof. In my view, these are not new claims but an amplification of the Claimants' claims for unfair termination and outstanding dues. This objection therefore also fails and is overruled.

18. Ultimately, the Court finds the Preliminary Objection raised by the Respondent not well taken and hereby overrules it with costs to the Claimants.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF FEBRUARY 2014

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 5TH DAY OF FEBRUARY 2014

MATHEWS NDERI NDUMA

JUDGE

In the Presence of:

.....*Claimants*

.....*Respondent*