



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 204 OF 2013

NICODEMUS MARANI.....CLAIMANT

- VERSUS -

TIMSALES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 4th April, 2014)

JUDGMENT

The claimant **Nicodemus Marani** filed the memorandum of claim on 1.7.2013 through Nancy Njoroge & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. **Underpayment amounting to Kshs.1,911,990.00.**
- b. **Payment in lieu of worked overtime amounting to Kshs.594,423.46.**
- c. **Compensation based on section 49 (1) (c) of Employment Act, 2007 Kshs.276,000.00.**

The respondent filed the notice of preliminary objection on 19.08.2013 that the claim is statute time-barred and is incompetent, fatally defective and an abuse of court process as the same offends provisions of section 90 of the Employment Act, 2007 Laws of Kenya. The preliminary objection was that the claim was filed on 1.07.2013 being 4 years after the claimant's termination on 8.06.2009. The claimant opposed the preliminary objection by filing the grounds of opposition on 18.02.2014 which were subsequently withdrawn and substituted with the grounds of opposition filed on 28.02.2014.

It was submitted for the respondent that the termination was on 8.06.2009 and suit filed on 1.06.2013 long after lapsing of the 3 years statutory limit on 9.06./2012. The suit was therefore filed 13 months late. It was further submitted for the respondent that the court did not have the jurisdiction to extend the time as limited under section 90 of the Employment Act, 2007. Thus, it was submitted that the suit be dismissed with costs.

For the claimant, it was submitted that the date of the termination letter was not in dispute but it had to be differentiated from the date the letter was delivered to the claimant but which date was not disclosed. It was stated that the claimant had arrived back from officiating a match as referee around 13.10.2009 and it was about that time that he received the termination letter. Further, it was submitted that the court was entitled to make a just order under sections 1A, 1B, 3 and 3A of the Civil Procedure Act. It was submitted that the court should uphold fairness.

The court has considered the submissions and finds that the suit was invariably filed outside 3 years from the date of the termination letter or the date it was said the letter might have been received by the claimant. Section 90 of the Act provides as follows:

“90. 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 4 (1) of the Limitation of Actions Act, Cap.22 provides for 6 years limitation period in the cases founded on contract. The court holds that the effect of section 90 of Employment Act 2007 is to prescribe 3 years limitation period in place of six years in cases based on the contract of employment. The court has considered the submissions and considered whether an otherwise time barred suit under section 90 of the Employment Act 2007 may nevertheless be entertained by the court. Section 39 of the Limitation of Actions Act provides:

“39. (1) A period of limitation does not run if -

a. there is a contract not to plead limitation; or

(b) that the person attempting to plead limitation is estopped from so doing.

(2) For the purposes of subsection (1), “estopped” includes estopped by equitable or promissory estoppel.”

The opinion of the court is that the section is in general terms and would apply in appropriate cases brought on the basis of the contract of employment. In the present case, the section has not been invoked and it cannot be said that it applies in the circumstances of the case as has been established before the court.

The court has also considered the provisions of section 59 of the Interpretation and General Provisions Act, Cap 2 which states:

“59. Where in a written law time is prescribed for doing an act or taking a proceeding, and a power is given to a court or other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application to for extension is not made until the expiration of the time prescribed.”

In the instant case, no power of the court has been established empowering the court to extend the time of 3 years prescribed in section 90 of the Employment Act, 2007 and no grounds have been shown to exist as envisaged in section 39 of the Limitation of Actions Act to justify the court’s entertainment of the suit outside the three years’ limitation period.

Thus, the court holds that section 90 of the Employment Act provides a time of limitation of 3 years and in an appropriate case, exceptions may exist like is envisaged in section 39 of the Limitation of Actions Act. The court finds that the present case has not established any ground for such exception.

In conclusion, the preliminary objection is allowed and the claimant’s suit is dismissed with costs.

Signed, dated and delivered in court at Nakuru this Friday, 4th April, 2014.

BYRAM ONGAYA

JUDGE

