



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO 2487 OF 2012**

**ELINATHAN KITIRO MWAMBURI.....CLAIMANT**

**VS**

**TELKOM (K) LIMITED.....RESPONDENT**

**RULING**

1. On 11<sup>th</sup> December 2012, the Claimant filed a Memorandum of Claim seeking unconditional reinstatement in the Respondent's employment. The Respondent filed a Reply on 24<sup>th</sup> January 2013 in which a preliminary objection to the Claimant's claim on the ground of limitation of time was raised. The Respondent's objection is reiterated in a notice dated 30<sup>th</sup> July 2013 and filed in Court on 2<sup>nd</sup> August 2013.
2. At the hearing of the objection, Mr. Nyaburi for the Respondent submitted that since the Claimant was dismissed on 21<sup>st</sup> August 2006, his claim which was filed on 11<sup>th</sup> December 2012 was statute barred. Given that at the time of the Claimant's dismissal the Employment Act, 2007 had not come into effect, his claim that the Respondent had breached provisions of this law was unsustainable since the applicable law was the repealed Employment Act (Cap 226).
3. At any rate, whether the Claimant's claim was brought under the Employment Act, 2007 or the repealed Employment Act (Cap 226), it was statute barred under Section 90 of the Employment Act, 2007 as well as under the Limitation of Actions Act.
4. In a replying affidavit sworn by the Claimant on 10<sup>th</sup> March 2014, it was deponed that following his dismissal on 21<sup>st</sup> August 2006, the Claimant appealed vide his letter dated 21<sup>st</sup> September 2006 and after several reminders, the Respondent declined the Claimant's appeal by letter dated 6<sup>th</sup> October 2008. The Claimant then filed Civil Case No 3903 of 2010 in the Chief Magistrate's Court at Milimani seeking relief for unfair termination of employment.
5. On 17<sup>th</sup> February 2011, the Respondent made an application at the Chief Magistrate's Court that the Claimant's suit be dismissed on the ground that the Magistrate's Court had no jurisdiction to hear the case. The suit was consequently dismissed on 1<sup>st</sup> July 2011 after which the Claimant filed the current claim.
6. Miss Maina for the Claimant submitted that since the appeal process regarding the Claimant's dismissal was completed on 6<sup>th</sup> October 2008, the Claimant's claim was within time. Further, the Industrial Court as currently constituted came into effect on 12th July 2012 when the Judges were appointed.

7. Prior to this, the Claimant had filed a suit at the Chief Magistrate's Court on 22<sup>nd</sup> October 2010 which was dismissed for lack of jurisdiction on 1<sup>st</sup> July 2012. According to Counsel, the cause of action arose on 6<sup>th</sup> October 2010 when the appeal process on the Claimant's dismissal was concluded.

8. There are two related issues for determination in this application:

- a. First, when did the cause of action giving rise to the Claimant's claim accrue?
- b. Second, is the Claimant's claim statute barred?

9. On the first issue, this Court has already established its position in the case of **Hilarion Mwabolo Vs Kenya Commercial Bank [2013 eKLR]** to the effect that accrual of the cause of action in a claim emanating from an employment relationship takes effect from the date of termination as stated in the letter of termination. I have no reason to depart from this position and I therefore establish the accrual date in this case as 21<sup>st</sup> August 2006, being the effective date of the termination of the Claimant's employment.

10. With regard to the second issue, it is clear that by the time the Claimant's employment was terminated, the Employment Act, 2007 had not come into operation. It follows therefore that the Claimant's employment with the Respondent was governed by the repealed Employment Act (Cap 226) and the Limitation of Actions Act. Section 4(1) of the Limitation of Actions Act provides that actions founded on contract may not be brought after the end of six years from the date of accrual of the cause of action.

11. It was submitted on behalf of the Claimant that his claim which was first filed in the Chief Magistrate's Court was dismissed for want of jurisdiction. The Court was unable to understand why the Claimant did not file his claim at the Industrial Court in the first place since as was held by **Onyango J** in the case of **Catherine Auma Ogello Vs Kenya Literature Bureau [2013] eKLR** the Industrial Court as previously constituted under the repealed Trade Disputes Act and later under the Labour Relations Act has always had jurisdiction to entertain claims arising either from the repealed Employment Act (Cap 226) or the Employment Act, 2007.

12. The Court was even more perturbed by the failure by Counsel for the Claimant to apply to have the matter transferred from the Chief Magistrate's Court to the Industrial Court. Nevertheless, the case having been dismissed for want of jurisdiction could be filed in this Court but within the six year limitation period from the date the cause of action arose; that would have been not later than 22<sup>nd</sup> August 2012. The result is that the Claimant's claim which was filed on 11<sup>th</sup> December 2012 falls beyond the six year limitation period set under Section 4(1) of the Limitation of Actions Act and must therefore be dismissed on that ground.

Each party will bear their own costs.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13<sup>TH</sup> DAY OF MAY 2014**

**LINNET NDOLO**

**JUDGE**

***In the Presence of:***

.....**Claimant**

.....**Respondent**