



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 857, 858 AND 859 OF 2010

JOSEPH MBASI MUTHAMA

PETER KININA KUNGU

ZACK KARIUKI GACHUHE CLAIMANTS

VERSUS

BRITISH AMERICAN TOBACCO (KENYA) LIMITED..... RESPONDENT

RULING

On 10th April 2014, the respondent herein British American Tobacco (Kenya) Limited represented by the Federation of Kenya Employers (FKE) filed their Notice of Preliminary Objections to the claim filed the claimants Joseph Mbasi Muthama, Peter Kinina Kungu and Zack Kariuku Gachuhe, all represented by Barongo Ombasa & Company Advocates.

The objections herein are that;

- a. *The claim offends the provisions of section 90 of the Employment Act, 2007;*
- b. *The claim offends the provisions of section 4(4) of the Trade Disputes Act Cap 234 (now repealed);*
- c. *The claim is misconceived, incompetent and bad in law and ought to be dismissed; and*
- d. *The suit is time barred.*

Both parties agreed to file their written submissions to these objections. The respondents submissions filed for the FKE and dated 10th April 2014 and the claimants' filed by Maari Nyaberi & Associates Advocates and dated 28th April 2014. At the mention to confirm the filing of these submissions, Ms Gladwell Mumia, Advocate appeared for the FKE while Ogolla Advocate held brief for Nyaberi Advocate for the claimants. Ms Mumia raised further objections on the appearance of Maari Nyaberi & Company Advocates for the claimants and for filing the submissions as they were no the advocates for the claimant and tha their submissions should be disregarded by the court. That further the Advocate who appeared for the claimants previously Ongicho Advocate is not a member in good standing before the Law Society of Kenya and has no current practicing Certificate to act and therefore his pleading and appearance should be disregarded by the court.

The questions therefore for determination are;

Whether the claim offends the provisions of section 90 of the Employment Act;

Whether the claim offends the provisions fo section 4(4) of the Trade Disputes Act cap 234

[now repealed];

Whether the claim is misconceived and time barred; and

Whether the submissions filed for claimant by Maari Nyaberi & Company Advocates should be expunged.

On the last issue on the representation of the claimant, the Industrial Court Act section 22 provides;

In any proceedings before the Court or a subordinate industrial court, a party to the proceedings may act in person or be represented by an advocate, an office bearer or official of the party's trade union or employers' organisation and, if the party is a juristic person, by a director or an employee specially authorized for that purpose.

Where an advocate is on record as representing any of the parties, the advocate must comply with the regulatory legislation, that is the Advocates Act, Cap 16 Law of Kenya and the subsequent requirements therein. Further to following these statutory provisions are the requirements laid out under the Civil Procedure Act and the Rules thereto with regard to how an advocate must come on record to be deemed to be the legal representative of any party in a particular cause filed in court. These provisions amplify the outlined provisions under section 22 of the Industrial Court Act.

In this case, the claim herein was filed on 9th June 2010 and amended on 24th October 2011 both under the firm of advocates Barongo Ombasa & Company Advocates. The respondents' defence filed by FKE was served upon the claimant's advocates firm as above. At the initial hearing Ongicho advocate appeared for the claimant until the filing of the submissions herein with regard to the respondent's preliminary objections. These submissions are filed by Maari Nyaberi & Associates for the claimants.

I have perused the entire record and do not find any Notice of Change of advocates where the claimants give notice that they have ceased being represented by the firm of Barongo Ombasa & Company Advocates to the firm that has filed the written submissions, Maari Nyaberi & Associates Advocates. Even in a case where Ongicho Advocate were to appear and indicate that he is now serving under the appointed firm for the claimants, there is no indication that the new entity that now appears for the claimant is different from the one on record and thus the entry of Maari Nyaberi & Associate become complete strangers to the proceeding herein with regard to the provisions of section 22 of the Industrial Court Act as well as under the provisions of the Advocates Act. To change from Barongo Ombasa & Company Advocates to any other entity or to act in person, the claimants must file their Notice of Change and serve the same upon the respondents. This is not a mere technicality that can be cured in any other way. When this error was discovered, the claimants should have sought for more time to file their documents and or submissions under their appointed advocates but nothing was done to this end. The claimants have rolled with the current as it were!

Therefore the records submitted by Maari Nyaberi & Associates are hereby expunged.

On the other substantive issues raised by the respondent; they stated that the claim offends the provisions of section 90 of the Employment Act, the claimant cause of action is based on a contract of employment that was terminated on 26th February 2006 and the suit was filed on 25th July 2010 and 29th July 2010 without seeking leave of court which was a period of over 5 years since the cause of action arose. That there is no good reason that has been advanced by the claimants as to why they were not diligent in filing their claims. Further that the claimants have failed to comply with the provisions of section 4(4) of the Trade Disputes Act Cap 234 [now repealed]. Any disputes under the repealed statute were to be reported to the Minister within 28 days of dismissal or termination of employment which was not done in this case. For these reasons the claimants are time barred to lodge the claim as filed. The respondent in raising the objections herein relied on the principles set out in the case of *Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributors [1969] E. A. 696* where the court held that objections on any point of law must be raised at the earliest and any time before judgement is delivered. That In this case the claimants have not complied with a mandatory provision of the law as set out under section 90 of the Employment

Act and section 4(4) of the Trade Disputes Act [now repealed] and should be dismissed. That even in case where the court were to consider the claim on its merits, upon being out of time, the claimants failed to seek for the extension of such time as to be allowed by the court to lodge their claims as provided under section 27 and 28 of the Limitation of Actions act Cap 22.

The respondent further submitted that any claim that is not filed within 3 years from the date the cause of action took place offends the mandatory provisions of section 90 of the Employment Act and that all claims that were running prior to the enactment of section 84 of the Labour Relations Act that came into force on 26th October 2007 were to be dealt with under section 4(4) of the Trade Disputes Act. Therefore in cases where there is breach of contract the time is limited to 6 years under the Trade Disputes Act and the Limitation of Actions Act whereas the same should have been reported to the Minister within 28 days. That in view of the legal requirements not followed by the claimants, the claims should be dismissed with costs to the respondent.

In the Amended Claim, the claimant's states that they were on 26th February 2006 locked out by the respondent among many other employees and were eventually terminated. The claimants were unionised under the Kenya Union of Commercial Food and Allied Workers which filed **Cause No.617 of 2009** over the same subject of their lock out but the same was abandoned where the claimants decided to file their individual claims. These were the claims filed on 6th July 2010 and later amended and filed on 24th October 2011.

The period of 26th February 2006 to 6th July 2010 is therefore crucial to the issues raised herein by the respondents and the basis of the preliminary objections. From the time the cause of action arose on 26th February 2006 to the time of filing of the claim, a time of over 4 years and 5 five months had lapsed for purposes of the operation of section 90 of the Employment Act, 2007 which create mandatory provisions that suits brought under its provisions must be filed within a time of 3 years from the date the cause of action arose. Hence, as of 24th October 2010 when the claimants came to court, they were time barred under the law and this time had not been extended under any other law so as to allow them to move the court as claimants and lodge their claims out of time.

However a look at the orders being sought by the claimants is crucial here. In the Amended memorandum of claim filed on 24th October 2011, the claimants outline their prayers as;

ia. The sum of Kshs.976.200 particularised under paragraph 8 of the claim

iib. damages for breach of contract of employment

iiic. costs of this suit

ivd. interest in (i) (ii), (iii) above.

It is therefore imperative to look at the applicable law that give rise to the prayers as sought by the claimants noting that the same can arise under the provisions of the Employment Act, 2007 as well as under the Trade Disputes Act [now repealed]. As outlined above, the claimants are already outside the provisions of section 90 of the Employment Act. However looking at the operative section and cited by the respondent for the subject preliminary objection section 4(4) was said to be mandatory and fundamental. The respondents submitted that this section is couched in mandatory terms that

The claimants in their pleadings or submissions have not shown evidence of compliance with the mandatory requirement of Section 4(4) of the Trade Disputes Act, Cap 234 (now repealed) of the Laws of Kenya. The Act provided that,

S. 4 (4). Any trade dispute involving the dismissal of an employee or the termination of any contract of employment shall be reported to the Minister within twenty eight days of the dismissal or termination of employment.

The claimants note in their pleadings that there was a suit **Cause No. 617 of 2009** lodged by their union but these pleadings and the background of such a case are not annexed to the current claim. It is also not demonstrated that the claimants engaged the Minister either by themselves or through this union that represented their interests at the time of their termination.

When the Notice of Preliminary objections was served upon the claimants citing the provisions as under section 4(4) of the Trade Disputes Act [now repealed] the duty rested upon the claimants to disprove the same by submitting evidence that indeed at the time of filing their claim on 6th July 2010 they had complied with the statutory requirements. Such evidence is lacking.

I therefore follows that where a party has failed to follow a mandatory provision of the law as outlined under section 90 of the Employment Act where suits are to be filed within 3 years from the date the cause of action arose or comply with section 4 (4) of the Trade Disputes Act [now repealed] where a dispute is to be reported to the Minister within the stipulated time thus offends the law. Even in a case where a party find themselves not in compliance with these mandatory provisions, with regard to being out of time, there is a cure where a party may seek leave from this court to extend such time, and on good grounds have the same considered. Unfortunately the claimants have no such time extended to be able to lodge their claims out of time and to seek the prayers as outlined under their claim.

Looking at the orders sought by the claimants, the same are based on breach of contract but even where the same apply as under the Employment Act, 2007 and looking at the relevant provisions of the Limitation of Actions Act where a claim for breach of contract may be claimed within three (3) or six (6) years respectively, the claimants still would fail the mandatory provisions of section 4 (4) of the Trade Disputes Act [now repealed] as the nature of disputes arising from employment contract dictated that the same be reported to the Minister within a stipulated period of 28 days to enable conciliation and investigation of such disputes before being lodged by a Union on behalf of its members. The report to the Minister could be forgone only with the *permission* of the Minister where such reporting was found in the circumstances of the case not to be necessary or warranting a report. That was the operative law at the time this cause of action arose as of 26th February 2006.

The preliminary objection by the respondent is hereby allowed. The suit/s herein dismissed. Each party to bear their own costs.

Read in open court at Nairobi this 6th day of May 2014

Mbaru

JUDGE

In the presence of

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