



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 296 OF 2013

AUGUSTINE ODHIAMBO ABIEROCLAIMANT

VERSUS

K.K. SECURITY LTDRESPONDENT

RULING

This is a ruling on the respondent's notice of Preliminary Objection (P.O.) filed in court on 5/12/2013. The P.O. urges the court to dismiss the suit on ground that it was filed out of time with respect to Section 90 of the employment Act, 2007. According to the respondent, the suit was filed on 17/9/2013, over 4 years after the termination of the claimant's employment on 25/6/2009. Consequently, the respondent submits that the suit is incompetent and bad in law and ought to be dismissed. He prays that the ruling of the court in this claim do apply to the P.O. raised in ICC Case No. 297 and 409 of 2013.

The claimant has reacted to the P.O. by filing Originating Summons dated 23/12/2013 seeking enlargement of time within which to file under Section 4, 27(c), and 28 of the Limitation of Actions Act, Cap 22 Laws of Kenya and Section 95 of the Civil Procedure Act Cap 21 Laws of Kenya. The claimant has also filed written submission in opposition to the P.O. by which he blames the delay in filing suit to the promise made by the respondent to settle the dispute amicably. While this ruling was pending other suits were mentioned in court in this series and parties agreed that this ruling apply to the said cases.

According to the claimant the respondent promised him and other colleagues who were dismissed with him that if they remained submissive and cooperated with her, she would reinstate them to their employment. The claimant's counsel also consented to the decision herein to apply in ICC case No. 299 and 409 of 2013.

after carefully perusing the pleadings and the submissions advanced by the two parties, the court has framed the following issues for determination.

- a. **Whether the suit was filed out of time.**
- b. **Whether the respondent is estopped from pleading the defence of limitation**

Was the suit time barred?

The cause of action namely termination of employment for the claimant arose on 25/6/2009. The suit was filed on 17/9/2013 which is over 4 years after the cause of action arose.

Section 90 of the Employment Act provides that no action or proceedings based or arising out of the Act 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 a continuing injury or damage, within 12 months next after the cessation thereof. The dispute herein does not involve a continuing injury or damage but the act of terminating the claimant's employment on 25/6/2009.

Paragraph 11 of the claim states that the termination of his employment was not in accordance with the contract and the Employment Act No. 11 of 2007. The foregoing puts the claim squarely under the provisions of the Employment Act which limits the period of instituting such suits to 3 years from the date the cause of action arose. The suit having been filed after 4 years obviously rendered the claim time barred. Consequently the suit is incompetent and bad in law for having been brought outside the statutory limitation period of 3 years as provided under Section 90 of the employment Act 2007.

Is the Respondent estopped from pleading limitation

Section 39 of the Limitation of Actions Act Cap 22 laws of Kenya provides that

11 (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 sub section (1) “*estopped*” includes *estopped* by equitable or promisory *estoppel*”.

It is trite that *estoppel* refers to a bar that prevents one from asserting a claim or a right that contracts what he has said or done before. Equitable *estoppel* is a defensive doctrine preventing one party from taking unfair advantage of another when through a false representation of facts or conduct, the person to be estopped has induced another person to act in certain way that resulted to substantial prejudice. Promisory estoppel on other other hand does not deal with representation of facts as in equitable estoppel but only on a promise which the promisor reasonably expected the promisee to act on it. If the promisee acts on the promise to his detriment, the promisor is prevented from denying the promise even if it was not supported by any consideration.

The question that arises is whether the claimant has established the defence of estoppel in either of the above types. Regrettably the court's opinion is that he has not. No written or other form of evidence was adduced to prove the alleged promise to settle the matter amicably if suit was not filed. What the court was treated to was mere allegations of an advise to the claimant to remain humble and cooperative with the respondent in order to earn a reinstatement.

The court is not convinced by that alleged verbal promise which was allegedly given to the claimant directly and not to his counsel. This court opines that if indeed the defence were desirous to settle the matter in the manner submitted by the claimant, the same should have been conveyed through his advocate by the respondent. Likewise the claimant should have notified his counsel in time to verify with the defence whether in deed amicable settlement was welcome. Consequently and on a balance of probability the court finds that this is not a case where the defence of **estoppel** under Section 39 *supra* should be allowed.

In conclusion and in view of all the above observations and findings, the respondents P.O. is allowed. The effect of this ruling is therefore to strike the suit herein in its entirety for being time barred. Similarly the suit in ICC case No. 297 of 2013, 409 of 2013 and any other suit filed under this series are also struck out for being time barred. No orders as to costs.

Dated, Signed and delivered this 20th June 2014.

O.N. Makau

Judge