



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1045 OF 2013

FRANCIS KIRIMI MUNGANIA CLAIMANT

VERSUS

BARCLAYS BANK (K) LTD.RESPONDENT

Mr. Ouma for Respondent / Objector

Mr. Mutua for Claimant / Respondent

RULING

1. This suit was filed via a statement of claim dated 9th July, 2013, on 10th July 2013.
2. The Respondent has filed a notice of preliminary objection in which it states that the claimant was employed in February 1984, in the position of clerk/cashier per the attached letter of appointment.
3. That by a letter of termination dated 23rd November 2009, the employment of the Claimant was terminated. In terms of the letter at the time of termination he had a personal loan owed to the Bank in the sum of Kshs.893,602.05 and a Barclays Card Debt of Kshs.164,850 Dr. plus staff current Account Dr. of Kshs. 5,947.

The letter said:

“any money due to you including today’s pay will be applied to offset your indebtedness to the bank.”

4. The Bank did not state how much it owed the Claimant in terms of terminal benefits in the said letter.
5. The Claimant was told that he may appeal the decision by writing to the Human Resource Director **Lyn Mungich** within 5 working days.
6. On 7th December 2009 the Claimant wrote to the Respondent asking for computation of overtime. There being no response she wrote a reminder on 26th June, 2012.
7. The Claimant wrote a letter dated 25th November 2009 disputing the termination and protesting the alleged reason for the termination. He requested that the Respondent awaits the pending criminal case

arising from the matter to be concluded before the Respondent takes any such measure against him. He ended: **“I request that you reconsider your decision.”**

8. On 14th June, 2012 the judgment in Chief Magistrate Criminal case Number 2977 of 2009 was delivered wherein the Claimant and one **Findah Kaibire Mwathi** were acquitted of the offence of stealing by servant contrary to **Section 281** of the **Penal Code**.

9. There was no response from the Director. Given the afore-said uncontroverted facts, it is clear there is a dispute of fact as to when the cause of action arose which matter will be determined upon hearing of the main suit.

10. In Industrial cause **No. 1981 of 2011** as consolidated with Industrial cause **No. 1996 of 2011 Tailors & Textile Workers Union – Vs – Moi University and Rivatex E.A. Ltd., Hon. Justice Nzioki wa Makau** correctly reiterated the principles of preliminary objection as:

1. a preliminary objection raises a pure point of law;
2. it is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained.
3. It cannot be raised if what is sought is the exercise of Judicial discretion.

11. The Respondent has not replied to the statement of claim and therefore the facts in the statement of claim remain uncontroverted.

Furthermore, **Section 90** also provides:

“..... or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

12. This being the case, the Appeal noted by the Claimant had not been dealt with up to the time of coming to Court nor had computation of terminal benefits been done. We are yet to hear the version of the Respondent on these matters which directly impact the time the cause of action arose with respect to the various claims by the Claimant / Respondent.

Accordingly the issue raised is not a pure point of law capable of determination without recourse to disputed facts.

The objection is therefore not upheld with costs to the Claimant.

Dated and Delivered at Nairobi this 11th day of June 2014

MATHEWS N. NDUMA

PRINCIPAL JUDGE