



IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 11 OF 2014

(Originally Mombasa Resident Magistrate's Court Civil Case 826 of 2013)

JOSEHAT M. M'RWIGI

CLAIMANT

v

KENYA PORTS AUTHORITY

RESPONDENT

RULING

1. The Claimant filed a Complaint against the Respondent before the Resident Magistrate's Court on 9 May 2013 seeking a declaration that the termination of his employment was unprocedural and unlawful and damages of Kshs 228,684/84.
2. On 31 May 2013, the Respondent filed a defence denying that the Claimant was wrongfully or unlawfully terminated. The Respondent also pleaded that the Court did not have jurisdiction to extend time and that it would raise a preliminary objection.
3. By consent, the parties agreed before the Resident Magistrate on 21 January 2014 to have the suit transferred to the Industrial Court. The suit was transferred to this Court consequent to the consent.
4. In my view, an application for transfer of a suit from a subordinate Court to a Superior Court ought to be made to the Superior Court and not the subordinate Court.
5. On 24 March 2014 the Claimant filed a motion seeking leave to amend the Claim to seek Kshs 2,864,783/-. Leave was granted and on 4 April 2014 the Claimant filed an Amended Claim.
6. The Respondent filed a Preliminary Objection thereafter on 8 April 2014 on the ground that the Court had no jurisdiction or discretion to extend time or grant leave to file a case grounded on breach of employment contract outside the time prescribed in section 90 of the Employment Act.
7. The preliminary objection was canvassed on 22 May 2014 and 3 June 2014.

Respondent's submissions

8. Mrs. Ikegu for the Respondent submitted that the Claimant had pleaded that he was terminated on 31 October 1994 and the suit was filed on 9 May 2013 before it was transferred to the Industrial Court, outside the 6 years allowed in section 4(1) of the Limitation of Actions Act.
9. According to Mrs. Ikegu, the suit should have been filed on or before 30 October 2000.
10. The Respondent also submitted that limitation is not just a technicality but a substantive issue and the Court has no discretion to extend time. She cited the cases of *Mary Kasiwa v Scorpio Enterprises Ltd* (2013) eKLR, *Michael Milisi v Kenya Ports Authority* (2013) eKLR and *Divecon v Samani* (1995-1998) 1 EA (CAK) 48.
11. Mrs. Ikegu further stated that a preliminary objection can be raised at any time.

Claimant's submissions

12. The Claimant through Mr. Gathuku submitted that there was no application before Court to extend time and therefore the *Kasiwa* and *Milisi* decisions were distinguishable and not applicable.
13. Mr. Gathuku further submitted that the Claim was filed pursuant to leave granted by the High Court in Mombasa High Court Case No. 68 of 2012 (OS) on 23 March 2013.
14. The counsel further submitted that the *Divecon* case does not allow the Court to entertain a preliminary objection and that challenge to grant of leave should be raised as one of the issues during main trial. He further submitted that Articles 48 and 50 of the Constitution should be considered.
15. He urged that the objection be dismissed as being not merited.
16. When asked by the Court whether the grant of leave was made *per incuriam* (without reference to the relevant statutory provisions or precedent), Mr. Gathuku stated that the only avenue open to the Respondent was to pursue an appeal or have the order reviewed by the Court which granted it.

Evaluation

17. The notice of Preliminary Objection filed in Court was premised on section 90 of the Employment Act. Section 90 of the Employment Act, 2007 is not applicable to the present suit.
18. In submissions, Mrs. Ikegu submitted on the basis of the Limitation of Actions Act and the Employment Act, cap 226 (repealed). There was an incongruity between the objection as filed and submissions.
19. It is not disputed that the Claimant was terminated in 1994. At the material time, the employment relationship was governed by the common law and Employment Act, cap 226 (repealed) which did not provide for any limitation to commencing of suit.
20. Because of the lacuna in the Employment Act, cap. 226 (repealed), the Limitation of Actions Act became implicated. Section 4(1) of the Act prescribes a limitation of 6 years for causes of action founded in contract.
21. The Claimant should therefore have commenced his suit on or before 30 October 2000. He did not. On that basis he was clearly out of time.
22. But the Claimant states that he sought and was granted leave to institute the suit in the High Court. The Plaintiff initially filed before the Resident Magistrate's Court stated that the plaintiff had been granted leave on 20 March 2013. The order was not shown to Court.
23. The authorities seem to suggest that where leave has been granted the same may only be challenged within the main trial. In Civil Appeal No. 96 of 1984, *Yunes Oruta & another v Samuel Nyamato, Gachuhi JA* in the leading judgment of the Court held that

It will be up to the Judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the Limitation of Actions Act particularly where leave to file an action against the defendant has been granted ex parte.

24. In ***Divecon*** case, it was held that the proper forum to challenge an ex parte order for leave to file suit out of time, is to raise the issue within the suit after the suit has been filed.
25. The holding in the *Oruta* case was upheld as recently as 2013 by the Court of Appeal in *Tana and Athi Rivers Development Authority v Joseph Mbindyo & 3 others* [2013] eKLR.
26. Whether these type of decisions need to be revisited in light of effective use of judicial time is not a decision the Court wants to engage/debate in now, considering the circumstances of this case.
27. For now, the Court is of the view that the Respondent should raise the issue of whether the order granting leave was validly granted to file suit out of time during trial so that it can be dealt with once and for all.
28. The upshot is that the preliminary objection is declined with no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 18th day of July 2014.

Radido Stephen

Judge

Appearances

Mrs. Ikegu instructed by Muthoni

Gatere Advocate for Claimant

Mr. Gathuku instructed by

Khaminwa & Khaminwa Advocates for Respondent