



IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 117 OF 2013

(Before D.K.N. Marete)

JAMES K. KAMAUCLAIMANT

Versus

THE CITY COUNCIL OF NAIROBI.....RESPONDENT

RULING

This matter is in court vide the claimant's Memorandum of Claim dated 26th January, 2013. The issue in dispute is herein cited as;

Unlawful with-holding of the claimant's salary, wrongful and unlawful termination of the Claimant's services and failure by the Respondent to pay terminal due to the claimant.

The Respondent opposes the claim vide the Respondent's Memorandum of Claim dated the 14th February, 2013 and follows the same with a Preliminary Objection dated 10th May, 2012 as follows;

- 1. The Claimant herein filed this claim well past the limitation period without first obtaining this Court's permission/leave to do so hence this Claim should be diminished with costs to the Respondent; and*
- 2. That the Claim herein as filed is fatally defective as the same is time barred and filed contrary to Section 90 of the Employment Act, 2007 and hence should be diminished with costs to the Respondent.*

The matter came for hearing variously until the 23rd July, 2013 when the parties agreed on a determination of the same by way of written submissions. For reasons not known to this court, this was not to be until the 10th June, 2014. However, the respondent did not file any written submissions on the subject. The claimant did. He submits that the preliminary objection is grounded on Section 90 of the Employment Act, 2007 but the respondent does not bring out a clear case of the status of the claimant. The information arising out of the barrage of documents is as follows;

- The Claimant was given a letter of summary dismissal on the 7th July 2006 the same was back dated to the 1st of October 2002.*
- The Claimant wrote an appeal dated 31st July 2006.*

- *Following the above events the Respondent held various meetings and passed resolutions as regard the appeal and the Claimant's situation.*
- *In a meeting held on the 9/6/2009 (under minute 6) the Respondent's recommendation was that the Claimant ought to be reinstated.*
- *In a meeting held on the 8/6/2010 (under minute 37) the recommendation by the officials of the Respondent was that the Claimant should be reinstated.*

The issue for determination is the time of accrual of the cause of action. This is not clear from the pleadings of the Respondent or even her preliminary objection. The Claimant on the other hand brings out a case of contested facts relating to his termination and subsequent appeal and management of the determination of his employment *inter partes*. This is highlighted on page 2 of his written submissions in the following terms;

“Was it in 2006, when the letter of termination was issued, or was it 2002 when the date the respondent back dated the termination to or was it at the point when it became apparently clear that the Respondent was not willing to honour the recommendations in their meetings to reinstate the Claimant?”

The Claimant in his written submissions relied on the authority of **Kenya Plantation & Agricultural Workers Union Vs. Mununga Leaf Base (2013) eKLR** to illustrate that he was not in control of the events relating to the management of his case and appeal after termination and therefore should not be punished for the time lapse between termination and filing of this suit. Aboudha, J. in this case observed as follows;

“In this particular case the Claimant was not in control of when the conciliator would complete his investigations and render his decision. All she could do which she did through her union as exhibited by several correspondences attached to the memorandum of claim was to remind the conciliator to expedite the matter. The Recommendation together with recommendations was finally rendered on 3rd June 2006 when it became clear to the Claimant that the Respondent would not honour the conciliator's recommendation. Therefore filing the claim on 9th July 2012 the Claimant was still within the six year rule prescribed under Section 4(1) of the Limitation Act to this extent the Preliminary Objection fails and is dismissed with costs.”

This position is replicated in the authority of **Kenya Scientific Research International Technical and Allied Institutions Workers Union Vs. Rainald Schumchers & Another eKLR 2012** also cited and relied on by the Claimant where my learned sister Wasilwa, J. posited as follows;

“in view of the fact that conciliation process was on going, the limitation period could not run until the same had been exhausted.”

Secondly, this court has in the past established that on the issue of limitation of action on grounds of time, there a times arises cases of law and fact. These therefore have to be proven through evidence. This frustrates the well established principle that a preliminary objection should *prima facie* be a matter of law and not dwell on evidence as was set out in the well known authority of **Mukhisa Biscuits Co. Ltd. v. West End Distributors Ltd. (1969) EA. 696** where the court observed as follows;

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Further,

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which 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 or if what is sought is the exercise of the judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

In the instance case, this is not the position. The application as brought out falls short of the legal attributes of a preliminary objection as above set out. This is not a matter which can be determined without delving into the factual basis of the case. It will require a factual analysis and evidence in order to come out clean and establish a just cause for the parties. This preliminary objection therefore fails and is dismissed with costs to the Claimant.

Delivered, dated and signed this 21st day of November, 2014.

D.K. Njagi Marete

JUDGE

Appearances.

1. Miss Odera instructed by Enonda, Makoloo, Makori & company

Advocates for the Claimant.

2. Mr. Ongicho instructed by Ongicho– Ongicho & Company Advocates for the Respondents .