



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 51 OF 2014

IBRAHIM RATEMO MAGOMGA.....CLAIMANT

v

ELDORET GRAINS LTD.....RESPONDENT

RULING

1. The Claimant sued the Respondent on 5 March 2014 alleging unlawful termination and seeking a total of Kshs 1,920,000/- as benefits/dues. The Respondent filed a Response on 25 March 2014.
2. On 22 October 2014, the Respondent filed a Notice of Preliminary Objection to the effect that

this claim is time barred and offends the provisions of Section 90 of the Employment Act, 2007. The objection was taken on the same day.

Respondent's submissions

3. The Respondent submitted that the cause of action was time barred as it offends section 90 of the Employment Act, 2007 because the Claimant pleaded that he worked until 2011.
4. It was further submitted that the firm of Sirma & Co. Advocates wrote a demand letter on behalf of the Claimant to the Respondent on 22 October 2010, stating that the Claimant had been terminated in July 2010. A similar letter was written by Nyairo & Co. Advocates on 18 July 2013.
5. The Respondent cited Petition No. 1 of 2013 *Josephat Ndirangu v Henkel Chemicals (EA) Ltd.*

Claimant's submissions

6. The Claimant confirmed that it was pleaded that the Claimant was terminated in 2011, but submitted that the Respondent had not pleaded limitation.
7. It was also submitted that there was a dispute as to the date of termination and this was an issue of evidence and not proper for determination as a preliminary objection. The preliminary objection, it was urged did not flow out of the pleadings.
8. The Claimant further submitted that the cause of action arose upon the refusal of the Respondent to reply to the demand letter and that it was in the interest of justice to determine the suit on the merits.
9. The Claimant cited *Henry Wanyama Khaemba v Standard Chartered Bank (K) Ltd & another* (2014) eKLR and *Janet Syokau Kaswii v Kathonzweni Financial Service Association* (2014) eKLR.

Evaluation

10. The nature of a preliminary objection was clearly set out in the case of *Mukisa Biscuit Company v*

Westend Distributors Ltd (1969) EA 696 and I need not recite it here.

11. The instant objection relies on various documents which were not referred to in the primary pleadings. The Claimant did not plead the exact date of termination. Equally, the Respondent did not plead the exact date of separation. The preliminary objection does not flow from the pleadings.
12. The Statement of Claim herein was poorly drafted. In Constitutional Petitions No. 373,426 of 2012, *Stephen Waweru Wanjohi & Others v Attorney General & Others and Kipngetich Maiyo & Others v the Kenya National Land Commission Selection Panel & Others*, Majanja J observed that

the key purpose of pleadings is to set out facts which constitute a cause of action.

13. The Claimant must be taken to know the facts which constitute his cause of action. The date when he was allegedly terminated must be known to him. And that date cannot be **until 2011** as pleaded.
14. Further, the Industrial Court (Procedure) Rules, 2010 are very clear on the content of pleadings. The Statement of Claim does not comply with the rules.
15. Although the Civil Procedure Rules require a party to plead limitation, being a point of law, the issue of limitation though not pleaded may be raised at any time but promptly provided that no prejudice or injustice will be occasioned to the other party.
16. I would have therefore dismissed the Statement of Claim for being frivolous but the Claimant should be given another chance. The defects can be cured through appropriate amendments.

Conclusion and Orders

17. In order to do justice to the parties, the Court orders as follows

- i. Claimant to file and serve an Amended Statement of Claim clearly setting out the facts constituting the cause of action on or before 20 November 2014 or the Cause to stand struck out.
- ii. Costs of the preliminary objection are awarded to the Respondent in the sum of Kshs 6,000/- to be paid before 20 November 2014.
- iii. The Cause be mentioned on 21 November 2014 to confirm compliance and for further directions

Delivered, dated and signed in open Court in Nakuru on this 14th day of November 2014.

Radido Stephen

Judge

Appearances

For Claimant Mr. Makuto instructed by Nyairo & Co. Advocates

For Respondent Mr. Kitiwa instructed by Kitiwa & Co. Advocates