



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 122 OF 2014

(Before D.K.N. Marete)

JOYCE CHESANG KITURCLAIMANT

Versus

TELCOM KENYA LIMITEDRESPONDENT

RULING

Before court is the Respondent's Notice of Preliminary Objection dated the 7th April, 2014 and founded as follows;

1. *The suit was filed out of time and the court lacks jurisdiction to entertain it.*
2. *The claimant's cause of action arose on 27th October 2009 when the claimant's contract was terminated. The Memorandum of Claim was filed on 5th February 2014 more than three (3) years after the dismissal.*
3. *Section 90 of the Employment Act, 2007 provides as follows:-*

90. Notwithstanding the provisions of section 4(1) of the Limitation of Actions of Actions Act, no civil action proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

4. *In the premises, the Claimant's entire suit is statute barred and should be struck out and/or dismissed with costs to the Respondent.*

The claimant files an undated objection to the application of 7th April, 2014 as follows;

The application is frivolous and otherwise an abuse of the due process of law as under Article 159 (d) of the Constitution of Kenya justice shall be administered without undue regard to procedural technicalities and under the famous double O Rule this court shall address the merit of the current claim.

Your Lordship, it is not in dispute that Joyce Chesang Kitur was employed by the Respondent in 1993 as a Sales Clerk at a salary of \$2,893 per annum.

Your Lordship, on or about the 7th day of October, 2009 Telkom Kenya Limited without any lawful excuse or valid ground terminated her services on the ground that the sales in the shop did not achieve the target.

Your Lordship, she has raised serious triable issues on merit. Hence dismiss the Preliminary objection on merit.

When the matter came for hearing on 3rd June, 2014 the parties were agreeable on a disposal of the issue by way of written submissions with the court upholding and ordering the same.

In her written submissions dated 4th June, 2014 the respondent submits that this suit is time barred by virtue of a contravention of S.90 of the Employment Act, 2007, as aforesaid, the cause of action having arisen on 27th October, 2009 when the claimant's contract of service was terminated. The memorandum of claim is filed on 5th February, 2014 which is more than three years after such dismissal. The court therefore lacks jurisdiction to entertain this case or one for extension of time and she therefore prays for the upholding of the preliminary objection and the claimants case be struck out for being filed out of time.

The claimant on the other hand opposes the application and relies on Article 159 (2) (d.) She submits that the issue of limitation is not a procedural technicality but delves on the jurisdiction of the court. She further submits that this is actually a procedural technicality which can be cured by the provisions of Article 159(2)(d.)

The Claimant in his emphatic written submissions cites several authorities in support of a case against this preliminary objection as a bar to further proceedings in this cause. She argues that any attempt at upholding this preliminary objection would occasion massive injustice as it would amount to short circuiting justice by subjecting the substance of the case to the periphery or the dogs. She puts it as here under;

2. *The Claimant submits that in the spirit of respecting the law, she does not ignore the provisions of Section 90 of the Employment Act, in fact, she is very much alive to the provision and its impact, however it is her humble submission that this Honorable Court, given the responsibility and discretion to overlook procedural technicalities in performing its core duty under Article 159 (2) (d), has the necessary jurisdiction to hear and determine this suit.*
3. *In my current case, the lapsed time does not affect the substance of the suit in any matter and no damage or loss shall occur to the Respondent where this Honorable court proceeds to allow the matter to be heard on its merits. The lapse time is a curable defect that can be cured by this Honorable court.*

The Claimant largely deals with the issue of a distinction between a technicality and substance. This is in order but not clearly brought out. This subject has been variously tackled by our courts in the past and we need not revisit the same. I am of the view that this is an issue more of substance than procedure and hold as such. The issue of limitation of action on grounds of time bar is not a technicality, strictly speaking. It is a substantive matter of law which requires compliance and the absence of such compliance jeopardizes the position of the defaulting party.

However, the circumstances of this case and the compelling submissions of the counsel of Claimant brings out a convincing case against injustice which would be occasioned by upholding the preliminary objection. It argues and submits that this would torpedo a substantial case for the Claimant. Inevitably, a court committed to the cause of justice would sense injustice from afar, as in the instant case. It is also our thinking that from the onset, the Claimant should have initiated an application for leave to file this cause out of time. We are not told why this was not done but would surmise that this was an oversight and or omission on the part of counsel for the Claimant. This calls for a delicate balance of the facts and circumstances of the case. We would not wish to hang the Claimant on this. I am therefore inclined not to determine this application on its actual merit but award leave to the Claimant to file an application for leave to file this cause out of time. This shall thereon be determined on merit and set the course for this

suit.

Delivered, dated and signed 7th day of November, 2014.

D.K. Njagi Marete

JUDGE

Appearances

1. Mr. Wachakana instructed by Wachakana & Company Advocates for the Claimant.
2. Mr. Moyo instructed by Iseme, Kamau & Maema Advocates for the Respondents.